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The role of the WTO during systemic economic crises¹

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Abstract

This paper considers the possible future role that the World Trade Organization (WTO) could play during systemic economic crises. The events of the past twelve months are analyzed so as to discern the commercial, political, and other practical factors that are likely to shape the degree to which governments are willing to cooperate with one another through the WTO during times of severe economic strain. Moreover, proposals for a greater role for the WTO in the near-term and after are described, assessed, and generally found wanting. Our expectations of what the WTO can achieve during economic crises should be tempered.

The Graduate Institute's Thinking Ahead on International Trade (TAIT) programme is a four-year research programme devoted to the analyses of medium-term challenges facing the international trade system in general and the WTO in particular. While founded on scholarship, the analysis is undertaken in association with public and business sector actors. The working method seeks advice and input from the public sector (policymakers, diplomats, international civil servants, and government officials) and the private sector in all matters but especially when it comes to gathering views, prioritising issues and developing action plans to address the challenges identified.

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The role of the WTO during systemic economic crises

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1. Introduction: Motivation and preliminary considerations

By now the world economy is two years into what has become the sharpest economic downturn since the creation of the General Agreement on Tariffs and Trade (GATT) in 1948. For sure, some countries have been through sharper contractions on their own in the postwar era. In the present case, however, economic pain is being felt worldwide, with performance in the first half of 2009 on some metrics that was worse than the Great Depression. Given that postwar multilateral economic institutions were created in large part to avoid repeating the mistakes of the 1930s, it is not surprising that there is interest in the role that the World Trade Organization (WTO) has played up until now and could play in the future.

This paper describes and assesses the possible roles that the WTO could play during systemic economic crises. However, care is needed in separating out a number of related, but distinct matters, many of which are outlined in this introduction. One could, for example, have different views as to what role the WTO could play in the near to short term (as the global economy appears to recover) and over the medium to longer term (perhaps in preparation for the next global economic crisis.) Both will be discussed here.

Furthermore, in thinking through the role of the WTO one ought to be clear which particular functions of this organization one has in mind. Is reference being made to the negotiating function, the dispute settlement function, or the transparency-cum-deliberation function (that some, including the Director-General, refer to as the "missing middle" of the WTO)? Whichever function is being considered surely one should also ask what the comparative advantage of the WTO is over other parties or institutions in pursuing any proposed initiative. What characteristics of the WTO and the initiative in question suggest that the latter is best undertaken in the former and not somewhere else?

Notwithstanding my admiration for the WTO's secretariat, the realization that there is no such thing as an independent actor called the WTO must surely shape one's approach to the matters raised here.³ It is the members of the WTO that will determine what role this organisation will

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³ The position being taken here is essentially a realist one, in the sense articulated by Mearsheimer (1994/1995). The question then arises as to how the position that, during the current sharp global economic downturn, the ultimate arbiters have been national governments be reconciled with their apparent adherence to the WTO's rules. This question is discussed in the second section of this paper.

play in the current and future global economic crises. In which case perhaps the question before us is really: under what circumstances and in what areas of crisis policymaking and regulatory decision-making is it in the collective interests of governments to bind themselves in enforceable accords at the WTO, to be monitored by the WTO secretariat and others, or to subject themselves to dispute settlement? Add in the principle of decision-making by consensus at the WTO, and these considerations put national governments (and in the case of Europe, the European Commission) at the centre of any pragmatic analysis.

It may be that the case for certain potential future roles for the WTO is compelling on first principles, however, that is not enough. Political viability is an important consideration. Ultimately, then, what role the WTO is likely to be able to play in an economic crisis is going to be influenced by the considerations that shape national decision-making during economic crises. Some national parties may not want any external influences shaping crisis responses. Other parties (e.g. bank regulators and central bankers) may prefer their own informal non-transparent forms of international collaboration, which may not sit well with established WTO practice. The reality is that international governance arrangements are already crowded with many formal and informal sectoral, regional, and international bodies.

Worse still, the short time-frames involved in crisis decision-making may mitigate against international collective action at the relatively slower-moving WTO. If, for example, developments in financial markets move so quickly that measures relating to a national bank or banking system must be determined between the close of the financial markets on a Friday afternoon in New York and their opening in Tokyo on Monday morning, then this does not leave much time for notification to the WTO, deliberation by the WTO membership, let alone negotiation between WTO members. To what extent do these practical considerations constitute a reality check for those arguing for a more ambitious role for the WTO during economic crises?⁴

In the light of these considerations the remainder of this paper is organized as follows. The starting point is to examine the questions raised by the current global economic downturn for the WTO's future potential role. Then, in the third section of the paper, a number of initiatives are discussed that the WTO membership could consider in the near-term as the current crisis unfolds. Given the length of time taken to negotiate multilateral trade accords, proposals for new multilateral disciplines are probably best left for the medium to longer term. Section four discusses three of these relatively more ambitious proposals. The final section tries to draw together the different arguments and considers the extent to which arguments to expand the WTO's role in economic crises based on first principles and noble ideals are necessarily tempered by the reality that during crises severe national political constraints constrain must room for international collective action.

2. The current economic crisis, protectionism, and the WTO

The world economy entered into the second half of 2007, when the damage done by the subprime crisis became apparent, with very high levels of international interdependence in trade, finance, migration, and cross-border operations of business. Initially any contagion associated with the current crisis was confined to the financial sector, in particular to the banking sector where there had been cross-border transactions in mortgage-related securitized

⁴ Differences across nations in the severity of downturns, in the sectors affected, and in the movement from downturn to recovery (and visa versa) are likely to influence the priorities of governments and their willingness to collaborate in international fora as well.

assets. The banking systems of the English-speaking world (with the exception of Canada), much of Continental Europe (except Italy) and the Nordics soon faced crises of illiquidity and insolvency.

