

Protectionism and the WTO after the Global Financial Crisis:
Role, Effectiveness, and Challenges of Governance
under Multilateral Trade Agreements

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1. 1929 and 2009: Presence/Absence of International Governance

- What caused the World Depression in 1929?: Both the UK and the U.S. avoided taking responsibility as “lenders of last resort.” (Kindleberger)
=> Absence of a hegemony providing and maintaining international public goods in 1929. (Krasner)
- Is a hegemony indispensable for peace in the world order?: Maybe not. The experiences after the Vietnam War demonstrated that an *international regime* functioned in keeping the world order. (Keohane)
=> The Bretton Woods Institute was established to cut the chains of economic depression and war.
- G20 in Washington D.C. (Nov. 15, 2008)
“We underscore the critical importance of rejecting protectionism and not turning inward in times of financial uncertainty. In this regard, within the next 12 months, we will refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing World Trade Organization (WTO) inconsistent measures to stimulate exports. Further, we shall strive to reach agreement this year on modalities that leads to a successful conclusion to the WTO Doha Development Agenda with an ambitious and balanced outcome.”



- G20 in London (Apr. 2, 2009)

“... to refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing World Trade Organisation (WTO) inconsistent measures to stimulate exports. In addition we will rectify promptly any such measures. We extend this pledge to the end of 2010.

...
[W]e will notify promptly the WTO of any such measures and we call on the WTO, together with other international bodies, within their respective mandates, to monitor and report publicly on our adherence to these undertakings on a quarterly basis.”

- WTO

Oct. 2008: DG Lamy creates the WTO task force on the financial crisis

Jan. 2009: The first report on the financial and economic crisis and trade-related developments is submitted to TPRB

=> updated in March (2nd report) and July (3rd report)

- Japan (Ministry of Economy, Trade and Industries, METI)

Feb. 2009: Establishment of special task force in the ministry

May 2009: Issuance of “Recent Developments Regarding Protectionism and Responses by the Ministry of Economy, Trade and Industry”



2. Taxonomy of “Protectionist Measures” and Some Legal Comments

(1) Increase of Tariff and Imposition of Surcharge

- Rule: Imposition of tariffs in excess of a WTO bound rate is prohibited

“The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.” (GATT art. 2.1(b))

- Raising an applied rate up to a bound rate is legally permissible
=> *ex.* India maintains considerably high bound rates on average, with tariff exemptions on a number of products
- Non-WTO member (including WTO observer): No discipline at all, increasing tariffs on a broad range of products under crisis
=> *ex.* Russia, Belarus

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- Import surcharges for balance-of-payment (BOP) protection: ex. Ecuador, Ukraine

=> reviewed by BOP Committee, and, if necessary, Panel/Appellate Body

“[A]ny contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article. (GATT art. 12.1)




(2) Export/Import Restrictions with Non-tariff Barriers

- Rule: Import/export restrictions are strictly prohibited
=> Onerous conditions generating a disincentive to import are to be covered by “restrictions” (*India—Automotive* (Panel) [2001])

“No prohibitions or restrictions other than duties, taxes or other charges...shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation ... of any product destined for the territory of any other contracting party.” (GATT art. 11.1)


- Import restriction: *ex.* Argentina–reference prices for about 1,000 products, India–import licenses for steel and auto, Indonesia– pre-shipment inspection
- Export restriction : *ex.* Philippines–mineral ores, Russia–wood products, Vietnam–wood products, mineral products, etc., China–various raw materials incl. bauxite, coke and zinc (U.S. and EU respectively brought a case against China [DS394, DS395])
=> Enclosure of natural resources?

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- Sanitary and Phytosanitary (SPS) Measures: *ex.* Trade measures in the context of the A(H1N1) Flu (about 40 countries); U.S.–Poultry (← China asked DSB to establish a panel on this matter [DS392])

=> Disguising restrictions with food safety?

“Members shall base their [SPS] measures on international standards, guidelines or recommendations, where they exist ...” (SPS Agreement art. 3.1)

“Members shall ensure that their [SPS] measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health ...” (SPS Agreement art. 5.1)

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- Technical Standards: *ex.* Steel products (India, Indonesia, Malaysia); China-IT-related requirements (Chinese Compulsory Certification (CCC)) for IT security products, mandatory filtering software (“Green Dam”), Korea-recognition procedure for lithium batteries (bilaterally settled)

=> Necessary to achieve “legitimate objectives”?

