

Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and other Trade Agreements

Proposing a Model Clause for Global Public Health Emergencies – Trade-Related Measures

Team Report Prepared by Afronomicslaw.org Academic Forum Group

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Executive Summary

This submission responds to the challenges faced by countries in the multilateral trade system of the World Trade Organisation (WTO) which have found it difficult to secure much needed Personal Protective Equipment (PPEs) during the COVID-19 Pandemic due to restrictions in trade of PPEs invoked by Contracting Parties under the General Agreement on Tariffs and Trade (GATT).

We propose a model WTO GATT clause that will prevent the use of GATT provisions (Art. XI:2 (a); Art. XX (b); Art. XXI (b) (iii) and any other provision of GATT 1994 inconsistent with our proposed Clause) to justify exceptions to restrictions in trade of PPEs during a Pandemic or any future Global Public Health Emergency. We envisage that the proposed model clause can be used in non-WTO treaties as well.

Keywords: *Export Restrictions, GATT 1994, COVID-19 Pandemic, Personal Protective Equipment (PPEs).*

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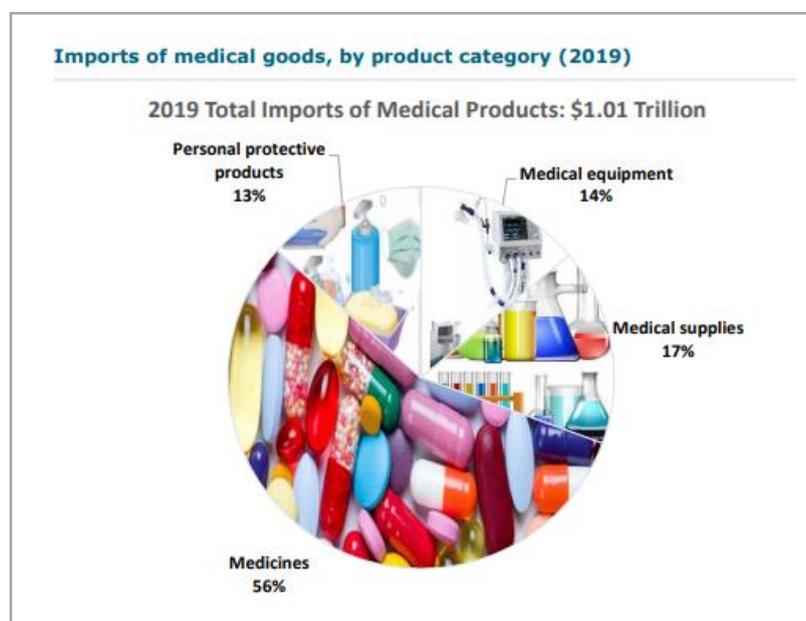
A. The Theme of the Submission

Our submission responds to the difficulties faced by countries in the multilateral trading system of the World Trade Organisation (WTO) arising from restrictions in trade of personal protective equipment (PPEs) imposed by GATT Contracting Parties against other Contracting Parties during the ongoing COVID-19 Pandemic. We propose a model WTO GATT clause that will prevent the use of GATT provisions (Art. XI:2 (a); Art. XX (b); Art. XXI (b) (iii) and any other provision of GATT 1994 inconsistent with our proposed Clause to justify exceptions to restrictions in trade of PPEs during a Pandemic or any future Global Public Health Emergency. We envisage that the proposed model clause can be used in non-WTO treaties as well.

B. Background Context: The Importance of PPEs During the COVID-19 Pandemic

The importance of PPEs during the current Pandemic cannot be overestimated. According to a report by the WTO Secretariat, PPEs which collectively amount to 1.7% of world merchandise trade are a subset of medical products that include ‘...disinfectants/sterilisation products; face masks; gloves; hand soap and sanitiser; patient monitors and pulse oximeters; protective spectacles and visors; sterilisers; syringes; thermometers; ultrasonic scanning apparatus; ventilators, oxygen masks; X-ray equipment; and other devices such as computer tomography apparatus.’¹

In 2019, PPEs accounted for 13% of the total imports of medical products within the multilateral trade system (see figure 1 below).



