

**Trade Regulations for Export Restrictions on Medical Supplies During the
Pandemic: Shortcomings and Suggestions**

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Executive Summary

Since the outbreak of COVID-19, export restrictions on medical supplies are widely applied. Although these restrictions may temporarily mitigate the shortage of domestic medical supplies, they are damaging the predictability of international trade, breaking down the global supply chains, and frustrating global cooperation, coordination and solidarity.

Trade regulations on export restrictions in relation to medical supplies are mainly composed of WTO and regional disciplines. As for the WTO disciplines, export restrictions on medical supplies applied in times of pandemic are prohibited by Article XI:1 of the GATT 1994, but they are likely to be justified under carve-outs and exceptions such as Articles XI:2(a), XX(b), XX(j) and XXI. The paper selects five regional arrangements, the CETA, the CPTPP, the UCMCA, the EAEU and the EEA as samples to examine regional disciplines in this respect. It is concluded that regional disciplines are similar to WTO disciplines, except the EAEU which permits the Eurasian Economic Commission to apply export quotas at the regional level and establish a formula for quota distribution among the participants of foreign trade activity of the members, and includes the establishment of a common market of drugs and medical products at regional level.

The shortcomings of current trade regulations on export restrictions are conspicuous. First, although the GATT 1994 is a multilateral agreement per se, the carve-outs and exceptions thereof are the provisions of nationalism and unilateralism. Current WTO disciplines do not provide for international concerted actions to tackle the shortages of medical supplies in times of the COVID-19 crisis. Second, the previous experience in the WTO and GATT is not enlightening for the regulations on export restrictions in times of pandemic. Third, there is a dilemma existing in current trade regulations that the WTO is incapable of deciding to what extent trade restrictions are necessary in times of pandemic, while WHO with such capacity cannot implement its recommendations on trade restrictions.

Three suggestions are proposed to improve the regulations on export restrictions applied on medical supplies in times of pandemic. First, it is necessary to establish a multilateral common market of medical products. Second, "targeted", "risk-proportionate", "transparent", and "temporary" are the four parameters that should be considered in formulating the improved regulations on export restrictions applied on medical supplies. Third, two schemes are proposed for improving the regulations. The first scheme is to establish a globally planned regulatory scheme for export restrictions, which seems optimal but utopian. The design of the first scheme is as follows: (1) WHO shall assess the degrees of virus risk that each state is encountering and assess the volumes of medical products that each state is in need; (2) states applying export restrictions shall notify the WTO, within 24 hours of implementation, of complete information regarding export restrictions on medical products; (3) the WTO shall review each state's application of export restrictions on the basis of relevant information submitted by WHO and

the concerned state, and may require the state to adjust the volume of export restrictions if the WTO considers the export restrictions are disproportionate; (4) with the aim of ensuring sustainable supply of medical products, the WTO shall monitor trade-restrictive measures that affect global production capacity and urge the concerned states to remove unnecessary trade-restrictive measures on the basis of WHO's advice; (5) the WTO shall be responsible for the distribution of donations of medical products, establish a database recording the data of each donor state's donations, distribute the donations to the states in need on the basis of WHO's advice, and establish a reward mechanism for the donor states. The second scheme is to formulate a comprehensive package of obligations, which imposes less restrictions on states' sovereignty while intensifying their obligations. The design of the second scheme is as follows: (1) each state shall notify the WTO of its applied export restrictions within 24 hours of implementation; (2) each state applying export restrictions shall specify the end dates or sunset clauses; (3) upon the request of affected importing states, each state applying export restrictions shall be obligated to provide technical assistance in helping the affected importing states build the capacity of producing medical products under the supervision of the WTO.

1. Introduction

COVID-19 has spread throughout the world with an egregious speed. Since the Director-General of the World Health Organization (WHO) declared that the outbreak of COVID-19 constitutes a Public Health Emergency of International Concern (PHEIC) on 30 January 2020,¹ more than 200 countries have been involved in fighting the coronavirus and confirmed cases have exceeded 6 million.² Since most states are not prepared to tackle this new pandemic, large amounts of medical staff and civilians are scrambling for medical supplies, i.e., COVID-19 test kits, personal protective equipment (PPE) and medicines. With the consideration of domestic priority, quite a few states temporarily restrict exports of medical supplies and liberalize imports of such products to relieve critical shortages. Astonishingly, some states unusually intercepted medical supplies in transit which were destined for other countries.³ It is not an exaggeration to say that go-it-alone policies are prevalent and international regulations on the trade of medical supplies are falling apart.

As regards export restrictions on medical supplies, five features are noticeable. First, there is no centralized registration of export-restrictive measures, considering that the WTO's statistics are calculated on the basis of the members' notifications which are often delayed or incomplete.⁴ Although the International Trade Center (ITC) also updates worldwide export-restrictive measures during the COVID-19 pandemic, the statistics may not be completely reliable since some data is from media reports. Second, the amount of adopted export-restrictive measures, including export prohibitions, export licenses and administrative orders that result in export restrictions, is large. According to the WTO, 57 states and regions have adopted 90 export-restrictive measures on medical supplies as of 10 July 2020;⁵ while, according to the ITC, 81 states and regions have adopted 113 export-restrictive measures as of 30 June 2020.⁶ Third, leading global exporters of medical products,⁷ such as the United States, the EU and China, adopted or are still adopting export restrictions. Fourth, the durations of the export-restrictive measures are varied. Some measures have been terminated, some are in force with specified durations, while the durations of others are unknown due to the lack of end dates. An overview

¹ WHO, 'Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee regarding the Outbreak of Novel Coronavirus (2019-nCoV)', [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)), last visited 6 June 2020.