“[T]echnical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective... Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.” (TBT Agreement art. 2.2)

“Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations” (TBT Agreement art. 2.4)




(3) “Buy Domestic”

- Public procurement: An exception to national treatment obligation
=> legitimately discriminate in favor of domestic products in public procurement (ex. China-“Buy Chinese” notice)

“The contracting parties recognize that internal taxes...and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products...should not be applied to imported or domestic products so as to afford protection to domestic production.” (GATT art. 3.1)

“The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes ...” (GATT art. 3.8 (a))
- Government Procurement Agreement (GPA): A party to the Agreement is obliged to provide national treatments to the products/services of other parties in its public procurement
=> Only 12 WTO Members and the EC signed as of today


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- A GPA party also installs discriminatory measures: *ex.* the U.S. Buy American clauses in 2009 ARRA (*cf.* international obligation clauses [§ § 604(k), 1605(d)]), the U.S. GSA procurement of \$285 million of environmentally friendly vehicles only from the “Big 3”
 - Aid to purchase and/or the trade in “gas-guzzlers” for “green” cars: *ex.* Japanese subsidies and tax incentives (exemption from automobile tonnage tax and other auto-related taxes), the U.S. “Cash for Clunkers” Program
=> Possibly in violation with GATT art. III, if discriminatory in favor of domestic products
 - Employment protectionism: *ex.* the U.S. Employ American clause in 2009 ARRA, restrictions in some European countries in granting of visas to foreign professional service providers (*ex.* lawyers, accountants) => Adverse affects on DDA service negotiation, in particular business and professional services and Mode 4?



(4) Trade Remedy


- Anti-Dumping Duties (ADD): Investigations increased in the latter half of 2009; The 3rd Secretariat Report econometrically forecasts more than 400 initiations of AD investigation and 300 impositions of ADD in 2009, correlated with the reduction in GDP growth and trade flow
=> A number of initiations of AD investigations in, inter alia, Argentina, EC, India, the U.S., a major portion of which target imports from China
- Initiation of AD investigation: often causing chilling effects in trade due to likelihood of future imposition of ADD
=> No injunction available against mere investigation due to inconsistency with AD Agreement through WTO dispute settlement (only final/provisional ADD or price undertakings are subject to terms of reference of a panel)

“[I]f final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body (“DSB”). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.” (AD Agreement art. 17.4)

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- Review of ADD: Deterioration of domestic industries in the financial crisis renders easy affirmative findings of likelihood of continuance or recurrence of dumping and injury; causation between dumped imports and injury to a domestic industry is not required in the review phases (U.S.—OTCG form Mexico (AB) [2004])
=> Possible continuance of ADD imposed due to causes other than dumped imports, *i.e.*, economic downturn during the crisis

“The authorities shall review the need for the continued imposition of the duty... Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.” (AD Agreement art. 11.2)

“[A]ny definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition..., unless the authorities determine, in a review..., that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.” (AD Agreement art. 11.3)

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- Safeguards: Initiation of 15 investigations reported only in the first half of 2009, showing a marked increase compared with previous years => India is a remarkably heavy user; some Members recourse to the China Special Safeguard (*ex. U.S.–Tire*)
 - Recourse to safeguard measures is somewhat difficult during a crisis: A complicated task to separate and distinguish between injuries caused by increased imports and by the crisis, also prospective difficulties in finding increased imports under reduced world trade due to the crisis

“When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.” (Safeguard Agreement art. 4.2(b))

- Countervailing Duties (CVD): No remarkable trend as of today, but one must be vigilant regarding trends in CVD over the next few years in relating to stimulus packages discussed below



(5) Financial Support Measures

- Various prudential measures: *ex.* U.S.–loans to financial institutions (*ex.* AIG); Switzerland–public purchase of bad loans from UBS; Iceland–nationalization of all domestic banks; Japan–Act on Special Measures for Strengthening Financial Functions
- WTO consistency: No discipline on subsidies is set out in the GATS (See GATS art. X), although there is concern that effective government control over financial institutions may lead to non-commercial financial contributions to individual enterprises/industries



(6) Stimulus Measures

- Discipline on subsidies: Subsidies are defined as financial contribution by government or public body such as a direct transfer of funds (ex. loans, equity infusions) and foregone revenue fiscal incentives, etc. (SCM Agreement art. 1).


Are all subsidies subject to the SCM Agreement?

=> No. Only subsidies granted specifically, in law or in fact, to certain industries or enterprises (SCM Agreement art. 2).

Which subsidies are prohibited?

=> Export subsidies; Subsidies contingent upon the use of domestic over imported goods (SCM Agreement art. 3).

Status of other subsidies: Not prohibited per se, but possibly subject to either one of the two remedies available to a party adversely affected by a subsidy: Removal of adverse effects, if such effects are established through the dispute settlement procedure (SCM Agreement art. 7); or CVD against subsidized imports (SCM Agreement pt. V).

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- General stimulus programs: A large number is listed in Secretariat reports, including loan programs for SMEs, operating costs loans, tax exemptions or reductions, credit guarantees, etc., most of which at least assume the nature of subsidies

=> Are they subject to the SCM Agreement?

ex.1 U.S. - American Recovery and Reinvestment Act of 2009: A comprehensive package consisting of various stimulus programs

=> Possibility of constituting a “specific” subsidy depending on the way individual programs are implemented on federal agencies or state levels.

ex.2 Japan – Act on Special Measures for Industrial Revitalization.

