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International Trade and the Financial Crisis Implications of the Global Financial Crisis on International Trade and and Investment Regimes

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their international competitors.[4] However, the General Agreement on Trade in Services (GATS) has no rules on subsidies—although Article XV of GATS authorizes WTO members to enter multilateral negotiations to develop rules for limiting the trade-distortive effects of subsidies within service-sector industries, such rules have not yet been adopted. This makes the argument for financial-sector bailout subsidies violating WTO rules substantially more complicated.

Because rules have not been adopted under GATS to govern subsidies or emergency safeguard measures, the legality of financial-sector bailouts will have to be determined under the general terms of GATS, one of which is the requirement of national treatment.[5] Article XVII of GATS states that "treatment shall be considered to be less favorable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member." To the extent that financial-sector bailouts favor domestic financial services providers over international providers, they would seem to violate this provision.

Although the financial-sector bailouts may arguably violate the national treatment requirement, they may find an exemption through the GATS Annex on Financial Services. Paragraph 2.a of the Annex allows for prudential measures aimed at preserving "the integrity and stability of the financial system."[6] Member countries may argue that their financial-sector bailouts were undertaken for such a purpose. If true, then such bailouts would not breach the GATS. However, to the extent that the bailouts were made conditional on banks increasing their domestic lending,[7] they may run afoul of this exemption unless the favoring of domestic businesses can somehow be linked to preserving "the integrity and stability of the financial system."[8]

International Trade and the Financial Crisis

By Elizabeth Trujillo[*]

One of the most distinctive aspects of this economic crisis was the coordinated efforts of nation-states, led by the G-20, to address the crisis within their domestic borders. While globalization has helped to shift the power of the nation-state toward global markets consisting of both state and non-state actors, international institutions governing global markets and free trade consist of representatives of the nation-state. With this financial crisis, it is clear that the nation-state is still in the picture, for it has been the nation-state, with its robust stimulus packages and capital reserves, that has marshaled our slow exit from this financial crisis (at least for now). In terms of trade, though, the nation-state can also be a source of protectionism.

[4] Bart de Meester, *The Global Financial Crisis and Government Support for Banks: What Role for the GATS?*, 13 J. Int'l Econ. Law 27, at 31 (reporting the concerns of the WTO, the UN Conference on Trade and Development, and the Organization for Economic Cooperation and Development regarding the consequences of such emergency measures favoring the domestic actors).

[5] *Id.* at 37, 42 (discussing idea that the emergency measures should be subject to national treatment under the GATS).

[6] *Id.* at 56 (explaining "prudential carve-out" exemption).

[7] *Id.* at 32 (noting that this kind of a condition may have detrimental impacts on competition in sectors other than the banking sector).

[8] *Id.* at 61 (arguing that a discriminatory measure can be employed so long as the goal aimed to be achieved with the measure is prudential).

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Today I would like to focus on three main observations related to trade that the recent economic crisis has highlighted:

- the emergence of protectionist tendencies by nation-states, particularly in times of economic recessions, as demonstrated by the recent domestic responses to the crisis;
- the central role of the nation-state in its regulatory capacity vis-à-vis international institutions and the free market;
- the role of international institutions, in particular the WTO, which have traditionally been focused on the nation-state, and which raise the question whether they are still the best model for today's more globalized world of state and non-state actors.

I will conclude with some brief points about the role of the WTO as nations move forward in redirecting their economies in various sectors, such as renewable energy and climate change.

According to the 2010 Report on G-20 Trade and Investment Measures prepared jointly by the Organization for Economic Co-Operation and Development (OECD), the WTO, and the United Nations Commission on Trade and Development (UNCTAD), the volume of trade has fallen by around 12% in 2009, back to the level of 2006. The crisis beginning in 2008 led to a sharp contraction of the global economy, which accelerated in the first quarter of 2009. Lower global demand and tighter credit conditions lead to contraction in trade flows in the second half of 2008, as well as increased costs to trade finance.[1]

The G-20 2010 Report noted a resumption in growth in world trade and output in 2009, especially in the Asia-Pacific region led by China and other East Asian countries. Overall, G-20 members' exports and imports followed an upward trend over the past recent months.

The rise of unemployment has been an important fall-out of this crisis, stirring citizen reaction against the perceived causes—globalization and trade. Unemployment in the United States is at nearly 10%.[2] The International Labor Organization (ILO) reported that around 27 million people around the world lost their jobs in 2009, taking the number of jobless worldwide to over 200 million.[3]

In terms of government protectionism, at the height of the crisis there did not seem to be an immediate significant increase in trade-restrictive measures. However, the 2009 G-20 Report noted policy slippage since the crisis began. Some G-20 members raised tariffs and introduced new non-tariff measures to protect domestic production in certain sectors, notably steel and motor vehicles. G-20 members continued to use trade defense mechanisms, in these and other sectors as well.[4]

With respect to trade-related measures, the WTO has calculated that new import-restricting measures introduced from September 1, 2009, to mid-February 2010 by G-20 members cover around 0.7% of the G-20 total imports, or 0.4% of total world imports.[5] During this period,

[1] OECD, WTO, UNCTAD REPORT ON G-20 TRADE AND INVESTMENT MEASURES (2010) *available at* http://www.unctad.org/Templates/Page.asp?intItemID=5344&lang=1 [hereinafter G-20 2010 REPORT].