It was only in 2008, when banks severely curtailed the working capital made available to firms and finance international trade, that the non-financial economy began to suffer severely. Falling aggregate demand in certain leading industrialized countries was transmitted abroad through falling purchases of imports. Double digit falls in export growth in turn pushed the world's largest exporters (Germany, China, and Japan) into recessions too. As the outlook for the world economy worsened through the second half of 2008 many commentators argued that the traditional international transmission of negative demand shocks would be exacerbated by governments resorting to protectionist measures, or at least to measures that shifted the burden of adjustment to other countries.

One might have thought that the heightened concerns about resort to beggar thy neighbor policies would result in initiatives being undertaken at the WTO and that organization taking centre stage for the management of this aspect of the current global economic downturn. Instead, to date the primary international initiative on commercial policy took place in the G20 forum of leading economies. At their first crisis-related summit in November 2008, the leaders of the G20 declared that:

"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's Doha Development Agenda with an ambitious and balanced outcome. We instruct our Trade Ministers to achieve this objective and stand ready to assist directly, as necessary. We also agree that our countries have the largest stake in the global trading system and therefore each must make the positive contributions necessary to achieve such an outcome" (paragraph 13, G20 Declaration, 15 November 2008, Washington DC)

The G20 leaders therefore committed themselves to a non-binding pledge to eschew protectionism⁵ and to complete the Doha Development Agenda. Initially, no monitoring mechanism was established to ensure that this non-binding pledge was adhered to. No dispute settlement or sanctioning mechanisms were introduced either.

This pledge was reiterated and extended in the 2 April 2009 Leader's Declaration at the subsequent G20 summit in London:

"Resisting protectionism and promoting global trade and investment

22. World trade growth has underpinned rising prosperity for half a century. But it is now falling for the first time in 25 years. Falling demand is exacerbated by growing protectionist pressures and a withdrawal of trade credit. Reinvigorating world trade and investment is essential for restoring global growth. We will not repeat the historic mistakes of protectionism of previous eras. To this end:

we reaffirm the commitment made in Washington: 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

⁵ Similar pledges were made in regional fora in Europe, the Asia-Pacific, and Latin America.

measures to stimulate exports. In addition we will rectify promptly any such measures. We extend this pledge to the end of 2010;

we will minimise any negative impact on trade and investment of our domestic policy actions including fiscal policy and action in support of the financial sector. We will not retreat into financial protectionism, particularly measures that constrain worldwide capital flows, especially to developing countries;

we 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;

we will take, at the same time, whatever steps we can to promote and facilitate trade and investment; and

we will ensure availability of at least \$250 billion over the next two years to support trade finance through our export credit and investment agencies and through the MDBs. We also ask our regulators to make use of available flexibility in capital requirements for trade finance.

23. We remain committed to reaching an ambitious and balanced conclusion to the Doha Development Round, which is urgently needed. This could boost the global economy by at least \$150 billion per annum. To achieve this we are committed to building on the progress already made, including with regard to modalities.

24. We will give renewed focus and political attention to this critical issue in the coming period and will use our continuing work and all international meetings that are relevant to drive progress."

The April 2009 statement contains more elements than its predecessor, not the least of which is a commitment to notify measures to the WTO and to encourage monitoring. The latter involved the WTO receiving an explicit mandate to monitor and report on trade-related developments during the crisis. In fact, the WTO's monitoring of such developments started earlier and, as of this writing, has resulted in three reports being published (another report is expected imminently). The World Bank and Organisation for Economic Co-operation and Development have issued similar reports and commissioned analyses of the state measures taken during the crisis, as have independent researchers. A recurring theme of these analyses is that governments were employing for protectionist ends the discretion found in much otherwise-unobjectionable state legislation, a phenomenon Richard Baldwin and I termed "murky protectionism."

Even with this enhanced monitoring mandate, it is important to state that there has been no change to the set of WTO functions as a result of the global economic downturn. That is, there has been no expansion in the set of functions, although the application of the monitoring function has greater scope. Nor has the set of functions been curtailed. In this sense there has been no change in the formal architecture of the WTO. But is that it?

Before coming to any (necessarily interim) assessment of the WTO's role during this global economic downturn, bearing in mind that the G20 group is made up of national governments (plus the European Commission) it will be useful to describe what state measures have been taken during the crisis that have implications for foreign commercial interests. Drawing upon the database of the independent monitoring initiative *Global Trade Alert*, which as of 9 September 2009 had investigated 350 state measures taken since the first crisis-related G20

summit, light can be shed on the landscape of crisis-related protectionism (see Table 1 and Figure 1).

As of 9 September 2009, of the 194 state measures that have been investigated by the Global Trade Alert team, 130 were found to have almost certainly discriminated⁶ against foreign commercial interests (be they exporters, investors, migrant workers, holders of intellectual property.) Another 42 measures were found likely to have discriminated against foreign commercial interests. Moreover, of the 155 state measures that have been announced but not yet implemented, 129 of them are thought almost certain to harm trading partners when they come into force. That is, the discriminatory measures in the pipeline are of the same magnitude as those implemented since the first crisis-related G20 meeting.

According to the latest numbers from *Global Trade Alert*, implemented state measures that were found to be almost certainly discriminatory together affect commerce in over 80 percent of all product categories (as measured by 4-digit tariff lines), two-thirds of all economic sectors, and the commerce of 189 jurisdictions. The top targets of beggar-thy-neighbor measures implemented since last November are China (63 measures), the United States (52 measures) and Germany (51 measures).

