

**International Trade Law**  
**Assessment Task**  
**UNIVERSITY OF THE WESTERN CAPE**

By

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## 1. INTRODUCTION

This paper will address two topics of debate arising from the recent G20 summit on the global economic crisis. The subject will be approached from the perspective of a developing country and attempts to comment critically on the multilateral trading system, currently in place. For purposes of clarity, I will divide and discuss the questions under separate headings.

## 2. PART 1: THE RISE IN PROTECTIONISM: ANY NEED FOR ACTION?

### 2.1 How is protectionism heightened and manifesting itself in the current global economic crisis?

One matter that heads of the Group of 20 states agreed upon at the summit of February/March 2009, is that countries should refrain from protectionist measures as an attempt to salvage respective national economies, despite negative macroeconomic circumstances affecting all nations. Typical protectionist measures include the barring of market accessibility by imposing strict licensing or certification processes upon importers, provision of subsidies to local producers, setting of unreasonable labour standards or the imposition of restrictive policy objectives. However, in a depressed economic climate, it seems almost natural for governments to take a conservative stance and to react by limiting their exposure and protecting its own.

Since the start of the economic crisis in 2008, most countries, G20-members included, adopted reactive protectionist measures<sup>1</sup>. Examples hereof are the US administration's stimulus package to struggling industries, with specific reference to the so called 'Buy American' clause, which requires beneficiaries of the package to use only US steel. Similarly, the European Union reinstated export subsidies on dairy produce and India imposed a six month ban on the import of Chinese toys, in the 'interest of public safety'<sup>2</sup>.

History indicates<sup>3</sup> that the imposition of protectionist measures has many adverse effects which causes competition to reduce and leads to contraction of the market<sup>4</sup>. These effects lead to a reduction of world economy – the opposite of what is required to repair an economic recession.

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<sup>1</sup> Donald J. Boudreaux *The protectionism the G-20 doesn't want you to know about*

<sup>2</sup> The Telegraph UK *China outraged after India bans all toy imports*

<sup>3</sup> Bruce Bartlett *The Truth About Trade In History* For example the contribution of the Smoot-Hawley protectionist tariffs to the great depression of the 1930's

<sup>4</sup> *Understanding the WTO*

It is therefore necessary for participants to international trade, to be aware of a rise in trade restrictions, hence the need for the appearance of such measures to be closely monitored.

## 2.2 Which bodies currently monitor trade barriers, specifically rises in protectionism and how?

An international body tasked with monitoring rises in protectionism (amongst others), already exists in the form of the World Trade Organisation (“WTO”), previously the General Agreement on Trade and Tariffs (“GATT”). The WTO is a structured and functioning body which oversees all matters relating to international trade.<sup>5</sup>

Numerous specialist systems exist under the WTO by which trade barriers are monitored. Primary mechanisms include:

2.1.2 The Council for Trade in Goods: The Council answers to the General Council of the WTO and is divided into eleven committees with special areas of focus. Most of these committees include in their mandates some duty to monitor a specific trade barrier(s) and as such play an important role in the monitoring and implementation of the applicable terms of WTO agreements and rules.

With particular reference to protectionist measures, I would like to focus on the mandates of certain of the eleven committees listed below:

- The Committee on Market Access

This Committee’s mandate, amongst other items, include the supervision over and implementation of concessions relating to tariffs and non-tariff measures, as well as providing of a forum for consultation on matters pertaining to tariffs and non-tariff measures. The Committee processes applications for the modification or withdrawal of tariff concessions and reports to the Council of Goods on a yearly basis at minimum.

- the Committee on Agriculture
- The committee on Sanitary and Phytosanitary Measures
- The Committee on Technical Barriers to Trade

This Committee attends to the prevention of imposition of arbitrary regulations by member states. The Committee is mandated to ensure that regulations, minimum standards and

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<sup>5</sup> *Understanding the WTO*

certification procedures imposed on importing countries, do not raise unnecessary trade barriers.

- The Committee on Subsidies and Countervailing Measures
- The Committee on Anti-Dumping Practices

The Anti-Dumping Agreement allows governments to launch an investigation and to request information in order to determine whether dumping has occurred. If injury can be proved, provisional measures may be imposed. Anti-dumping practices are monitored by members, who report to the Committee and give notifications of amendments to their laws and policies.