Relevant points: governmental nature of relevant bodies; entrustment or direction to the equity investment/loan?; aid de facto specific to certain recipients?

=> Some factual/legal aspects are common in both Japan’s financial aid for Elpida (2009) and Korean rescue program for Hynix (2001)

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- Supports for automobile industries: ex. U.S. (a series of aids to the “Big 3”), Argentina, Australia, Canada, Malaysia, Russia, the EU and its Member States

=> The SCM Agreement is applicable if benefit is conferred to the recipients.

ex. U.S. – “nationalization” of GM: In the case that the GM shares are sold for less than fair market value in future “re-privatization,” equity infusion and other public financial contributions would constitute actionable subsidies.

(7) Export Support Programs

- Enhancement of Trade Finance: *ex.* The Global Trade Liquidity Program by the International Finance Corporation (IFC); Asia-Pacific export finance network under auspices of APEC

=> The Secretariat reports positively, evaluated from the viewpoint of support for developing Members.

- Increasing supply of trade finance: *ex.* The EC, Brazil, Denmark, Hong Kong, Vietnam, Latvia etc.

=> Export finance program by a Member government may constitute an export subsidy under certain circumstances (*cf.* Brazil – Export Financing Program for Aircraft; U.S. – Upland Cotton)

(j) The provision by governments ... of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products ..., at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments ... of export credits at rates below those which they actually have to pay for the funds so employed ..., or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.
(Annex I of the SCM Agreement: Illustrative List of Export Subsidies)

- Other export support programs: Abolishment of export duties or restraints (Argentina, India)/refund of internal tax (*ex.* VAT) for the exports (Brazil, China); export subsidies for agricultural products (Dairy products by the U.S. and the EC).



3. Appraisal of the Steps taken by the WTO

(1) Monitoring Function

- The report does not prejudge WTO consistency of measures. Information collection is dependent on the Members due to a lack of resources at the Secretariat.
- Nevertheless, WTO's constant day-to-day surveillance led to prompt actions soon after the crisis broke; it is highly appreciated that the Secretariat provided a deep insight into the current movement of protectionism without giving in to the criticism of Members on lack of mandate.
=> London G20 and L'Aquila Summit appreciated and approved the efforts; the contents of the report appeared in major press, drawing attention to problems all over the world.

(2) Dispute Settlement Procedure

- Dispute settlement takes a substantial length of time
=> Nonetheless, exceptional effectiveness among international dispute settlement procedures, in particular coupled with the surveillance.



(3) Limitation of Trade Rules and Institution ?

- Critical view: WTO is incapable of preventing so-called “protectionism measures” as described above. A limit to the WTO.
=> DO NOT AGREE
- “Embedded liberalism” (Ruggie): The WTO System stands upon the balance of liberalism in the international sphere on the one hand and stability in employment and income level in the domestic sphere on the other hand.
=> So-called “protectionist measures” lie just within the “play” of the WTO rules.

ex. 1 Tokyo Round SCM Agreement clearly restates importance of subsidies for non-trade objectives.

“Signatories recognize that subsidies ... are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable.” (Tokyo Round SCM Agreement art. 11.1)



ex. 2 WTO Appellate Body acknowledges legitimacy of tariffs as policy instruments.


“We also have concerns with the Panel's characterization of duties or charges ... as "inherently discriminatory", insofar as this may suggest that the mere application of a tariff by a Member on imports of another Member is somehow unfair or prejudicial ... Tariffs are legitimate instruments to accomplish certain trade policy or other objectives such as to generate fiscal revenue.” (India–Additional Tax (AB), para. 159)

- The “Protectionism” measures seem largely WTO consistent or at least pretend to be based on WTO-consistent grounds => The Agreement successfully prevents the infinite rise of protectionism, clearly recognized as normative constraints by Members



4. Issues and the Doha Round

- Overall evaluation: by and large, WTO has been playing its expected role well in the present economic crisis.
- Issues
 - (a) Lack of sufficient resource for monitoring: Cooperation of Members is indispensable.
=> Japan's (METI) own monitoring report and assistance to the Secretary General is highly appreciated.
 - (b) Dispute Settlement: In some sectors (*ex.* steel and automobile), Members take similar protectionist measures, which could lead to mutual refrainment among Members in bringing a case to WTO; also political difficulties could cause slow and troubled implementation of DSB recommendation and ruling.
=> Be aware ! Malfunction of the WTO DSM would result in a real crisis.
 - (c) Market liberalization of non-Members and further tariff reduction
=> Success of the DDA is imperative.



Thank you for your attention

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