[2] *See id.* U.S. Census Bureau data show 9.7%, a doubling in the last two years from 5–10%. *See* U.S. Census Bureau, *at* http://www.bls.gov/cps/. A recent *New York Times* article states that the unemployment rate has risen to 9.9% for April 2010. *See U.S. Adds 290,000 Jobs in April; Rate Rises to 9.9%*, N.Y. TIMES, May 7, 2010.

[3] ILO REPORT, *available at* http://www.ilo.org/public/libdoc/ilo/P/09332/09332%282010-January%29.pdf.

[4] OECD, WTO, UNCTAD REPORT ON G-20 TRADE AND INVESTMENT MEASURES (2009), *available at* http://www.pittsburghsummit.gov/documents/organization/129863.pdf [hereinafter G-20 2009 REPORT].

[5] G-20 2010 REPORT, *supra* note 1. *See also* Data from the International Trade Administration of the U.S. Department of Commerce, *available at* http://www.trade.gov/ (last visited Mar. 24, 2010).

the increase in antidumping investigation notifications to the WTO was remarkably lower than in past recessions. However, according to the U.S. Department of Commerce, in 2008 the United States initiated a total of 22 either antidumping or countervailing duty investigations—15 of which were against Chinese imports. In 2009 the United States initiated 34 cases, 22 of which were against Chinese imports.[6]

There has been an important increase in countervailing duty investigation notifications to the WTO from 2008 to 2009. This makes sense, especially in light of domestic initiatives to subsidize consumption and help domestic industries. Most were by developed countries, with China being the most targeted—with six countervailing duty investigations between July 2008 and June 2009, followed by India with five.[7]

Safeguard investigations seem to be the remedy of choice for many of the emerging economies, with India leading the pack with 40% of the 27 new investigations notified by all WTO members in that period. There were six China-specific safeguard initiations in 2009. In comparison, India initiated no investigations in the same period the previous year.[8] Unlike antidumping measures, safeguards are applied to all imports of the targeted good, regardless of country of origin.

What is striking about these investigations is the upsurge in disputes between developed and emerging countries, and, in particular, emerging economies as initiators of these in many cases. Emerging economies are also using trade remedies against other developing countries.

Rather than focusing on traditional trade-related restrictions, governments have instead enacted big economic stimulus packages containing strikingly protectionist "buy/invest/lend/hire local" provisions. Most of the 2008/2009 big economic stimulus packages provided support in the form of consumption subsidies, credit support to exporters and businesses facing funding difficulties, and direct support for "green" products.[9] Despite the G-20's commitment to global trade and to avoiding protectionist measures as expressed in the London and Pittsburgh summits, there are elements in these economic stimulus packages that have the potential to distort trade and competition. Most of these elements are in the form of government procurement provisions for substantial infrastructure components and the "buy local" requirements. In the $787 billion U.S. economic stimulus package, for example, the Buy America clauses have created quite a stir among free-trade groups.[10] Section 1605 of the Recovery Act prohibits use of recovery funds for a project for the construction, maintenance, or repair of a public building or public work unless all iron, steel, and manufactured goods used in the project are produced in the

[6] Chad P. Bown, *Global Antidumping Database* [Version 6.0, Mar. 2010], *at* http://www.brandeis.edu/~cbown/global_ad/. In 2009 the number of anti-dumping investigations initiated by G-20 was 21% less than in 2008. There have been more at the national level, though. *Id.*

[7] *WTO Says U.S. Leads Surge In Countervailing Duty Actions*, 26 ITR 1512 (Nov. 5, 2009). Between July 2008 and June 2009, there were 36 new countervailing duties investigations to the WTO, 34 of which were initiated by developed countries (the United States was responsible for 23 of these). Thirty-five U.S. CVD duties have been imposed in the same time period, with 10 targeting China. *See id.*

[8] *See id.* Of the 17 provisional safeguard measures and seven definitive measures imposed by WTO members in that period, India accounted for seven provisional measures and three definitive measures, respectively. India started 11 new safeguard investigations between October 2008 and October 2009, or 40 percent of the 27 new investigations notified by all WTO members in that period.

[9] G-20 2010 REPORT, *supra* note 1.