² The data comes from the WHO website, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>, last visited 6 June 2020.

³ For example, French authorities requisitioned the entire stock of surgical masks which were produced by a Swedish plant in Asia and in transit to Europe on 5 March 2020; US officials intercepted nearly three million masks at 3M's South Dakota facility as of 6 April 2020. See Matteo Fiorini, Bernard Hoekman & Aydin Yildirim, 'COVID-19: Expanding Access to Essential Supplies in a Value Chain World' in Richard E. Baldwin & Simon J. Evenett (eds.) *COVID-19 and Trade Policy: Why Turning Inward Won't Work* (CEPR Press, 2020) pp. 67, 70.

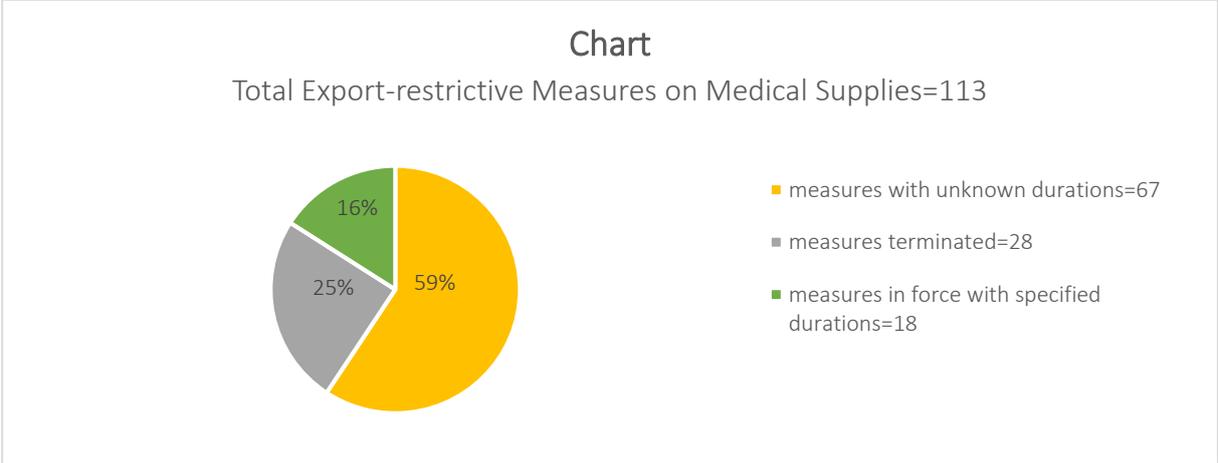
⁴ Federation of German Industries, 'Export Controls and Export Bans over the Course of the Covid-19 Pandemic' (p. 2, 29 April 2020), available at https://www.wto.org/english/tratop_e/covid19_e/bdi_covid19_e.pdf, last visited 8 June 2020.

⁵ The data come from the WTO and was edited by the authors. See https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm, last visited 11 July 2020.

⁶ The data of the Chart come from the ITC websites and edited by the authors. See <https://www.macmap.org/covid19>, last visited 11 July 2020.

⁷ Top ten exporters of medical products in 2019 were Germany, United States, Switzerland, Netherlands, Belgium, Ireland, China, France, Italy and the United Kingdom. See the WTO document, *Trade in Medical Goods in the Context of Tackling COVID-19* (p. 5, 3 April 2020), https://www.wto.org/english/news_e/news20_e/rese_03apr20_e.pdf, last visited 12 July 2020.

of export restrictions is presented in the Chart⁸ below. Last but not least, the export-restrictive measures, except those adopted by the Eurasian Economic Union (EAEU)⁹ and the European Economic Area (EEA)¹⁰, affect all other countries.¹¹ In other words, among regional economic arrangements applying export restrictions on medical products as listed by the ITC, only the EAEU and the EEA maintained solidarity and cooperation at the regional level and did not adopt export-restrictive measures that would affect regional trade of medical products.¹²



The side effects of export restrictions on medical supplies are conspicuous. Although the restrictions may temporarily mitigate the shortage of domestic medical supplies, they suppress domestic prices and may reduce the incentive to produce the goods domestically.¹³ Export restrictions are unsustainable to solve the problem of domestic shortages given the international dependency established by global supply chains. In addition, the unpredictability brought about by those export-restrictive measures without end dates and the interruption of global supply chains is damaging global trade. States lacking the capacity to produce medical products are helpless, and thus global cooperation, coordination and solidarity, which are most needed in combating COVID-19, are frustrated.