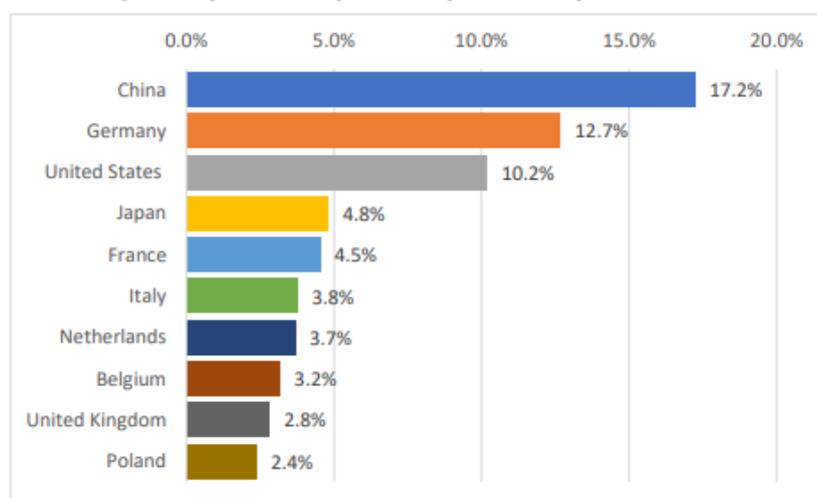
Source: [WTO Secretariat 2019](#)

The WTO report also showed that total exports of PPEs were valued at \$135 billion on average for the period 2017-2019 of which about 17% or \$23 billion came from China, the

¹ See WTO Secretariat, *Trade in Medical Goods in the Context of Tackling Covid-19: Information Note*, April 03 2020, https://www.wto.org/english/news_e/news20_e/rese_03apr20_e.pdf accessed 09 Aug. 20.

top exporter, followed by Germany and the US. These three exporters accounted for more than 40% of world exports of protective supplies (see figure 2 below).²

Share of top 10 exporters of personal protective products



Source: [WTO Secretariat 2019](#)

While the search for an effective vaccine against the virus continues, PPEs are essential in the global response to the COVID-19 Pandemic. To put this in context, in March 2020, the WHO estimated that the global community would ‘require as much as 89 million medical masks per month, as well as an additional 76 million examination gloves and 1.6 million goggles.’³ To meet these demands, a 40% increase in global production of PPEs is required. Unsurprisingly, production and supply of PPEs are still below the global demand.⁴ There are several factors responsible for this shortfall in supply of PPEs. Notably, and of priority to our submission is the restrictive trade measures introduced by members of the WTO on the export of PPEs.⁵ The disruptions to supply chains and trade corridors across the world has been a significant fallout during the Pandemic.⁶ This has been most evident in relation to trade in PPEs. As such, the primary focus of our intervention is on the trade-related measures introduced by WTO member states that have contributed to the PPE shortage.

² Ibid, 4.

³ See WHO, *Press Release: Shortage of Personal Protective Equipment Endangering Health Workers Worldwide*, March 03 2020, <https://www.who.int/news-room/detail/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide> accessed 09 Aug. 20.

⁴ WHO as of March 2020 was urging industry and governments to increase manufacturing by 40 per cent to meet rising global demand.

⁵ Panic buying, hoarding and misuse of PPEs has not helped the situation. These trends have negatively affected the ability of critical health care workers to access these vital tools in their fight against the pandemic from the frontline.

⁶ For detailed analysis of the impact of the pandemic on international supply chains see R. Baldwin and E. Tomiura, ‘Thinking ahead about the impact of COVID-19’, in R. Baldwin, and B. Weder di Mauro (eds.), *Economics in the Time of COVID-19*, (CEPR Press, 2020), pp. 58–70.