The G20 pledge to eschew protectionist measures is in tatters. Eighty-five of the beggar thy neighbor policies implemented since November 2008 have been implemented by a G20 member. That is, on average, a G20 member breaks the pledge every four days! The harmful measures taken by the G20 members have hurt the commercial interests of 181 jurisdictions-- a vivid demonstration of the failure of this non-binding initiative.

Unlike the 1930s, which saw across the board increases in tariff rates, the current global economic downturn has seen resort to a wide variety of discriminatory state measures. To date, worldwide the three most used state measures with harmful effects are bailout/state aids (38 measures), tariff increases (22 measures), and trade defense measures. Although only 18 trade defense measures have been actually implemented, an avalanche of 108 measures are in the pipeline. In terms of trading partners affected, discriminatory export tax changes are thought to have harmed 146 trading partners, trade finance schemes that amount to export subsidies are expected to hurt 122 trading partners, and other export subsidies a total of 122 jurisdictions.

It would be wrong, however, to conclude that there have been no liberalizing measures taken during this crisis. Though liberalizing measures tend to be outnumbered by discriminatory measures by a ratio of seven-to-one, numerous tariff reductions have been implemented by Sub-Saharan African nations. Many developing countries have lowered tariffs on imports of parts and components⁷ and the liberalization of foreign direct investment rules has been observed in OECD and developing countries alike.

What do these development imply for the role that the WTO has played during economic crises? A positive interpretation starts off by contrasting the widespread violation of the non-binding G20 initiative with few, if any, breaches of extant WTO commitments. The combination of binding rules backed up dispute settlement have discouraged governments from taking too many overtly protectionist steps, and so the multilateral trading system has

⁶ In the Global Trade Alert the metric used to evaluate a state measure concerns the effect of implementing the measure on the existence and extent of any asymmetric treatment of foreign commercial interests vis-à-vis domestic commercial interests. The Global Trade Alert does not consider whether a measure is "protectionist," "acceptable," or "WTO-legal," terms which are very hard to define. Moreover, the Global Trade Alert considers all state measures taken since November 2008 to be within its scope and, therefore, does not take a position as to whether a measure is "crisis-related" etc. For more details about the methods used in Global Trade Alert see <http://www.globaltradealert.org/about>.

⁷ Although this may raise concerns of increasing the effective rate of protection of final goods.

succeeded in "holding the line" against market closing, or at least limiting it. Alas this may not be the only interpretation that appears to be consistent with the facts.

A more skeptical view would begin by pointing out that the compliance with existing legally binding trade rules does not necessarily imply that beggar-thy-neighbor policies have been kept at bay. As far as tariffs are concerned, most of the tariff increases observed during this global economic downturn have been by developing countries where the gap between their current applied and bound rates tends to be significant. Here the bindings aren't much of a constraint on across-the-board tariff increases which, in fact, have been seen in a number of developing countries.

With respect to the industrialized countries, a skeptic might point out that the fundamental challenge facing most firms during the crisis has been cash flow. With insufficient cash flow, insolvency beckons along with job layoffs and production losses. Cash flow problems are most directly remedied by state aids of different forms, including direct cash transfers, credit guarantees, etc, and not by tariffs and other border interventions. The latter work at best indirectly, first by shifting customers away from imports and, only then if the customers haven't cut back on their spending (as they tend to do when worried about job security etc during crises of this sort), increasing domestic firms sales.

Another advantage from the perspective of a decision-maker keen for results, is that customer shifting may take a lot longer than depositing the necessary resources in a recipient firm's bank account. Bearing in mind also the rather limited ambit of WTO rules on subsidies, governments with deep enough pockets (mainly industrialized economies) don't have to resort to breaking WTO rules to shift the burden of adjustment to firms in trading partners. Taken together, then, a world with significant binding overhangs in tariffs and an incomplete set of multilateral trade disciplines can be reconciled with apparent fealty to WTO rules and substantial amounts of beggar-thy-neighbor policies. On this view, the WTO rules weren't found wanting because they were never really tested. The "success" of WTO rules over the G20's non-binding pledge is more apparent than real.

Questions ought to be asked why G20 leaders chose to keep their trade initiative "in house" (so to speak) and not to pursue it in the WTO. There is no reason to suppose that each G20 leader had the same view, or indeed any view, on this matter. Four possible rationales for keeping the pledge out of the WTO are as follows. First, a G20 leader that never intended to honor their pledge would hardly want the pledge codified as a binding obligation in the WTO, backed up by a dispute settlement process that would leave their country ultimately open to sanctions. On this argument, best to keep the pledge informal and hope that its violation doesn't garner too much publicity or an adverse reaction from trading partners.

Second, a G20 leader may have intended to honor the pledge, seen value in binding the obligation, but WTO dispute settlement takes too long to enforce those commitments, at least compared to the speed with which economies deteriorate during sharp global economic downturns. Third, like the second case, but the time necessary to negotiate an accord at the WTO would diminish the accord's value during an ongoing crisis. In short, much of the crisis would be over by the time the accord was negotiated. And, fourth, like the third case, but the G20 leader may have concluded (perhaps on the basis of the never-ending Doha Round negotiations) that the probability of successfully negotiating a non-trivial accord would be low and that failure to agree would be worse than not negotiating at all.

The last three rationales do not reflect well on the operation of the WTO's core functions. Indeed, the question arises as to whether changes in those functions are a pre-requisite for the WTO to make the most of more encompassing disciplines during any future global economic crisis.

Last, any overview of the WTO's activities during the current crisis should make reference to the enhanced monitoring that the WTO secretariat has undertaken. Readers should be aware that as the coordinator of what some see as a rival monitoring initiative, the opinions expressed here might be biased. Nevertheless, for what it is worth, a few observations are offered. In terms of content (both quality and quantity) the WTO's monitoring reports have gone from strength to strength. Many WTO members do not have the staff and resources to collect this information, which is essentially a traditional public good, and otherwise would not be able to assess the impact of crisis-related developments on their commercial interests. Concerns must surely arise that the WTO secretariat is largely dependent on its own members to verify measures that the latter have taken and, given what can be confirmed from official records elsewhere, it is evident that not every government cooperates in the verification process to the fullest extent possible.