2. Trade Regulations on Export Restrictions

Trade regulations on export restrictions are mainly classified into two categories: WTO disciplines in the form of multilateral arrangements, and regional disciplines represented by free trade agreements and regional economic unions. WTO disciplines in principle prohibit the members from employing quantitative export restrictions, such as export prohibitions, licensing,

⁸ *Ibid.*
⁹ Current signatories are Armenia, Belarus, Kazakhstan, Kyrgyz Republic, and Russian Federation. It was signed on 29 May 2014 and came into force as of 1 January 2015.
¹⁰ Current signatories are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Iceland, Liechtenstein, and Norway. It was signed on 2 May 1992 and came into force as of 1 January 1994.
¹¹ See the ITC, *Tackling of COVID-19 Temporary Trade Measures*, <https://www.macmap.org/covid19>, last visited 12 July 2020.
¹² *Ibid.*
¹³ The WTO document, *Export Prohibitions and Restrictions* (p. 1, 23 April 2020).

etc. In comparison, regional disciplines generally set out higher requirements that not only prohibit quantitative export restrictions, but also forbid cost restrictions such as tariffs and taxes.¹⁴ In fact, WTO disciplines function as baselines for regional trade disciplines.

2.1 WTO Disciplines on Export Restrictions

Export Restrictions Are Principally Prohibited

Article XI:1 of the General Agreement on Tariffs and Trade (GATT 1994) specifies that quantitative restrictions in both terms of exportation and importation are prohibited. Regarding the scope of the concept of “restriction”, the Panel in *India – Quantitative Restrictions* set out:

“[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions ‘other than duties, taxes or other charges’. As was noted by the panel in *Japan – Trade in Semi-conductors*, the wording of Article XI:1 is comprehensive: it applies ‘to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.’ The scope of the term ‘restriction’ is also broad, as seen in its ordinary meaning, which is a ‘limitation on action, a limiting condition or regulation’.”¹⁵

According to the Appellate Body in *China – Raw Materials*, any measure that has a limiting effect on the quantity or amount of a product being imported or exported is prohibited and falls under Article XI:1.¹⁶ The limiting effect “need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture and revealing structure of the measure at issue considered in its relevant context.”¹⁷ Although “duties, taxes or other charges” may also be employed to restrict importation or exportation, they are classified as “cost restrictions” and the elimination of them is left to members’ negotiations.¹⁸

As regards the export restrictions of medical supplies due to COVID-19, their limiting effects on the quantity of exportation are evident. For example, the European Commission issued Implementation Regulation 2020/402 in March, which was amended by Implementation Regulation 2020/568 in April, making the exportation of certain PPE subject to the production of an export authorization.¹⁹ The Federal Emergency Management Agency (FEMA) of the United States promulgated the Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources for Domestic Use in April, requiring that five types of PPE, subject to certain exemptions, should not be exported without approval from FEMA.²⁰ Prior

¹⁴ MIN/3B/9, 1 May 1974, p. 3.

¹⁵ Panel Report, *India – Quantitative Restrictions*, para. 5.129.

¹⁶ Appellate Body Report, *China – Raw Materials*, para. 320.

¹⁷ Appellate Body Report, *Argentina – Import Measures*, para. 5.217. See also Panel Report, *EU – Energy Package*, para. 7.975.

¹⁸ MIN/3B/9, 1 May 1974, p. 3.

¹⁹ See [2020] OJ L 77 I/1 and [2020] OJ L 129/7.

²⁰ This rule is temporarily effective from 4 April to 10 August 2020 and includes an exemption that stipulates “FEMA will

authorization and approval is a kind of license used to meet increased domestic needs of medical supplies in times of COVID-19. Such export restrictions, with the effects of restricting export, are definitely covered and principally prohibited by Article XI:1.

Carve-outs and Exceptions

GATT 1994 provides carve-outs and exceptions that members can invoke to justify their export restrictions under Article XI:1. The carve-outs are set out in Article XI:2 and the exceptions are specified in Articles XX and XXI. It is necessary to examine whether the applied export restrictions on medical supplies are justified under Articles XI:2, XX and XXI.

Article XI:2 includes three subparagraphs, and Subparagraph (a) is relevant for the current scenario.²¹ According to Subparagraph (a), the measures temporarily applied to prevent or relieve critical shortages of the products essential to the exporting Member are permitted. The Appellate Body in *China – Raw Materials* explained that:

“[T]he noun ‘shortage’ is defined as ‘[d]efficiency in quantity; an amount lacking’ and is qualified by the adjective ‘critical’, which, in turn, is defined as ‘[o]f, pertaining to, or constituting a crisis; of decisive importance, crucial; involving risk or suspense’. The term ‘crisis’ describes ‘[a] turning-point, a vitally important or decisive stage; a time or trouble, danger or suspense in politics, commerce, etc.’ Taken together, ‘critical shortage’ thus refers to those deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point.”²²

It is undisputed that states suffering from COVID-19 are facing a crisis of public health. The fast spreading speed of coronavirus results in millions of people infected, so that the need of medical supplies to safeguard the health of medical staff, patients and uninfected civilians are tremendously increasing. It is not an exaggeration to say that the states, especially those that remain in the epicenter of COVID-19, are at a critical stage in combating the pandemic. Since most states are unprepared for the outbreak of COVID-19, they are in critical shortages of medical supplies which function as essential and crucial virus-fighting equipment. Therefore, it is concluded that export restrictions on medical supplies in times of COVID-19 are generally covered by Subparagraph (a) and thus carved out from Article XI:1. Should the requirements of Subparagraph (a) be met, the members are not obligated to eliminate quantitative restrictions

not purchase covered materials from shipments made by or on behalf of U.S. manufacturers with continuous export agreements with customers in other countries since at least January 1, 2020, so long as at least 80 percent of such manufacturer’s domestic production of covered materials, on a per item basis, was distributed in the United States in the preceding 12 months.” See 44 CFR Part 328, Docket ID FEMA–2020–0018, <https://www.govinfo.gov/content/pkg/FR-2020-04-10/pdf/2020-07659.pdf>, last visited 15 July 2020.