- The Committee on Rules of Origin
- The Committee on Import Licensing
- The Committee on Trade-Related Investment Measures
- The Committee on Safeguards
- The Committee on Customs Valuation

All of the above committees monitor trade restrictions by means of receipt and process of notifications from members. Notifications are submitted by the member imposing the barrier or by any member, who becomes aware of the imposition of barriers, by another member. Committees also conduct investigations and submit committee-generated reports to the Council. Disputes which can not be regulated by committees are referred to the WTO Dispute Settlement Body.

2.2.2 Dispute Settlement Body: The WTO provides a forum for member states to address disputes in accordance with structured rules and subject to time constraints. The Dispute Settlement Body offers an accessible and effective service to all member states and has to date successfully presided over many disputes relating to international trade barriers, including rising protectionism<sup>6</sup>. With regards to enforcement of rulings by the Dispute Settlement Body, I refer to article 21.6 of the Dispute Settlement Understanding which requires the Dispute Settlement Body to keep the implementation of rulings under sufficient surveillance. This is done by obliging members to the dispute to provide reports on progress to the ruling.

2.2.3 Trade Policy Review Body: The General Council of the WTO also meets as the Trade Policy Review Body. This body is charged with monitoring the implementation of national trade policies, by means of the Trade Policy Review Mechanism. In terms hereof all member states are obliged to inform the World Trade Organisation, as well as fellow members of legislation,

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<sup>6</sup> See the WTO website for publications of disputes handled by the Dispute Settlement Body

policies or other measures relating to the provisions of concessions and agreements, by means of providing regular notifications. The Trade Policy Review Body monitors and enforces compliance by member states. In addition, the Body conducts reviews and compile reports on of individual countries.

### 2.3 Is the need to monitor protectionism sufficiently met?

According to critics there are a few main problems with the current World Trade Organisation trade monitoring method.

The first refers to delays in reporting and the submission of notifications, which undermine the predictability of international commitments.<sup>7</sup>

But for the monitoring committees, the WTO monitoring system operates very much as a peer review mechanism. As developed countries are more integrated into the WTO system and therefore have greater interests to protect, they are in a position of exercising stronger pressure on Developing Countries. This leads to a reduced confidence in a multilateral trading system by Developing Countries.<sup>8</sup>

Documentation and reports by the Trade Policy Review Body work rather reactive than proactive and have in the past 'failed to identify and warn about contentious policies in advance of disputes.'<sup>9</sup>

Access to the Dispute Settlement Body has been criticized as being available to poorer countries in theory, but unpractical due to high costs implied with instituting an action.<sup>10</sup> The Dispute Settlement Mechanism under the GATT required the concerned parties to adopt the GATT panel's report in order for it to be enforceable. Thus the mechanism was rather politically based than rules-based, as disputants could render the panel's report ineffective. The WTO replaced this mechanism with an adversarial legal system. Critics point out that accessing the WTO is too costly for smaller and poorer Developing Countries due to the processes involved with

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<sup>7</sup> Dr Arunabha Ghosh *Monitoring the Monitors: Strengthening the WTO's information system*

<sup>8</sup> Supra 6

<sup>9</sup> Supra 6

<sup>10</sup> T. N. Srinivasan *Center Discussion Paper No 842 Developing Countries and the Multilateral Trading System After Doha (2002)*

assessment whether trade has been hurt by the violation of WTO rules. Expertise regarding WTO rules is a rarity in Developing Countries and legal counsel is expensive and difficult to acquire. For these reasons the dispute settlement mechanism is under-utilised by poorer countries and it can even be described as inaccessible.

Amidst a flailing world economy, suggestions for the creation of a different, independent monitoring body are untimely and unpractical. Firstly, countries' main focus is on immediate rescue methods and secondly, it would probably be nigh on impossible for countries to reach consensus on the establishment of any such body.