C. Export Restrictions on Trade in PPEs During the COVID-19 Pandemic

In response to the COVID-19 Pandemic, governments have taken extraordinary measures commonly seen in times of war, such as the requisitioning of private company facilities to manufacture personal protective equipment for workers on the front lines.⁷ Several countries around the world have also imposed measures on the trade in PPEs intending to prevent the exportation of domestic supplies of PPEs. Melaku Desta argues that the recourse to these protective measures by major economic blocs such as the European Union (EU) during the ongoing Pandemic exposes once again the gaping inadequacy of international economic law to curb hoarding or price-gouging practices within national legal systems.⁸ From these developments, it is evident that the global health crisis has activated a self-preservation mode of individual nations/regions in the international trade system and has relegated ‘cooperation in the common interest’ to the back burner. Anthea Roberts and others aptly describe this unprecedented era in the international system as a ‘geo-economic world order’, where countries place a lot of emphasis on ‘the use of economic instruments to promote and defend national interests to produce beneficial geopolitical results.’⁹

To achieve these goals, WTO members have relied on some or all the following provisions of GATT 1994:

- 1) Art. XI:2 (a) GATT;
- 2) Art. XX (b) GATT, which allows for deviations from WTO obligations in the pursuit of the protection of human life and health;¹⁰ and
- 3) The security exception of Art. XXI (b) (iii) GATT which might come into play as a justification clause as well.

According to the WTO Secretariat, by late April 2020, ‘...it would appear that 80 countries and separate customs territories have thus far introduced export prohibitions or restrictions as a result of the COVID-19 Pandemic, including 46 WTO members (72 if the EU member states are counted individually) and eight non-WTO members.’¹¹ These measures cover a wide range of medical products (including PPEs) and foodstuff (see Chart below).

⁷ See C. Simson, *COVID-19 Claims May Test Tribunals With Thorny Questions*, <https://www.law360.com/articles/1268760/covid-19-claims-may-test-tribunals-with-thorny-questions> accessed August 9, 2020.

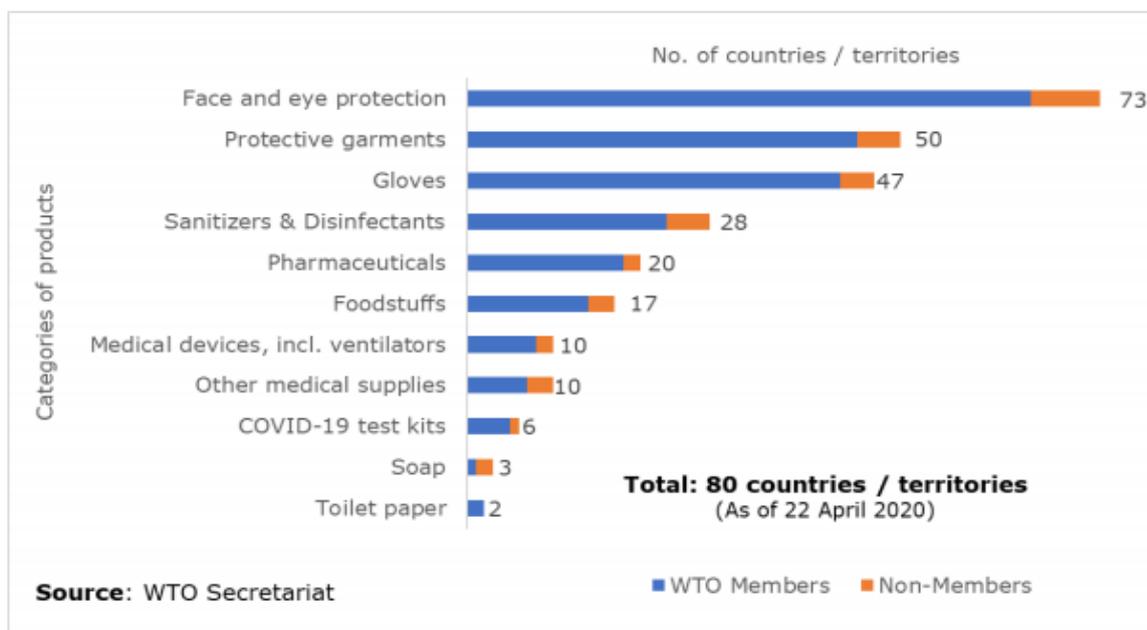
⁸ M. Desta, *Covid-19 and Export Restrictions: The Limits of International Trade Law and Lessons for the AfCFTA*, African Trade Policy Centre Brief, <https://www.uneca.org/publications/covid-19-and-export-restrictions-limits-international-trade-law-and-lessons-afcfta> accessed August 9, 2020.