The purpose of this section has been to describe the principal trade policy developments during the current sharp global economic downturn and then to assess the contribution of multilateral trade rules. Any such assessment is necessarily tentative, after all the global economic downturn is not over and, as suggested, there are plenty of state measures in the pipeline that are very likely to have implications for foreign commercial interests. Still, some skepticism has been expressed here that the combination of binding rules backed up by dispute settlement has been quite as successful in holding the line against beggar thy neighbor policies.

Indeed, on the basis of the evidence presented above, one may question whether the line has been held at all. Worse, the fact that the G20 leaders, almost all of whom head governments of jurisdictions that are WTO members, chose to undertake the highest profile trade policy initiative outside of the auspices of the WTO is hardly an endorsement and begs questions as to what features of current WTO practice need to change if its own governments are willing to undertake serious initiatives there during times of economic duress. Or it is an indication of those leaders desire not to be bound by international rules when the stakes for their economies at home are so large. Looking forward the point can be put another way: What reasons are there to believe that future systemic crises result in different attitudes from government leaders on these matters?

3. Potential initiatives for the WTO during the remainder of the current economic crisis

Whatever position one takes on the extent to which the WTO's own membership is likely to oppose any expansion of this body's role during the current economic crisis, it is worthwhile examining what possibilities exist. In doing so, the constituencies likely to support and oppose each such initiative may become clearer as well as the pre-requisites for successful implementation.

Each of the following initiatives might contribute, perhaps only modestly, to the objective of keeping borders open during the economic crisis. Each initiative takes the existing set of WTO rights, obligations, and procedures as given. It is not clear that these initiatives are mutually exclusive.

- An upgraded monitoring initiative to allow for more frequent reporting, identification harmed trading partners (in particular the more vulnerable developing countries) by state measures, and greater resources devoted to information collection and verification.

- Review of the rules, experience, and incentives to make notifications to the WTO as policies change.
- More analytical work to be undertaken by the WTO secretariat in its own name, including the estimation of the effects of state measures thought to harm foreign commercial interests.
- Discussions among WTO members in relevant committees of better practices when implementing measures that are not currently subject to WTO accords yet have potential implications for foreign commercial interests.
- Adoption of the principles of accountability, transparency, and evidenced-based policymaking in regulatory areas that could implicate foreign commercial interests. This would include instituting national and possibly even international reviews of state measures taken during the crisis and examination of serious alternative measures that are potentially less distorting.
- Having assembled information on measures taken in a specific sector or policy area, and once the economic recovery is underway, discussions could begin on the merits of (informal or formal) accords to unwind discriminatory measures over an agreed time-frame.
- If possible, use the heightened concerns about protectionism to complete the Doha Development Agenda (DDA).
- Identify policies, regulations, and practices that may form part of a post-DDA negotiating agenda, bearing in mind that plurilateral and critical mass accords are options as well as multilateral agreements. In principle, one need not wait until a new round of multilateral trade negotiations to make progress on some of the matters identified.

In each case, it is worth asking what are the incentives for all or a significant subset of WTO members to take part in an initiative.

4. More ambitious longer-term proposals concerning the WTO's role

Of course, there is no reason why the set of WTO accords must remain frozen in time. Indeed, in the early 1980s some of the findings of the GATT's then monitoring exercise influenced some members positions as to which matters should be on the negotiating agenda in the Uruguay Round. In this sense, many of the notification-, best practice-, and monitoring-related initiatives mentioned in the last section may well provide the impetus and ideas for a more ambitious reassessment of the adequacy of WTO disciplines. In what follows, three rather ambitious options are described.⁸

The first option would be to develop individual sector-specific or policy-specific accords on the state measures that were prone to discriminatory use in the current global economic downturn. On the basis of the evidence available, this would almost certainly include tighter rules on state subsidies to firms, public procurement, and export restrictions.

⁸ These three options are quite distinct from one another. One might think of the first option introducing sector-specific rules, the second option "horizontal" disciplines, and the third option a crisis-specific set of obligations.

A distinct approach is to try to negotiate WTO disciplines that limit the resort to murky protectionism, that is, the abuse of legitimate and often necessary discretion in regulatory decision-making for protectionist ends. The objective here should not be misunderstood; it is not to undermine the right to regulate; nor is it to eliminate discretion in regulatory decision-making. Instead, it is to insist that wherever possible regulatory decisions pursue stated non-protectionist goals, use available scientific and other objective evidence, make choices on the basis of logic, evidence, and accepted international standards (where they exist), present argumentation and evidence to support such decision-making, and commit to review decision-making in the light of new evidence or other developments. These steps, and no doubt others, would limit the extent to which national treatment obligations are violated during regulatory decision-making. Where discrimination against foreign commercial interests is necessary, it would have to be justified and steps taken to minimize it. Such an accord may include provisions that relate specifically to decision-making in crises, publication of decisions made quickly during crises, ex-post review of decisions made during crisis, and a commitment to negotiating unwinding any discriminatory measures taken during the crisis after a certain period of time.⁹

The third option is to negotiate a legally binding standstill accord that would come into effect when an economic crisis results in certain measurable outcomes or when the members to this accord (leaving open the possibility that the accord is not a multilateral WTO accord) decides to collectively invoke the standstill. This accord would seek to freeze in place the trade policies of its parties for a pre-specified period of time. The length of the standstill could be increased by agreement. The goal of such an accord would be to provide assurance to the private sector that international trading conditions will not deteriorate on account of government trade policymaking.¹⁰ Such an initiative could be coupled with a strengthened surveillance mechanism.