[10] American Recovery and Reinvestment Act of 2009, Pub.L.-111-5; *see also Buy American Provisions: International Trade Reporter*, Feb. 4 and 25, 2010.

United States. The Rule applies to all states for all procurement awards valued at less than around $7 million ($7,443,000).[11]

This is not the first time we see these types of clauses in American history. There was the Buy American Act of 1933 requiring 51% of content used in government procurement contracts to be mined, manufactured, or produced in the United States.[12] The 1964 Surface Transportation Administration Act was the topic of a 2003 NAFTA investor-state dispute between a Canadian investor and the U.S. government.[13]

The biggest concern with domestic requirements such as those found in the economic stimulus packages is the expected reactions by other nations, in particular from the emerging economies to whom the developed world now looks to for support and for new investment opportunities. These types of government actions may be construed as protectionist under free-trade agreements, and may merit retaliatory responses by countries affected. The United States is not alone, though, in creating "buy local" requirements. China, for example, also included government procurement rules in its stimulus package last year.[14] The Chinese $585 million stimulus package includes "buy China" procurement policies for wind and solar energy projects, and effectively shuts out foreign makers from these large projects. Chinese relationships with foreign businesses are strained due to government actions promoting dominant state companies and tougher government policies on foreign companies.[15] The recent Google debacle only magnifies this strain.[16]

Other types of "creeping protectionism" include stricter immigration rules in the U.S. stimulus package making it more difficult for U.S. companies receiving TARP money to hire non-U.S. citizens.[17] A provision in the U.S. stimulus package requires banks receiving TARP money to give priority to U.S. workers over foreign workers holding H-1B visas. Another provision requires that these companies, if they hire legal immigrants, prove that they are not displacing or replacing U.S. workers and that they have actively recruited U.S. workers.[18] Furthermore, trade financing and valuation issues connected to artificially low currency exchange rates are also significant sources of protectionism.

Finally, domestic politics can help create distrust among trading partners. The latest legislation in the House introducing the repeal of the North American Free Trade Agreement (NAFTA) is an example of government action raising the banner of protectionism in the faces of our regional trading partners.[19] Canada and the United States have dealt with these

[11] *See id.* There are exceptions, for example, if following the Buy America clauses will increase the cost of the overall project by more than 25% or the required iron, steel, or relevant manufactured goods are not produced in the United States in sufficient quantities. The Rule may also be waived if this domestic preference would be inconsistent with the public interest and does not apply to the extent a state has acceded to government procurement provisions of an international agreement. As a final amendment, though, the Buy America clauses must be applied consistently with obligations under international agreements.

[12] *See* the Buy American Act 1933, 41 U.S.C. § 10a–10d.

[13] *See* Surfaced Transportation Administration Act, 49 U.S.C. 31105, *as amended by* § 1536 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53; *See also ADF Group, Inc. v. U.S.*, Final Award (2003), *available at* http://www.naftaclaims.com/disputes_us_adf.htm.

[14] *Comparing Stimulus Packages*, ECONOMIST, Oct. 3, 2009. *See also China Sets Big Stimulus Plan in Bid to Jump-Start Growth*, WALL ST. J., Nov. 10, 2008.

[15] Andrew Browne & Jason Dean, *Business Sours on China: Foreign Executives Say Beijing Creates Fresh Barriers; Broadsides, Patent Rules*, WALL ST. J., Mar. 17, 2010, at A1, A14.

[16] *Google Takes Aim at Beijing Censorship*, WALL ST. J., Mar. 23, 2010.

[17] American Recovery and Reinvestment Act, § 1610–1611 (2009).

[18] *See id.*

[19] "Legislation Introduced to Repeal the North American Free Trade Agreement," 111th Congress 2nd session, HR 4759.

domestic policies bilaterally, recently reaching an agreement to provide companies on both sides of the border access to government procurement contracts at the state and local levels.[20]

While the number of trade investigations and other trade restrictive measures is relatively low compared to the effects of the Smoot-Hawley tariffs of the 1930s, the domestic responses to the crisis, including retaliatory rhetoric, highlight the innate desire of governments to protect what is perceived to be for the public good. The apparently opposing goals of the WTO and domestic governance highlight this tension between legitimate regulation and trade agreements, which provide parameters around which such regulations may be passed, including rules of non-discrimination, non-arbitrariness, and market access. The stimulus packages themselves, with their large subsidies and government procurement regulations, could be construed as protectionist and violating trade commitments; however, seen through a different lens, they could also be interpreted as necessary under the current crisis and even as a matter of national security—both arguments that could hold water under the Article XX exceptions of the GATT.[21]