²¹ Article XI:2: The provisions of paragraph 1 of this Article shall not extend to the following: (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party; (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade; (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures.

²² Appellate Body Report, *China – Raw Materials*, para. 324.

and there is no need to resort to Article XX.²³

Article XX provides general exceptions that the members can use to justify their export restrictions. A successful revocation of Article XX must satisfy a three-tiered test: first, a measure must fall within the range of policies designed to achieve the objective listed in Subparagraphs (a) to (j); second, the measure must be necessary to achieve the said objective; and third, the measure is applied in a manner consistent with the chapeau of Article XX.²⁴ As regards the export restrictions on medical supplies, they can possibly be justified under Subparagraphs (b) and (j), which respectively allow the measures “necessary to protect human life or health” and “essential to the acquisition or distribution of products in general or local short supply”.

Regarding the consistency with first-tiered test, since the export restrictions of medical supplies are implemented to fight COVID-19, they fall directly within the policies designed to protect human life and health, and to solve the distribution of medical products in local supply. As to the second-tiered test, the Appellate Body explained that a “necessary” assessment entailed an analysis of all relevant factors, “particularly the extent of the contribution to the achievement of a measure’s objective and its trade restrictiveness, in the light of the importance of the interests or values at stake”,²⁵ which should be weighed and balanced as a holistic operation.²⁶ Considering the pressing threat brought about by COVID-19 and the salient values of human life at stake, export restrictions seem to be the most convenient, efficient and effective measures to solve shortages in the short term. Therefore, export restrictions are likely to satisfy the second-tiered test. Regarding the third-tiered test, the chapeau of Article XX requires that measures should not be applied in an arbitrary, unjustifiable or discriminative manner, which is also entailed by Subparagraph (j) specifying that the measures must “be consistent with the principle that all Members are entitled to an equitable share of the international supply of the products concerned”. According to the ITC, all the 81 states and regions applying export restrictions, except the EAEU and the EEA, treated other members in an equal and indiscriminative manner since they restricted the exportation of medical supplies to all other members. It seems the EAEU and the EEA discriminated against non-regional members, because their export restrictions were only applicable to non-regional members. However, as Article XXIV:8 provides that the members of a customs union or of a free trade area may maintain, where necessary, certain restrictive regulations of commerce that are otherwise permitted under Articles XI through XV and under Article XX of the GATT 1994,²⁷ the EAEU and the EEA are justified to restrict the exportation of medical supplies to non-regional members. Therefore, all the entities applying export restrictions on medical supplies are likely to be justified under Subparagraphs (b) and (j) of Article XX.

Article XXI(b)(iii) allows the members to take actions necessary for the protection of their essential security interests in times of war or other emergency in international relations. The

²³ Appellate Body Report, *China – Raw Materials*, para. 334.

²⁴ Panel Report, *EC – Tariff Preferences*, paras. 7.198-7.199.

²⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

²⁶ *Ibid.*, para. 182.

²⁷ Appellate Body Report, *Turkey – Textiles*, para. 48.

Panel in *Russia – Traffic in Transit* explained the meaning of “essential security interests” as a narrower concept than “security interests” and referred to “those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally”.²⁸ It is clear that the members are not free to elevate any concern to the level of an “essential security interest” and the principle of good faith requires that the members should not use the exceptions in Article XXI to circumvent their obligations under the GATT 1994.²⁹ As regards the outbreak of COVID-19, since the Director-General of WHO has declared it constituted a PHEIC,³⁰ it is not disputed that COVID-19 is qualified as an emergency situation under Article XXI(b)(iii) and the safety of public health is qualified as an “essential security interest”. Therefore, members suffering from the spread of COVID-19 are justified in restricting the exportation of medical supplies pursuant to Article XXI(b)(iii).

Notification Obligations

Making timely notifications of export restrictions will provide transparency and predictability for international trade. Article X of the GATT 1994 requires the members to publish all the measures affecting international trade, including export restrictions, in such a prompt manner as to enable governments and traders to become acquainted with them. In addition, the 2012 Decision on Notification Procedures for Quantitative Restrictions (2012 QR Decision) requires members to make complete notifications of all quantitative restrictions in force by 30 September 2012 and at biennial intervals thereafter, as well as changes to those quantitative restrictions not later than six months from their entry into force.³¹ The Trade Facilitation Agreement also requires members to promptly publish the information of export restrictions in a non-discriminatory and easily-accessible manner.³² On 24 March 2020, Director-General Azevêdo asked all members to submit information to the WTO Secretariat about their COVID-19 policies, including export restrictions and other trade-related measures.³³ As mentioned above, 57 states and regions have submitted information on 90 export-restrictive measures on medical supplies as of 10 July 2020.³⁴

2.2 Regional Disciplines on Export Restrictions

According to the WTO, there are 305 regional trade agreements (RTAs) in force as of 10 July 2020.³⁵ This paper will not examine each RTA discipline, but it will select five RTAs as samples. The selected five RTAs are the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA),³⁶ the Comprehensive and Progressive Agreement for Trans-Pacific

²⁸ Panel Report, *Russia – Traffic in Transit*, WT/DS512/R, p.130.