While the case for each of these initiatives could be made, some words of caution are in order. There may be structural reasons why the payoff to doing so is less than one might think (leaving aside any doubts about the likelihood of successfully negotiating such accords). So long as the corpus of WTO rules remains incomplete after putting in place additional obligations on public procurement, state aids, etc, surely the fear remains that in the next economic crisis government will again substitute as yet undisciplined discriminatory measures for those banned or constrained by multilateral accords. In which case, the new obligations will merely displace the protectionist pressure that arises during the next global economic crisis. This is not to say, however, that outside of a crisis that new disciplines on state aids (for example) are not valuable. But these observations should temper one's expectations about the benefits these new rules might deliver during a systemic economic crisis.

All three of the above options suffer from another problem and that concerns compliance. So long as it takes 18-24 months for a case to work its way through the WTO dispute settlement system only to have the offending party remove the discriminatory measure at the end of the process, one might ask hard questions about what bite new disciplines could have. This suggests that revisions to the dispute settlement system are needed to encourage countries back into compliance much sooner during crises. Indeed, this line of thought might lead one to consider the logic underlying a recommendation made earlier this year. Zedillo (2009) argued the equivalent of "if you want peace, prepare for war." In the trade policy context,

⁹ With a group of trade experts, I have attempted to spell out what such an accord might entail, see the Annex of this paper.

¹⁰ Any such accord would require a clear statement of what policies are "frozen." With some colleagues I have attempted to do this, see section 3 of the Annex to this paper.

during an economic crisis this amounts to fighting "fire with fire." Without suggesting that Zedillo endorses the following specifics, it might be worth considering if retaliation could come swifter and be on a larger scale during non-crisis times. This proposal could be defended on the grounds of enhancing the deterrent value of WTO obligations.

Another approach might be to reduce the WTO rights of parties that violate obligations during crises. Both ideas (greater punishments, fewer rights) have their downsides. The former may actually result in nationalistic escalation of tariff barriers, exacerbating an economic crisis. The second may result in disengagement of the party losing their rights, with longer term consequences for the multilateral trading system. Overall, this discussion identifies some of the complexities associated with ambitious expansions in the potential role of the WTO during economic crises and the need to rethink compliance incentives as well as the rules themselves.

5. Concluding remarks

The creators of the postwar international economic institutions sought to avoid the economic calamity of the 1930s. In light of this, it is natural to ask what the current systemic economic crisis bodes for the future of the multilateral trading system. Having considered both the events over the past 12 months and numerous possible reform proposals, one is tempted to answer "not much." The current global economic crisis has exposed two fundamental mismatches; first, between the capacity and desire of governments to react very quickly (and not necessarily wisely) against the slow-moving WTO dispute settlement system; second, between the wide range of policies available to governments to discriminate against foreign commercial interests and the narrower range of policies subject to WTO disciplines. Unless disciplines across the broad range of policymaking are negotiated and incentives for compliance strengthened then we should not expect much more from the WTO during future crises. So long as the piecemeal structure of the WTO exists, loopholes will continue to exist and will continue to be exploited by desperate officials in times of economic distress.

If international economic institutions cannot offer much more of defense of open borders during global economic crises, what can? Here the current global economic downturn may offer another clue as many nations, typically those with small markets, have liberalized some aspects of the commercial policies. Perhaps the most effective defense of open borders during systemic economic crisis is a national consensus that the benefits of openness are substantial and widely shared and that alternatives, however tempting, are flawed. Could such experience provide a more powerful defense of open markets than the accords and procedures of any international institution?

6. References

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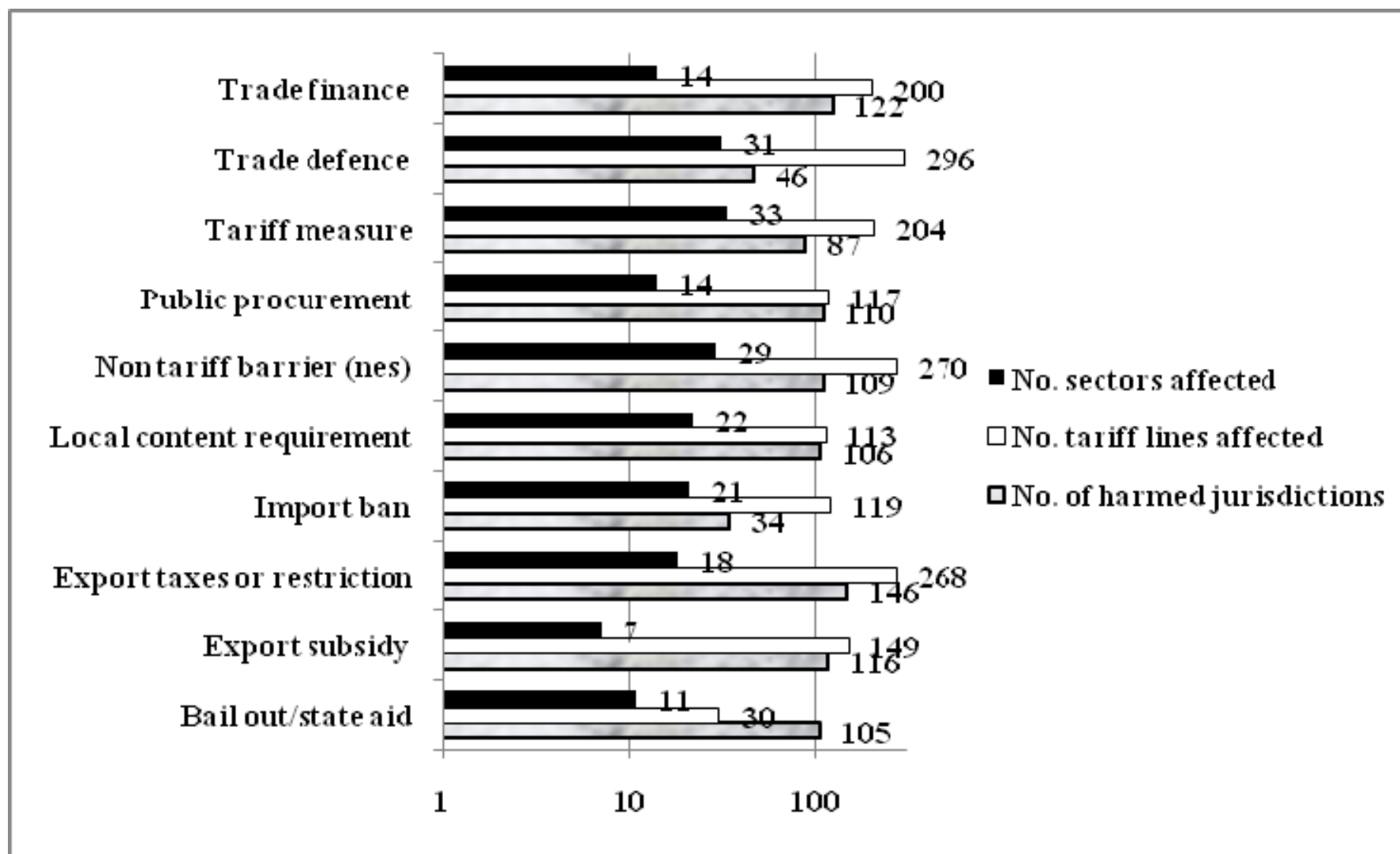
Table 1: Summary statistics on the state measures taken during the crisis.