With regards to the high costs associated with the WTO dispute settlement mechanism, the elimination of such a system needs to be considered. In lieu of a multilateral dispute settlement body, contracting countries will need to monitor the terms of each contract individually. In case of violation of same, an aggrieved party might have to consider arbitration and mediation or litigation. Due to the lack of a functional, universal forum and clear rules, litigation steps will surely prove to be more costly and lengthy. An aggrieved party will have to invoke rules of international law and the relevant domestic law in its arguments. Despite the obvious difficulties associated with instituting an action in a different country, the national courts of the parties will exercise jurisdiction – a factor which will mostly certainly deter developed nations from even entering into agreement with a Developing Country or Least Developed Country, (where legal and administration processes might be vague, uncertain or subject to bureaucracy and corruption) for the fear of defection. It is my opinion that the Dispute Settlement Mechanism of the WTO levels out the playing fields.

## **2.4 CONCLUSION**

My conclusion is that the WTO already provides member states with the necessary infrastructure, namely specialised bodies for the monitoring and reporting on rising trade barriers, as well as sufficient mechanisms to deal with the implementation of terms of trade agreements and the enforcement of retaliatory steps, in case of non-compliance with duties. As a working body already exists, it would be unnecessary and superfluous for a new body to be established to monitor rising trade barriers.

Monitoring of trade barriers should be heightened, not only given the current economic circumstances, but with the objective to raise preventative functions in respect of economic forecasts and the monitoring standard in general. It is suggested that instead of creating a new policing body,

energies should be focused to strengthen existing bodies' capabilities and resources so that monitoring powers may be heightened.

### 3. PART 2: THE WORLD TRADING SYSTEM AND DEVELOPING COUNTRIES

#### 3.1 Are the interests of Developing Countries well served by a multilateral trading system?

Members of Developing Countries often raise concerns about the actual benefits of being a member to the WTO multilateral trading system. Concerns are mostly based on the premise that small participants to world trade are powerless against the industrial giants and that WTO membership holds no benefits<sup>11</sup>.

A multilateral trading system such as the WTO provides support services to its members which are absolutely instrumental to the growth of national and international economies. Such beneficial services include:

- **Forum for negotiations:** The WTO is a rules-based organisation, meaning that rules are applicable to and enforced equally upon all member states. Rules are based on democracy and equal treatment of all members. The implementation of rules is manifested in principles such as non-discrimination, Most Favourite Nation- and National Treatment principles. All countries can therefore approach each other on common ground, where they are free to negotiate, form alliances and exercise bargaining powers equally.
- **Dispute Settlement Body:** Through the WTO Developing Countries obtain access to the dispute settlement body, which allows any country, irrespective of its degree of development, to challenge another countries' trade related actions and decisions. By having access to this mechanism, Developing Countries are empowered to protect their interests.
- **Access to Information:** The WTO provides assistance to Developing Countries by means of providing access to information, technical assistance and advice, hosting seminars and symposiums and arranging training programs.

To determine whether Developing Countries' needs are sufficiently served, one has to consider the alternatives to a multilateral trading system:

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<sup>11</sup> Aileen Kwa *WTO and Developing Countries* Foreign Policy



a) Regional Trade System

There are currently certain regional trade agreements in place between countries<sup>12</sup>. Specific issues amongst geographically connected or equally developed countries are often similar and regional trade agreements could address these more thoroughly than a multilateral system might. Regional trade agreements are also instrumental to the management of border control issues. Yet, other issues are of a global nature and if regional trade agreements fail to address these, parties to the agreement will be left in the dark. As an example, the World Bank mentions agricultural subsidies as a ‘systematic distortion’ which can not be addressed by Regional Agreements. Regional trade agreements, by implication, prefer and exclude certain countries from its scope<sup>13</sup>. Although such agreements may, and indeed do, play a supportive or supplementary role to the multilateral trading system, the sole existence of a regional trade system might induce tunnel vision.

Here I wish to quote Mr Gerhard Erasmus who said that “Regional integration is not an end in itself, but must be used as a vehicle towards the end of development and global integration.”<sup>14</sup>

b) Bi-lateral or Pluri-lateral Agreements

Direct contracting between countries implies greater effort on behalf of governments to make contact with other nations, to form alliances and market their goods or services. In lieu of set structures and general principles applicable to both parties, the terms of agreements are harder to negotiate. Reduced transparency and a lack of a central source of information, mean that countries have no benchmark to measure each other against. This leads to the assumption that countries will want to take lesser risk and will prefer not to diversify sources of imports, which will in turn lead to the exclusion of Developing Countries from international trade, by stronger opponents.