²⁹ *Ibid.*, paras. 7.131-7.132.

³⁰ See footnote 1.

³¹ G/L/59/Rev.1, 3 July 2012, para. 1.

³² See Article 1.1 of the Trade Facilitation Agreement which entered into force on 22 February 2017.

³³ ‘DG Azevêdo Requests WTO Members to Share Information on Trade Measures Related to COVID-19’, https://www.wto.org/english/news_e/news20_e/dgra_24mar20_e.htm, last visited 12 July 2020.

³⁴ See footnote 5.

³⁵ The information is from the WTO website, <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>, last visited 12 July 2020.

³⁶ The CETA was signed on 30 October 2016 and came into force on 21 September 2017.

Partnership (CPTPP),³⁷ the Agreement between the United States of America, the United Mexican States, and Canada (UCMCA),³⁸ the EAEU and the EEA. The first three RTAs are the most influencing regional trade rules concluded during the past five years, while the other two are the only ones among RTAs listed by the ITC that applied export restrictions while keeping free trade within regional areas.³⁹

The design of regional disciplines on export restrictions is similar with that of the GATT 1994. Export restrictions are also generally prohibited subject to specified carve-outs and exceptions. CETA, CPTPP and UCMCA incorporate Article XI of the GATT 1994 with similar linguistic expression that “Article XI of the GATT 1994 is incorporated into and made part of this Agreement”.⁴⁰ Although the EAEU does not contain similar incorporating expression, it specifies that “the member State shall not apply customs duties (other duties, taxes and charges having equivalent power), non-tariff measures, special protective, antidumping and countervailing measure, except otherwise provided in this Treaty”.⁴¹ The EEA directly sets out that “[q]uantitative restrictions on exports and all measures having equivalent effect shall be prohibited between the Contracting Parties.”⁴²

As regards the exceptions that regional members can invoke to justify export restrictions, CETA incorporates Article XX of the GATT 1994 with a specific phrase that “Article XX of the GATT 1994 is incorporated into and made part of this Agreement”,⁴³ and CPTPP and UCMCA also incorporate interpretative notes of Article XX.⁴⁴ CETA also contains a provision of “national security”, which is written in the same manner and almost in the same wording as Article XXI of the GATT 1994.⁴⁵ With respect to security exceptions under CPTPP and UCMCA, they include exactly the same wording and permit the members to apply measures they consider necessary for the protection of their own essential security interests.⁴⁶ As for the EAEU, its Section VII, entitled “General Exceptions”, essentially incorporate both Article XX and Article XXI of the GATT 1994.⁴⁷ In comparison, the EEA only incorporates Subparagraphs (a), (b) and (f) of Article XX of the GATT 1994, and incorporates all the subparagraphs of Article XXI, except Subparagraph (b)(i).⁴⁸ In summary, all the five regional arrangements allow their members to impose export restrictions on grounds of protection of human health and life, and security interests. Except the EEA, the other four regional arrangements also provide the exception of the measures “necessary to distribute goods which are in local shortage”.

³⁷ Current signatories to the CPTPP are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam. The CPTPP was signed on 8 March 2018 and came into force as of 30 December 2018.

³⁸ The UCMCA is the result of renegotiation of the North American Free Trade Agreement, which was signed on 30 November 2018 and came into force as of 1 July 2020.

³⁹ See the footnote 12.

⁴⁰ See Article 2.11(1) of the CETA, Article 2.10(1) of the CPTPP and Article 2.10(1) of the UCMCA.

⁴¹ Article 28(3) of the EAEU.

⁴² Article 12 of the EEA.

⁴³ Article 28.3(1) of the CETA.

⁴⁴ See Article 29.1(1) of the CPTPP and Article 32.1(1).

⁴⁵ See Article 28.6 of the CETA.

⁴⁶ See Article 29.2 of the CPTPP and Article 32.2 of the UCMCA.

⁴⁷ Article 38 of the Annex 7 of the EAEU.

⁴⁸ See Articles 13 and 123 of the EEA.

Noticeably, the EAEU bears distinguished features on export restrictions and medical circulation. First, it not only specifies that the members may unilaterally impose temporary export restrictions, on the grounds contained in Section VII of “General Exceptions”,⁴⁹ but also permits the Eurasian Economic Commission (Commission) to apply export quotas at the regional level.⁵⁰ Second, if the Commission decides to adopt export quotas, it should establish a formula for quota distribution that specifies the distribution and the way of distribution of shares of export quotas among the participants of foreign trade activity of the members.⁵¹ Last but not least, the EAEU proposes to establish a common market of drugs and medical products, aiming to promote the harmonization and unification of legal standards and requirements on medical products and adopt common rules in the field of drug circulation.⁵²

With respect to notification obligations, promptly publishing information on export restrictions is also required in regional disciplines. Through the examination of relevant provisions in CETA, CPTTP, USMCA, EAEU and EEA,⁵³ there is no specification on how timely regional members should make notifications or publish relevant information. Therefore, regional disciplines on notification obligations are neither more specified nor more creative than WTO disciplines.