Measure Type	Total number of measures in the Global Trade Alert database	(Green) Measures in database	(Amber) Measures in database	(Red) Measures in database	Number of implemented measures of specified measure type	Number of pending measures of specified measure type	Number of jurisdictions implementing specified measure type and classified as red	Number of jurisdictions affected by measures of specified measure type and classified as red	Number of tariff lines affected by measures of specified measure type and classified as red	Number of sectors affected by measures of specified measure type and classified as red
Bail out/state aid	42	1	3	38	37	5	21	105	30	11
Tariff measure	49	8	19	22	37	12	13	87	204	33
Trade defence measure (AD, CVD, safeguard)	133	8	106	18	38	95	10	46	296	31
Non tariff barrier (nes)	20	2	7	11	17	3	7	109	270	29
Public procurement	23	1	11	11	14	9	10	110	117	14
Sanitary and Phytosanitary Measure	14	1	3	10	9	5	8	17	24	7
Export subsidy	8	0	2	6	7	1	31	116	149	7
Import ban	9	0	3	6	6	3	5	34	119	21
Export taxes or restriction	13	3	5	5	10	3	9	146	268	18
Migration measure	8	1	2	5	6	2	5	30	0	0
Other service sector measure	15	3	8	4	5	10	3	26	23	11

Measure Type	Total number of measures in the Global Trade Alert database	(Green) Measures in database	(Amber) Measures in database	(Red) Measures in database	Number of implemented measures of specified measure type	Number of pending measures of specified measure type	Number of jurisdictions implementing specified measure type and classified as red	Number of jurisdictions affected by measures of specified measure type and classified as red	Number of tariff lines affected by measures of specified measure type and classified as red	Number of sectors affected by measures of specified measure type and classified as red
Consumption subsidy	6	1	2	3	4	2	3	63	18	5
Local content requirement	14	0	11	3	4	10	3	106	113	22
Competitive devaluation	2	0	0	2	1	1	2	32	7	1
Trade finance	4	0	2	2	2	2	2	122	200	14
Quota	2	0	1	1	1	1	2	2	2	1
State trading enterprise	1	0	0	1	1	0	1	5	14	2
Import subsidy	1	0	1	0	0	1	0	0	0	0
Intellectual property protection	4	0	4	0	0	4	0	0	0	0
Investment measure	11	5	6	0	4	7	0	0	0	0
State-controlled company	0	0	0	0	0	0	0	0	0	0
Technical Barrier to Trade	7	1	6	0	1	6	0	0	0	0

Source: *Global Trade Alert*, 10 September 2009. Updates of this table can be obtained from <http://www.globaltradealert.org/site-statistics/table/12#>

Figure 1: Indices of harm done by certain state measures.



Source: Extracted from <http://www.globaltradealert.org/site-statistics/table/12#>, *Global Trade Alert*, 10 September 2009.

Annex.

Disavowing Protectionism: A Strengthened G20 Standstill and Surveillance

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The G20 standstill on protectionism, agreed less than five months ago at a Washington D.C., has lost much of its force. This calls into question the credibility of leaders' claims to disavow beggar-thy-neighbor responses to the global economic downturn. While no major trading power has yet to resort to across-the-board restrictions on international trade and investment, enough elements of many national economic recovery programmes contain discriminatory measures--or appear to--that a new approach is needed, especially as the measures of greatest concern today are very different from the protectionist measures of yesteryear. The purpose of this chapter is to argue for a strengthened G20 standstill, that covers the new, murkier forms of protection as well as traditional discriminatory measures, backed up a tough real-time surveillance mechanism.