As opposed to Regional Trade Systems and Bilateral Agreements, a multilateral system is uniform, universally applicable and standards are clear. The availability of information ensures transparency, which in turn aids to coordinate state actions and serves as a deterrent against defection.<sup>15</sup> It is my opinion that globalisation of trade is inevitable and that a well-regulated, multilateral system is the best way by which international trade should be approached. The reality is that poverty impedes

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<sup>12</sup> Regional Economic groupings such as COMESA, SADC and EAC

<sup>13</sup> Michael Cook *Africa must overcome regional barriers*

<sup>14</sup> Gerhard Erasmus *International economic crisis, the G20 summit and African Countries*

<sup>15</sup> Supra 6

access to a multilateral forum. Although Developing Countries do not or can not make optimum use of the system, the WTO infrastructure is at all members' disposal and is able and available, albeit be it in theory, to serve Developing Countries' needs.

### 3.2 Is it in the best interest of Developing Countries to push for the conclusion of the Doha Round?

At the recent G20 summit, leaders resolved to apply their best efforts to conclude the Doha Round<sup>16</sup>. Conclusion of the round would send a strong signal about the intention and capability of the international community to cooperate and unite against the current crisis.

One of the Doha round objectives is to address Developing Countries' issues with integration. T. N. Srinivasan explains why Developing Countries are having trouble with implementation of WTO agreements: "The Uruguay Round agreement involved many behind the border or domestic policy commitments, many of which required strengthening preexisting institutions as well as creation of new ones on the part of Developing Countries. They undertook several unprecedented obligations, not only to reduce trade barriers, but to implement significant reforms both on trade procedures and on many areas of regulation that establish the basic business environment in the domestic economy (for example technical, sanitary, and phytosanitary standards, intellectual property law)<sup>17</sup>".

Suspension or termination of the round would erase all efforts and progress made thus far and will not benefit anyone. According to the World Bank, one of the risks of non-conclusion is increased pressure on WTO dispute settlements, which might turn into litigation, which in turn increases protectionism. Other economists believe that non-conclusion would, by default, intensify interest in regional trade agreements<sup>18</sup>. Conclusion of the Doha rounds would be beneficial to Developing Countries, as a new round of trade negotiations will be launched. Lines between developed and Developing Countries become less rigid after each concluded round and a successful conclusion will necessarily mean more liberalised trade and strengthened coalitions.

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<sup>16</sup> G20 Communique

<sup>17</sup> T. N. Srinivasan *Center Discussion Paper No. 842 Developing Countries and the Multilateral Trading System After Doha* (2002)

<sup>18</sup> T. N. Srinivasan *Center Discussion Paper No. 842 Developing Countries and the Multilateral Trading System After Doha* (2002)

### 3.3 CONCLUSION

Developed nations recognize the need for an international trade-governing body to protect their interests. The World Trade Organisation was not only established to serve developed countries' needs, but is open for participation by all countries that are, or wish to become a member. The same services are equally available to Developed, Developing and Least Developed Countries – at more favourable terms to the latter. Developing Countries' weak economies is in need of better policy making, improved macroeconomic management, investment and training. Obstacles include high banking costs, favoured monopolies, lack of infrastructure, expensive communications, poor transport and insufficient human resources<sup>19</sup>.

G20 countries agree with the general opinion that the conclusion of the Doha Round would serve all members, especially Developing Countries and the latter is advised to offer concessions and agree to liberalise policies, so that a deadlock to the negotiations may be avoided.

Instead of being put off from participation in a multilateral trade environment by the abovementioned obstacles, Developing Countries should attempt to make small scale changes. The dynamics of economics teaches that even a minor change will force another problem or opportunity to arise. Developing Countries should use the available structure to their advantage as far as possible. Developing Countries should recognize and accept the multilateral trading system as a means of enhancing national economies, rather than focusing on it as a tool for status comparison.

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<sup>19</sup> Gerhard Erasmus *International Economic Crisis, the G20 Summit and African Countries*

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