⁹ A. Roberts, H. Choer Moraes and V. Ferguson, ‘Toward a Geoeconomic Order in International Trade and Investment’, 22 (4) *Journal of International Economic Law* (2019), 655, 656-657.

¹⁰ The Appellate Body in *China – Raw Materials* established that ‘whenever the requirements of Art. XI:2 (a) GATT are met, there would be no scope for the application of Art. XX GATT’. See *China – Measures Related to the Exportation of Various Raw Materials* AB-2011-5 (WT/DS394-98/AB/R).

¹¹ WTO, *Information Note: Export Prohibitions and Restrictions*, April 23 2020, p. 6-7, https://www.wto.org/english/tratop_e/covid19_e/bdi_covid19_e.pdf accessed July 24.

Chart 1. Number of countries and separate customs territory introducing export prohibitions and restrictions as a result of COVID-19, by categories of products



In another report,¹² the WTO profiled some of the specific measures introduced by countries and economic blocs such as the EU to restrict the export of PPEs.¹³ The EU's measures were preceded by unilateral export restriction measures introduced by EU member states – France, Germany, the Czech Republic and Poland that applied to other EU members states and third-party countries alike.¹⁴

A major challenge with the use of these GATT measures to restrict the export of PPEs is the adverse impact it has on developing countries that are dependent on international markets for imports. For example, Signé and Van der Ven estimate that ‘...53 percent of African imports originate in countries that have been highly impacted by COVID-19...’¹⁵ as such they argue that ‘...the Pandemic is interrupting the region’s access to critical products.’¹⁶

With the global production of PPEs concentrated in advanced economies, developing countries find themselves in a precarious position. As the WTO Secretariat has pointed out, evidence from previous emergencies in the global economy such as the 2008 global financial crisis shows that:

...the negative effects of export restrictions can be substantial. This is especially true when the country is a large exporter of the good on which the export

¹² See Federation of German Industries (BDI), *Export Controls and Export Bans over the Course of the Covid-19 Pandemic: Export Restrictions Impair Ability to Respond to the Crisis*, April 29 2020, https://www.wto.org/english/tratop_e/covid19_e/bdi_covid19_e.pdf accessed July 24.

¹³ Ibid, 2-3. The EU restrictions were introduced pursuant to regulation 2020/402 which was valid up on till the 26th of April 2020. See Commission Implementing Regulation (EU) 2020/402 of 14 March 2020, ‘Making the Exportation of Certain Products Subject to the Production of an Export Authorisation’ https://eur-lex.europa.eu/eli/reg_impl/2020/402/oj accessed July 24.

¹⁴ See Caroline Glöckle, *Export Restrictions Under Scrutiny – The Legal Dimensions of Export Restrictions on Personal Protective Equipment*, April 7, 2020, <https://www.ejiltalk.org/export-restrictions-under-scrutiny-the-legal-dimensions-of-export-restrictions-on-personal-protective-equipment/> accessed July 24.

¹⁵ See L. Signé and C. van der Ven, ‘How the AfCFTA will improve access to ‘essential products’ and bolster Africa’s resilience to respond to future pandemics’, April 30, 2020, <https://www.brookings.edu/blog/africa-in-focus/2020/04/30/how-the-afcfta-will-improve-access-to-essential-products-and-bolster-africas-resilience-to-respond-to-future-pandemics/> accessed July 24, 2020.

¹⁶ Ibid.

prohibition or restriction is enacted. When a large exporter prohibits or otherwise restricts exports of a particular product, the world supply decreases and the world price of that good increases. Importers suffer, and in particular poor countries with limited production capacity.¹⁷

The ongoing issues relating to trade in PPEs is a reflection of broader systemic issues and vulnerabilities in the global rules-based trade system. Notably, for several years, the WTO system has been struggling with the question of how to strike a proper balance between the pursuit of free trade and the need to provide WTO members with sufficient autonomy to regulate their domestic issues.¹⁸ The last time this question gained momentum was right after the global economic crisis of 2008, which forced many WTO members to come up with legislation and policies that were aimed at supporting domestic industries for the survival of their economies.¹⁹ And to this day, WTO members have been relying on the defence of necessity.²⁰