The original rationales for a G20 standstill--avoiding beggar-thy-neighbor measures and the almost inevitable retaliation and descent into trade wars that would follow--are sound. That's why the G20 shouldn't abandon its standstill. Even so, recognition of the many--some blatant, some far more subtle--ways in which discrimination against foreign traders, investors, and workers, can creep into national, sectoral, and firm-specific government measures calls for a new form of standstill. Moreover, many non-discriminatory recovery measures that governments may take can have the effect of reducing international commerce, even though the latter is not their purpose. A standstill that is both more comprehensive in scope and better able to discourage stealthy as well as blatant protectionism is needed. Plus, any new standstill should not seek to stop government intervention *per se*, but rather to encourage governments to use whatever discretion they have in a non-discriminatory manner when designing and implementing measures to promote economic recovery. To prevent retaliation discretion must not just be used in a non-discriminatory manner, but seen to be so.

In this chapter we propose that the G20 leaders adopt, at their April 2009 summit in London, a comprehensive Protocol that reaffirms their commitment to find non-discriminatory ends and means to combating the global economic downturn. The Protocol would not be permanent and would lapse after two years. Subsequently other, non-G20 nations would be encouraged to sign this Protocol too. As a sign of their willingness to take leadership during the current global economic downturn, the G20 would implement the Protocol on an unconditional most-favored nation basis. Taking these steps would send a strong signal to the financial markets and the private sector, boosting confidence. In addition, signing up to this Protocol would provide useful benchmarks against which state measures could be judged. The combination of these agreed benchmarks and a new real-time surveillance mechanism would generate the necessary peer pressure to discourage governments from taking beggar-thy-neighbor measures.

¹¹ Each author is writing here strictly in a personal capacity. A list of the authors' affiliations can be found on the next page

G20 leaders would commit to a Protocol which has the following elements:

1. Five principles for state intervention that encourage governments to intervene in an evidence-based, reasoned, and transparent manner without deliberately discriminating against foreign commercial interests or workers, unless such discrimination is absolutely necessary and distorts international commerce to the least possible degree.
2. A commitment by G20 leaders to oppose measures proposed by others at home that needlessly discriminate against international commerce.
3. The continuation of a traditional commercial policy standstill, thereby disavowing blatantly protectionist responses to the global economic downturn.
4. Five commitments concerning the proper implementation of so-called bail-outs to firms.
5. Steps to allow firms more time to meet new costly technical, safety, and health regulations that can affect both domestic and international trade.

This Protocol would be binding on its signatories but would not become a WTO agreement subject to dispute settlement etc. While there are clear attractions to the latter, two practicalities mean the G20's strengthened standstill should stay outside of the WTO. First, negotiating a WTO standstill would take time, time that the world economy does not have. (Plus, any such negotiations could founder and be seen by some as a distraction from completing the Doha Round.) Second, even if a WTO standstill could be negotiated quickly, dispute settlement under the WTO's rules takes so long that any protectionist measures taken in the near term need not be reversed before the end of 2010 (when any WTO case could be drawn out to), in the meantime the damage has been done and the temptation to retaliate remains. Peer pressure and real-time surveillance, coupled with benchmarks for state action embodied in a Protocol of the kind described below, are the only practicable ways to strengthen a G20 standstill commitment at this time.

PROTOCOL ON STATE INTERVENTION DURING THE CURRENT GLOBAL ECONOMIC DOWNTURN

The Parties to this Protocol shall:

1. Adhere to each of the following **Principles of State Intervention** for every state measure¹² taken while this Protocol is in effect:
 - a. No state measure shall have as its purpose to improve the lot of any Party's commercial entities or workers over another Party's. This applies only to those foreign commercial entities and workers whose presence in a Party was legitimately established before 1 January 2008.
 - b. A Party shall come to an informed and reasoned decision as to the form that each state intervention shall take. Parties shall base their decisions on the best available expertise and information concerning effectiveness and cost, shall consider any relevant international best practices, shall not confine themselves to considering one possible measure and preserving the status quo, and shall

¹² For the purposes of this Protocol commitments to state measures are in relation to final or interim laws, administrative measures, rules and notices, or any other form of stipulation or guideline. Any state measure controlled by the central government and associated state organs that potentially affects any foreign commercial interest, taken to include interests associated with trade in goods, trade in services, the operations of foreign commercial entities in a Party, and the commercial activities of foreign workers in a Party falls within the purview of this Protocol, irrespective of whether those measures are implemented for ordinary commerce within a customs territory or within a special economic zone, free trade zone, border area, or other such area.

publish with any announcement of a proposed measure the rationale for the measure's objectives, form, duration, and method of implementation. The time frame over which any particular state intervention is implemented shall be proportionate to the circumstances that the state wishes to address.

- c. No Party shall implement a measure that has the effect of discriminating against foreign commercial interests and workers. However, nothing in this Protocol shall prevent a measure that discriminates against foreign commercial interests being taken by a Party during this crisis so long as at the time of implementation it is the informed and reasoned judgment of the Party in question that the measure has the least adverse effect on foreign commercial interests while attaining, and not going beyond, the Party's goals for the measure. A Party implementing such a discriminatory measure must demonstrate publicly, at the time the measure is proposed, that it has thoroughly examined credible alternative measures and shall provide compelling reasons as to why those alternative measures were rejected in favor of the discriminatory measure.
 - d. In every six month interval following the implementation of a significant state measure, a reasoned review of the measure taken, informed by all the relevant facts, shall be undertaken. These reviews shall establish whether the original measure has attained the purpose for which it was implemented and, if not, examine the reasons why. Such reviews shall examine whether credible alternative measures could achieve the same purpose at less cost, less harm to foreign commercial interests or workers, or better attain the stated purpose of the original measure. Should a review reveal that an alternative measure is preferable, then the Party shall replace the original measure within six months of the conclusion of the review. The conclusions of the review and any decision in respect of replacement of the original measure must be made public as soon as possible, and compelling reasons and evidence provided to justify those decisions.
 - e. For the duration of this agreement the parties shall not undertake any bilateral, regional, multilateral, or other international agreement that involves measures which violate the above mentioned principles.
2. Adhere to each of the following **Commitments to Oppose State Measures that Discriminate Against Foreign Commercial Interests and Workers**. The highest level of the executive branch of a Party's government shall:
- a. Oppose any proposal from the legislature to enact a measure that discriminates against foreign commercial interests and workers or is inconsistent with any of the Principles elucidated in 1. above.
 - b. Subject to the provisions in existing legislation, ensure that when considering state measures that might be implemented government ministries, regulatory agencies (independent or otherwise) exercise any permitted discretion in ways that are entirely consistent with the Principles elucidated in 1. above.
 - c. Oppose any proposal from a sub-central government that discriminates against foreign commercial interests or is inconsistent with the Principles elucidated in 1. above.
 - d. Not encourage others to advocate state measures that discriminate against foreign commercial interests and workers or are inconsistent with any of the Principles elucidated in 1. above.