In summary, regional disciplines on export restrictions present a great degree of similarity with WTO disciplines. They aim to intensify regional integration and cooperation that cannot be achieved within the WTO. As regards CETA, CPTTP, USMCA, EAEU and EEA, their designs in relation to the regulation of export restrictions are not more illuminating than that of the WTO, except some features presented by the EAEU as mentioned above.

3. Shortcomings of Current Trade Regulations

3.1 Shortage of Appropriate Regulations on Pandemic-Related Export Restrictions

As analyzed above, Articles XI:1, XI:2(a), XX(b), XX(j) and XXI(b)(iii) of the GATT 1994 are relevant provisions on export restrictions under the WTO disciplines, and it seems there is nothing new with respect to regional disciplines, except the EAEU. It must be taken into account that the GATT 1994 originated from the GATT 1947, and thus Articles XI, XX and XXI of the GATT 1994 are essentially framed by the drafters who had just experienced the Second World War (WWII). Scarred by the damage and destruction of the war, the international community in the 1940s reconsidered the importance of peaceful economic relations and intended to achieve levels of openness not reached before WWII.⁵⁴ Nevertheless, free trade was neither considered a realistic goal nor a reasonable aspiration for the founders of the GATT.⁵⁵ The carve-outs and exceptions under the GATT 1994 allow members to protect some

⁴⁹ See Article 50 of the Annex 7 of the EAEU.

⁵⁰ See Article 13 of the Annex 13 of the EAEU.

⁵¹ See Article 16 of the Annex 7 of the EAEU.

⁵² See Section VII of the EAEU.

⁵³ See Article 27.1(1) of the CETA, Article 2.16 of the CPTTP, Article 2.16 of the USMCA and Article 17 of the Annex 7 of the EAEU.

⁵⁴ See Craig VanGrasstek, *The History and Future of the World Trade Organization* (WTO Publications, 2013), p. 8.

⁵⁵ William Diebold, ‘Reflections on the International Trade Organization’, 14(2) *Northern Illinois University Law Review* (1994), p. 336.

important non-economic values,⁵⁶ but they were mainly designed to deal with emergency situations related to post-war reconstruction, and the emergency situation of a global pandemic was not fully considered by the drafters of the GATT 1947. By examining the drafting history of and the rationale underlying the WTO disciplines on export restrictions, it is evident that the regulation on export restrictions of medical supplies in times of a global pandemic was not envisaged by the drafters of the GATT 1947 and the WTO disciplines are short of appropriate regulations.

As regards Article XI:1 of the GATT 1994, the original drafters of the GATT 1947 were influenced by the experience of the 1930s when import restrictions were widespread and retaliatory import restrictions substantially reduced world trade.⁵⁷ disciplining the application of import restrictions and preventing economic anarchy were the major concerns of the drafters.⁵⁸ It was not until the 1970s, when many countries noted that free and unfettered exports might cause inflation to their economies, that they started to use export restrictions to keep the level of domestic prices down.⁵⁹ Therefore, the drafters in the 1940s did not expect the scenario of the wide use of export restrictions in the 1970s and designed less stringent limitations on export restrictions than that on import restrictions. With respect to Article XI:2(a), it was mainly drafted to permit the use of export restrictions to maintain price control by a member undergoing shortages subsequent to war or to relieve critical shortages of crops such as famine.⁶⁰ "[O]ther products essential to the exporting country" in Article XI:2(a) was drafted to tackle unexpected situations so as to enable a member to restrict the exportation of any product that would be of importance to a particular exporting member.⁶¹ There is no doubt that medical supplies are products of importance to the members who are affected by the COVID-19 pandemic, and thus those affected members can resort to Article XI:2(a) to use export restrictions to relieve or to prevent shortages of medical supplies. Nevertheless, Article XI:2(a) is not a recipe to shortages that are caused by the lack of production capacity. As for countries dependent on the importation of medical products, Article XI:2(a) is a merciless unilateral design that forces them to manage any shortages by themselves.

With respect to the exceptions under the GATT 1994, Article XX(b) was designed "to protect human, animal or plant life or health", and the drafters agreed unanimously that "to protect human, animal or plant life or health" should be qualified as the purpose of the exception. The drafters' major concern was whether a member's quarantine or other sanitary measures adopted under the name of protecting "human, animal or plant life or health" were applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.⁶² In fact, "to protect human, animal or plant life or health" is a well-accepted non-commercial value that should not be frustrated by commercial purposes, no matter whether it is in times of peace or war. In contrast, Article XX(j) was originally adopted to take care of temporary situations arising out

⁵⁶ Peter Van Den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2005), p. 598.

⁵⁷ MIN/3B/9, 1 May 1974, p. 1.