The rationale behind the focus on the interpretation of the term necessity is not far-fetched. It is to ensure a balance in the world of international trade. It is important to mention that the definition of what qualifies as necessity varies from time to time and is largely dependent on the status quo and what is obtainable at a certain period of time. And without undue flogging, what nations of the world consider a necessity during a pandemic are PPEs. Linking this to the debate, the question then becomes a clash between national needs and global requirements. This is so because what serves as a necessity to individual nationals is also required to protect the world at large. Extensively, what this means is that in the debate or conflict between national objectives and the WTO objectives, the latter should triumph.

The necessity test, as a defence for restricting the import/export of certain goods, is found within Article XX (a), (b), and (d) of the GATT and it is one of the most important legal tests addressed in WTO dispute settlement system.²¹ The test is used to justify the general exception in these paragraphs of Article XX. For these exceptions to be relied upon, the WTO Appellate Body has ruled that GATT requires a State relying on an exception also to achieve the two conditions set out in the introductory paragraph (chapeau) of Article XX. The two conditions are as follows: no exception should be applied in a manner that would amount to arbitrary or unjustifiable discrimination between countries in which similar conditions prevail, and no exception should be applied as a disguised restriction on international trade.²² It is along these lines that the traditional interpretation of Article XX has been understood to invoke a two-tier test. This test requires that ‘the measure must first be justified under one of the Art. XX listed exceptions paragraphs (a)-(j), before being tested against the chapeau so as to verify that the measure is not applied in a manner which would constitute ‘a means of arbitrary or unjustifiable discrimination’ or ‘as a disguised restriction on international trade’.²³

However, there has never been a consensus in the jurisprudence of the WTO on what

¹⁷ See WTO, Information Note: Export Prohibitions and Restrictions (n 11) 8.

¹⁸ G. Kapterian, ‘Critique of the WTO Jurisprudence on Necessity’ 59(1) *International and Comparative Law Quarterly*, (2010), 89.

¹⁹ Kapterian, (n 18) 89-90.

²⁰ This proposal is particularly interested in the WTO system ‘necessity’ defense, which is the legal basis that underpins the restrictive trade measures relating to export of COVID-19 PPEs. Kapterian, (n 18) 90.

²¹ L. Bartels, ‘The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction,’ 109 (1) *The American Journal of International Law*, (2015), 95.

²² GATT 1994, Article XX.

²³ S. Nuzzo, ‘Tackling diversity inside WTO: GATT Moral Clause after Colombia-Textiles’, 10(1) *European Journal of Legal Studies*, (2017), 270; see also Appellate Body Report, *US – Gasoline* (1996); Appellate Body Report, *Brazil – Retreaded Tyres* (2007), para. 139; Appellate Body Reports, *EC – Seal Products* (2014), para. 5.169; and Appellate Body Report, *Colombia – Textiles* (2016), para. 6.20.

conditions the chapeau has imposed on the general exceptions. The United States – Gasoline,²⁴ the United States – Shrimp,²⁵ the United States – Gambling,²⁶ Brazil – Retreated Tyres²⁷ and EC – Seal Products²⁸ are cases in point to illustrate this lack of consensus. In the United States – Gasoline case, for example, the Appellate Body confirmed that this two-tier test aims to curb any form of abuse of the GATT Article XX exceptions.²⁹

Although these defences have been a useful compromise over the years, we find the unilateral application of the necessity test by member states to be problematic during an unprecedented crisis such as the COVID-19 Pandemic. This is especially problematic for countries with low levels of human capital, mostly concentrated in the Global South, who do not generally have the infrastructure for the production of PPEs.³⁰ Furthermore, WTO panels and the AB have been, in many cases, reluctant to interfere with the decisions of governments that are aimed at protecting the health of their citizens.³¹ In a situation of a global pandemic which requires the solidarity of nations, WTO jurisprudence can be said, and rightly so, to have failed to cater for the needs of those countries that do not have high levels of human capital to produce the relevant PPEs on their own. A critique may, therefore, conclude that WTO adjudicative bodies have had difficulty striking a proper balance between domestic autonomy and international trade liberalisation.³²