- e. Dedicate sufficient state resources to monitor effectively the content of proposals advanced for state measures in the Party in question.
3. Implement a **Commercial Policy-Related Standstill** and therefore **Disavow Blatantly Protectionist Measures**. Each Party shall:
- a. Not raise the applied tariff on any good above their level on 1 January 2009.
 - b. Not introduce any new tariff on any good.
 - c. Not raise any export taxes from the levels established on 1 January 2009.
 - d. Not introduce any new export taxes or restrictions, including replacing any such measures due to lapse.
 - e. Not introduce any new export subsidy schemes, including replacing any scheme due to lapse.
 - f. For agricultural products, not raise budgetary outlays on export subsidy or domestic support schemes, nor administered prices and prices used to trigger and/or determine subsidies paid to agricultural producers, above the levels applied on 1 January 2008.
 - g. Ensure that any measures taken in the exercise of existing WTO rights will not go beyond what is strictly necessary to remedy specific situations provided for in the relevant WTO provisions.
 - h. Subject to any relevant provisions in existing national legislation, not engage in any form of import surveillance that monitors specifically a sector (or sectors) or commerce with any other WTO member.
 - i. Not enact any legislation that creates new forms of import surveillance.
 - j. Not negotiate, or encourage others in the negotiation of, a tacit understanding with another WTO member to restrict, distort, or otherwise manage trade between them.
 - k. Fully comply with any commitments the Party has made in WTO agreements and regional trade agreements.
4. Adhere to all of the following commitments concerning the various forms of **Assistance Granted to Firms Previously Operating Solely on a Commercial Basis** that falls short of complete nationalization by the state. Each Party may offer assistance to firms in its customs territory but shall ensure that, in addition to adhering to the Principles elucidated in 1. above,
- a. No obligations are imposed upon a recipient firm, or assurances sought or given by a recipient firm, that prevent or induce the firm in question from operating subsequently solely on a commercial basis. A Party shall not interfere in any manner with the commercial relations between a recipient firm and any other commercial party or entity. Purchases by a recipient firm shall not fall under any state regulation or control, including the public procurement laws and regulations of the Party in question.
 - b. Any obligations imposed upon or assurances given by a recipient firm are made public at the time the Party decides to offer assistance.
 - c. Even if a Party ultimately decides not to award assistance to every firm in a given sector, the Party shall on objective grounds examine whether all of the firms in that sector should receive assistance. This decision should be

reasoned, based on verifiable empirical criteria, and made public at the time the assistance is offered.

- d. The assistance received shall not take the form of the award of contracts for government goods or services, or any step that increases the likelihood that a government contract is awarded to the firm in question. Nor shall the Party instruct or encourage that other private commercial entities purchase from a recipient firm.
 - e. No Party shall instruct or encourage other private commercial entities or state entities to provide goods, services, finance, or other items of commercial value to the recipient firm on terms that are more advantageous than those conditions currently prevailing in the markets in question.
5. Adhere to the following commitments concerning **Technical Barriers to Trade and Sanitary and Phytosanitary measures**. Each Party shall to the extent permitted by national legislation:
- a. Seek to avoid any new Technical Barrier to Trade, but in all cases, unless there is a demonstrable serious threat that merits expeditious action, each Party shall use the maximum available time allowed to consider, notify, receive comments upon, revise, enact or implement any new Technical Barrier to Trade.
 - b. Seek to avoid any new Sanitary and Phytosanitary measure, but in all cases, unless there is a demonstrable serious threat that merits expeditious action, each Party shall use the maximum available time allowed to consider, notify, receive comments upon, revise, enact or implement any new Sanitary and Phytosanitary measure.
6. It is understood by all Parties to this Protocol that the binding commitments contained herein are exceptional and need not reflect the binding commitments at the WTO or elsewhere that any Party would be prepared to accept during ordinary economic circumstances.
7. Every commitment contained in this Protocol will be implemented on a unconditional Most Favored Nation basis.
8. The Parties to this Protocol are the members of the so-called Group of 20 plus any other WTO member that wishes to join. Other WTO members may join this Protocol after it has come into force and are encouraged to do so.
9. Each Party agrees that the implementation of the commitments contained in this Protocol shall be subject to multilateral surveillance so as to ensure that it is effective. The Parties to this Protocol will separately decide on the appropriate mechanisms to carry out the surveillance, including periodic reviews and evaluations. Any Party may bring to the attention of the appropriate surveillance mechanism any actions or omissions it believes to be relevant to the fulfillment of the commitments contained in this Protocol.
10. This Protocol will come into force immediately after it has been agreed.
11. This Protocol will lapse after two years. This Protocol can be terminated before this time should the Parties to this Protocol unanimously so decide.

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