⁵⁸ See F/CONF.2/23, 24 December 1947, p. 4.

⁵⁹ MIN/3B/9, 1 May 1974, p. 2.

⁶⁰ E/PC/T/C.II/36, 31 October 1946, p. 9.

⁶¹ E/PC/T/141, 1 August 1947, p. 2.

⁶² E/CONF.2/C.3/SR.35, 14 February 1948, p. 6.

of war, and the drafters considered that export restrictions for the equitable distribution of products in short supply and for the maintenance of war-time price control by countries undergoing shortages as a result of war should be permissible. However, the use of export restrictions should be "limited to a specified post-war transitional period, which might, however, be subject to some extensions in particular cases".⁶³ At a subsequent session, the Contracting Parties considered it unnecessary to amend Article XX(j), and other provisions of the GATT 1947 were also adequate to cover the application of the measures under Article XX(j).⁶⁴ Therefore, regarding the shortages of medical supplies caused by COVID-19, the affected states are justified to resort to Article XX(b) or Article XX(j). Just as the problem with Article XI:2(a), export restrictions cannot solve shortages caused by the lack of production capacity.

Compared with Article XX, Article XXI was designed as the exceptions to the GATT as a whole, while the exceptions under Article XX were designed to be applied on commercial policy.⁶⁵ The drafters of Article XXI indicated that "some latitude must be granted for security as opposed to commercial purposes".⁶⁶ Article XXI(b)(iii) was specifically designed to deal with security issues in times of war or other emergencies in international relations, such as pre-war situations.⁶⁷ Although the drafters did not mention "pandemic" as a threat to national security, it is not doubted that the emergency caused by COVID-19 is qualified as "other emergency" under Article XXI(b)(iii). However, the problem that export restrictions cannot solve shortages caused by the lack of production capacity also exists regarding the application of export restrictions under Article XXI(b)(iii).

In summary, the GATT 1994 is a multilateral agreement per se, but the carve-outs and exceptions thereof are the provisions of nationalism and unilateralism. Export restrictions are only effective for members capable of producing medical products in the short term. The risk is that export restrictions may cause retaliations and break-down of global supply chains, thus members having production capacity may fall into the shortage of raw materials to produce medical products. It is difficult for members lacking production capacity to build such capacity in a short time, and to some extent, they are helpless given the widespread export restrictions. What is more, WTO disciplines are not sufficient to require members to provide timely information on the measures of export restrictions. According to the 2012 QR Decision, members are only obligated to make notification of the new export restrictions within six months, which is why DG Azevêdo additionally asked the members to submit information to the WTO Secretariat about their COVID-19 policies.

Current WTO disciplines do not provide international concerted actions to tackle shortages of medical supplies in times of the COVID-19 crisis. It is noted that some WTO members concluded a plurilateral agreement of Trade in Pharmaceutical Products (Pharma Agreement) in 1994 and agreed to eliminate customary duties on pharmaceutical products,⁶⁸ but the Pharma

⁶³ E/PC/T/C.II/59, 21 November 1946, p. 2.

⁶⁴ L/334, 1 March 1955, p. 8.

⁶⁵ MTN.GNC/NG7/W/16, 18 August 1987, p. 2.

⁶⁶ E/PC/T/A/SR/33, 24 July 1947, p. 3.

⁶⁷ E/PC/T/A/PV/33, 24 July 1947, p. 20.

⁶⁸ Currently the WTO Pharma Agreement has 34 members, including Canada, 27 EU Member States and the UK, Japan, Norway, Switzerland, USA and Macau.

Agreement does not contain the disciplines on export restrictions or the legal regime for the establishment of a common market of medical products. The EAEU proposes to establish a common market of drugs and medical products which is conducive to the circulation of medical products. However, it is only a regional arrangement.

3.2 Shortage of Experience in Regulating Pandemic-Related Export Restrictions

COVID-19 is the sixth PHEIC announced by WHO.⁶⁹ Although it is not the first infectious disease confronted by humans, it is an unprecedented pandemic that has infected and affected the largest amount of people and areas around the world in history. As for the WTO and GATT, they have the experience in tackling health-related trade issues, but they have never dealt with such a global emergency situation related to regulating export restrictions on medical supplies.

Among the agreements under the WTO legal structure, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) is the most pertinent agreement on the protection of human life and health. The preamble of the SPS Agreement explicitly states that "no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health", which is similar to the wording of Article XX(b). However, the rationale underlying the SPS Agreement is different from the current trade issue in relation to the application of export restrictions on medical supplies, since the SPS Agreement aims to regulate international trade in products involving the risks of threatening human life and health, such as the case of *EC - Hormones*, while the current trade issue is not about whether international trade in medical supplies involves the risks of threatening human health, but the shutdown of international trade in medical supplies, due to the application of export restrictions, will frustrate the efforts to fight coronavirus. Therefore, the SPS Agreement and relevant practicing experience are not useful for regulating the currently applied export restrictions on medical supplies.