There is a problem in using necessity as the primary metric to gauge the legitimacy of any reliance on the exceptions that the GATT provides.³³ Necessity is part and parcel of the principle of proportionality. This principle has played a critical role in many legal systems to check the regulatory freedom of governments. It has been with reference to the application of a certain measure by these governments and the question has always been ‘was the application of such a measure proportional?’ However, within the WTO system, proportionality has a different meaning. Its requirements depend on the actual language that is to be found in the text of the relevant provisions. It is not dependent on the application of the measure.

Simply put the word necessary in Article XX of the GATT implies ‘first and foremost, the existence of a link between the measure at stake and the subsequent language of individual clauses of Article XX describing the aim as such (‘protect public morals’, ‘protect human, animal or plant life or health’ secure compliance’, etc.)’.³⁴ The EC-Asbestos case is illustrative. In this case, for the French ban on Asbestos to be necessary/proportional, it was enough to prove that they pose a risk to human health and not to prove that the ban actually protected health in a manner that was proportional and hence necessary.³⁵

It is important to note that these exceptions also emerged in the domain of international investment law since we are today witnessing an expanding body of BITs that are embracing general treaty exceptions. Although these exceptions do not speak directly to health,³⁶ they relate to matters touching on the security of states against external threats and internal disorder, essential security interests, the regulation of the economy, the preservation of diverse cultures

²⁴ *United States – Standards for Reformulated and Conventional Gasoline* (WT/DS2/AB/R).

²⁵ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/RW).

²⁶ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/AB/R).

²⁷ *Brazil – Measures Affecting Imports of Rethreaded Tyres* (WT/DS332/AB/R)

²⁸ *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS400/AB/R).

²⁹ Kapterian, (n 18), 96.

³⁰ Simson (n 7).

³¹ *Ibid.*

³² Kapterian, (n 18) 127.

³³ *Ibid.*, 94

³⁴ *Ibid.*, 465.

³⁵ *Ibid.*, 66.

³⁶ Simson (n 7).

and the preservation and protection of life.³⁷ The most common exception available in Bilateral Investment Treaties has been the ‘essential security interests’ exception,³⁸ which is referred to as a self-judging-language exception. This language allows a party to take measures that are considered necessary for the protection of their essential security interests, without the intervention of a tribunal to determine whether such exception applies.³⁹

There are some other exceptions in international treaties which are also known as escape clauses which regularly feature in BITs. They allow for flexibility giving room for member states to react at will during certain circumstances. According to Rosendorff and Milner, escape clauses or exceptions in international treaties are ‘any provision of an international agreement that allows a country to suspend the concession it previously negotiated without violating or abrogating the terms of the agreement.’⁴⁰ For instance, different countries of the world, mostly in the European Union, have employed the provisions of Art. XI:2 (a); Art. XX (b); Art. XXI to justify exceptions to restrictions in trade of PPEs during the COVID-19 Pandemic. These provisions of the GATT, are included and are expected to be activated under two circumstances; first, in an instance where failure to invoke these exceptions will result in serious injuries and secondly where there is the presence of overwhelming domestic needs. These provisions were, however, not designed in anticipation of a pandemic. The rationale behind the inclusion of these provisions in GATT was in response to ‘unforeseen developments.’ Yet, it is quite clear that a pandemic that affects all member states is what was anticipated when these provisions were written.

The overwhelming consensus is that the use of export restrictions on PPEs and other essential medical products during a crisis of this magnitude is counterproductive. For example, the WTO Secretariat has recently argued that export restrictions rather than solve supply shortage, create a negative domino effect because no country is self-sufficient in its production of medical equipment, as such, ‘...If every country holds back its goods, no country will have all the (medical) products needed to cope with the Pandemic.’⁴¹ The report also warned that:

Export restrictions on personal protective equipment (PPE) can cause production abroad to come to a standstill as PPE are required for certified cleanroom production – particularly in the chemical and pharmaceutical sectors. As a result, the worldwide production of urgently needed goods, which are particularly required for intensive care units in hospitals, could be endangered.⁴²

To mitigate the adverse effects of restrictive measures on trade in PPEs in the event of a future pandemic or global health emergency, we have come up with a model clause discussed in the next section.