Not only do free-trade regimes implicate the nation-state, they attempt to manage the nation-state through their dispute settlement mechanisms. However, even these dispute settlement mechanisms rely on the nation-state to enforce their decisions. In this way, trade appears to be two-tiered—the nation-state and the supranational regime of trade. However, the financial crisis reveals that the landscape of free trade is not only two-tiered, but multi-tiered.[22] The overlap between free trade and investment cannot be ignored—in fact, it must be encouraged in order for capital to flow freely again across borders. In addition to multilateral agreements such as the WTO Government Procurement Agreement, regional trade agreements such as NAFTA have their own government procurement provisions that would presumably tame the effects of "buy local" requirements in the stimulus packages.[23] Regional and bilateral agreements regulate trade for their members and within their economic and geographic space. Free trade exists within a pluralist landscape of legal regimes and adjudicatory processes, supranational and national, regional, bilateral, and multilateral.[24] Furthermore, the financial crisis has demonstrated that free trade is no longer solely in the hands of a few industrialized nations like the United States and the European Union. Emerging economies and other developing nations are playing a very important role in global markets and in free trade. In 2000, developing countries accounted for 37% of world output. In 2008, their share rose to 45%, and the BRICs account for almost half of this percentage.[25] In April 2009, Brazil's largest export market was no longer the United States but China, and Brazil now is one of the largest exporters to India.[26] The BRICs can no longer be ignored in today's world.

[20] *U.S., Canada Set Deal on "Buy American,"* WALL ST. J., Feb. 5, 2010. *See also* Office of U.S. Trade Representative, *available at* http://www.ustr.gov/about-us/press-office/blog/2010/february/us-canada-reach-deal-buy-american.

[21] *See* General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 UNTS 194 [hereinafter GATT].

[22] Elizabeth Trujillo, *From Here to Beijing: Public/Private Overlaps in Trade and Their Effects on U.S. Law*, 40 LOY. U. CHI. L.J. 691, 700–12 (2009) (discussing the multi-scalar aspects of trade and the adjudicatory overlaps of trade and investment regimes).

[23] WTO Agreement on Government Procurement [hereinafter GPA]. *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 ILM 289 (1993), ch. 10 (on government procurement).

[24] Trujillo, *supra* note 22.

[25] *See Not Just Straw Men; BRICs, Emerging Markets and the World Economy*, ECONOMIST, June 20, 2009 (discussing the emerging markets of Brazil, Russia, India, and China).

[26] *See id.*

This brings me to my final point regarding the financial crisis and its impact on trade—the role of international institutions, in particular the WTO, which have traditionally been focused on the nation-state.

If globalization and free trade have changed the economic landscape since the 1930s, the role of international institutions that traditionally focus on the nation-state, such as the WTO, is also put into question. Is the WTO's current model of governance (primarily top-down) the most effective in today's more globalized world directed by state and non-state actors? Perhaps this is a topic for another panel, but I raise it as an important consideration for nations moving forward out of this financial crisis and redirecting their economies toward other markets such as renewable energy and climate change markets.[27] Because of the WTO's role in managing non-tariff barriers to trade, it effectively has a say in the domestic regulatory space of nation-states.

The irony of this financial crisis is that, with all its challenges, it may also be the catalyst for a new form of capitalism—one in which governments work together to incentivize the free market to invest in renewable energy and solutions for climate change. Harold James in his recent book has noted that the current phase of globalization that we are experiencing is one where *financial* globalization has been at its core, as opposed to *manufacturing,* which was the focus of the early part of the 20th century.[28] In furtherance of this point, I propose that we are entering a new phase of globalization, one that will incorporate significant participation by emerging economies and that may be dubbed a *climate change globalization.* As in other phases of globalization, capital flows are necessary to oil the machine, and free trade provides the foundation, but should not be the inhibitor. However, in this new phase, international institutions must recognize and facilitate the delicate interplay among domestic governance of the nation-state, on-the-ground partnerships of state and non-state actors working in the free market, and the multilateral, regional, and bilateral spheres of trade and investment.

THE GLOBAL FINANCIAL CRISIS AND INTERNATIONAL INVESTMENT REGIMES

By Jeffery P. Commission[*]

INTRODUCTION

The global financial crisis has seen unprecedented intervention by governments across the world, including sweeping nationalizations and recapitalizations, in an effort to restore confidence, especially in the banking sector. Most recently, in the period between December 2009 and March 2010, more than 62 countries or economies enacted new policy measures affecting foreign investment.[1] In particular, at least 23 economies (mostly G-20 countries)

[27] *See* Elizabeth Trujillo, *Tuna-Dolphin Revisited: Transnational Governance Implications for Trade Regulation in the Context of Climate Change Policy* (draft on file with author).

[28] HAROLD JAMES, THE CREATION AND DESTRUCTION OF VALUE: THE GLOBALIZATION CYCLE 157–61 (2010).

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[1] United Nations Conference on Trade and Development (UNCTAD), *Investment Policy Monitor,* No. 2, Apr. 20, 2010.