D. The Model Clause: Public Health Emergency of International Concern (PHEIC) – Trade-Related Measures

1. This Clause applies in the event of a Public health emergency of international concern (PHEIC) as designated by the International Health Regulations Committee of the WHO.

³⁷ K. Vandeveld, ‘Rebalancing Through Exceptions’, 17 (2) *Lewis and Clark Law Review*, (2013), 449–450.

³⁸ *Ibid*, 449.

³⁹ *Ibid*, 450–451 ff 455.

⁴⁰ B. Rosendorff, and H. Milner, ‘The Optimal Design of International Trade Institutions: Uncertainty and Escape’, 55 (4) *International Organisations*, (2001), 829, 830.

⁴¹ Export Controls and Export Bans over the Course of the Covid-19 Pandemic: Export Restrictions Impair Ability to Respond to the Crisis, (n 12).

⁴² *Ibid*.

2. In the circumstances referred to in paragraph 1 above, Contracting Parties (Member States) shall not introduce measures pursuant to Art. XI:2 (a); Art. XX (b); Art. XXI (b) (iii) or on the basis of any other provision of GATT 1994 or of any other agreement or provision that has the effect of restricting or limiting or prohibiting or banning the exportation or the supply or sale of essential medical products that are critical to the public health response of any country in the international system to a Pandemic.
3. The provisions of paragraph 2 shall not extend to export prohibitions or restrictions temporarily applied by a Contracting or Member State that does not have sufficient manufacturing capacity to produce essential medical products to fulfil its domestic demand as long as those restrictions are otherwise consistent with Art. XI:2 (a) GATT 1994.

E. Justification for Proposed Model Clause

For Clause D 1, we have proposed a broad definition – Public health emergency of international concern (PHEIC) - which captures both pandemics or any public health emergencies of a global magnitude.⁴³ Furthermore, due to the technicalities that surround the designation of a pandemic, we envisage that the International Health Regulations Committee of the WHO is a competent authority to determine the threshold for declaring a PHEIC.

Clause D 2 is the main operative clause which prohibits the invocation of export restrictions under the GATT (or of any other agreement or provision outside the GATT) which impair the ability of other WTO members to respond to a PHEIC. Clause D 2 refers to ‘essential medical products’ rather than PPEs because we envisage that future PHEICs may have a different emphasis on what medical products are essential for responding to the crisis.

Clause D 3 provides an exception to the operation of this model clause. Here we envisage that some WTO member states may genuinely need temporal restrictions during a PHEIC. However, we propose that the restrictions must be temporary and applicable to member states that cannot produce essential medical products to fulfil its domestic demand.

Following from the preceding, it is important to note that cooperating for the greater good has been integral to international politics and cooperation since the end of the second world war. As such, we argue that escape clauses as exceptions should have limitation in invocation, especially during a pandemic. As an alternative, we propose limiting the applicability of these escape clauses during a public health emergency. We note that the WHO’s International Health Regulations Committee that designates public health emergencies such as pandemics is an expert body in which member states are represented. This means that a member state can challenge such a designation. In effect, the expertise of this Committee can be relied upon to determine the availability of the exceptions that are the subject of this proposal.

The two-fold premise of the proposed ‘pandemic clause’ is that restrictions in the trade of PPEs are fundamentally inconsistent with the commitment to free trade in the multilateral trading system. One example of such a restrictive regime is the EU’s export authorisation requirement for PPE exports outside the Union.

Second, restrictions in the trade of PPEs needs to be balanced with the interests of countries that are heavily dependent on the free trade of PPEs. Major disruptions in the global

⁴³ The term Public Health Emergency of International Concern is defined in the International Health Regulations (2005) as ‘an extraordinary event which is determined:

- I. to constitute a public health risk to other States through the international spread of disease; and
- II. to potentially require a coordinated international response.’

trade of PPEs renders these countries, which also have the insufficient manufacturing capacity to fulfil their PPE needs, particularly vulnerable in responding to the Pandemic.

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