As regards the WTO and GATT experience in settling trade disputes on export restrictions, the export restrictions at issue are either applied for economic or commercial reasons, or for traditional security reasons such as political tensions caused by the Cold War. The economic or commercial reasons for the application of export restrictions usually include raising the price of exports, promoting domestic processing industries, generating revenues, stabilizing domestic prices and protecting exhaustible natural resources.⁷⁰ For example, in *China – Raw Materials* and *China – Rare Earth*, the measures in dispute were China's export quotas on refractory-grade bauxite and rare earths, and a common disputing point in both cases was whether China's export quotas were justified under Article XX(g), i.e., whether China's export quotas were necessary measures relating to the conservation of exhaustible natural resources or disguised restrictions on trade.⁷¹ As to export restrictions applied due to political tensions, a case in point is when the US applied export licenses on strategic goods against Czechoslovakia in 1949 due to the Cold War and the Contracting Parties decided to reject the complaint of Czechoslovakia

⁶⁹ Previously declared PHEICs include the 2009 novel flu pandemic, 2014 wild polio, 2014 West African Ebola, 2016 Zika virus, and 2018 Ebola outbreak.

⁷⁰ MTN.GNG/NG2/W/40, 8 August 1989, pp. 1-2.

⁷¹ See Panel Report, *China – Raw Materials*, paras. 7.451; Panel Report, *China – Rare Earths*, para. 7.236.

considering the political nature of the dispute.⁷² Examining the history of the WTO and GATT, there is no case about export restrictions applied for the prevention of a global pandemic. Therefore, the previous experience in the WTO and GATT is not enlightening for regulating export restrictions in times of pandemic.

3.3 Shortage of Capacity in Regulating Pandemic-Related Export Restrictions

It is noteworthy that the WTO is incapable of assessing the speed and scale of spread of the coronavirus, and trade-related measures taken in the context of the COVID-19 crisis are no longer just trade measures. WHO is the organization responsible for handling global health issues and capable of declaring whether the spread of a disease constitutes a PHEIC. As far as COVID-19 is concerned, WHO established an Emergency Committee, consisting of 15 experts from various countries with expertise in the areas of epidemiology, virology, infectious diseases, public health and risk communications, to assess the severity of the coronavirus risk and recommend control measures, including trade measures.⁷³ Therefore, in order to scientifically regulate international trade in times of pandemic, cooperation between the WTO and WHO is required.

WHO has cooperated with the WTO on a number of issues related to trade and health. For example, WHO has observer status in the Committee on Sanitary and Phytosanitary Measures and the Technical Barriers to Trade Committee, as well as ad hoc observer status in the Council on Trade-related Aspects of Intellectual Property Rights and the Council for Trade in Services.⁷⁴ However, there is no formal agreement between the WTO and WHO similar to the Agreement Between the World Intellectual Property Organization and the World Trade Organization. Without formal cooperation between WHO and the WTO, the dilemma cannot be solved that the WTO is incapable of deciding to what extent trade restrictions are necessary in times of pandemic, while WHO with such capacity cannot implement its recommendations on trade restrictions.

4. Suggestions

Export restrictions on medical supplies in times of pandemic are not only related to trade regulations, but also concerned with global health governance. Therefore, the cooperation between the WTO and WHO is required. To solve the problem of shortages in medical products caused by a global pandemic requires improving trade regulations. The three following suggestions are proposed: to establish a multilateral common market of medical products, introduce four parameters that should be considered in regulating export restrictions, and apply two schemes for improving relevant regulations.

⁷² See MTN.GNG/NG7/W/16, 18 August 1987, p. 5.

⁷³ See Youngmee Jee, 'WHO International Health Regulations Emergency Committee for the COVID-19 Outbreak', 42 *Epidemiol Health* (2020) 1, 1-2.

⁷⁴ See the information on the WTO website, https://www.wto.org/english/thewto_e/coher_e/wto_who_e.htm, last visited 12 July 2020.

4.1 To Establish a Multilateral Common Market of Medical Products

It is noted that the plurilateral Pharma Agreement concluded in 1994 contribute to the elimination of customary duties on medical products, but its effects are limited. Referring to the common market of drugs established by the EAEU, it is necessary to establish a multilateral common market of medical products to promote the global circulation of these products. The proposed multilateral common market of medical products should harmonize the legal regulations and standards in the field of medical products, reduce the barriers to international trade in medical products, eliminate tariffs on medical products, encourage joint efforts to develop new drugs and vaccines, and assist under-developed states in building medical facilities and training medical staff.

4.2 Four Parameters in Regulating Export Restrictions

It is well recognized that export restrictions applied in times of the COVID-19 crisis should be targeted, risk-proportionate, transparent, and temporary.⁷⁵ These four parameters should be considered in formulating improved regulations for export restrictions on medical supplies. According to the authors' understanding, "targeted" means the applicable scope of export restrictions should be specified, limited and necessary, and the WTO is the appropriate body to assess whether the measure of export restrictions is targeted; "risk-proportionate" means export restrictions should be proportionate to the degree of risk that the state applying export restrictions is encountering, and WHO is the right body to assess the degree of virus risk that a state is confronting; "transparent" means the state applying export restrictions should timely update relevant information, and referring to Article 6(1) of the 2005 International Health Regulations, a state applying export restrictions should make notification within 24 hours of implementation;⁷⁶ "temporary" means export restrictions should not be applied permanently, and hence an end date or a sunset clause should be specified.

4.3 Two Schemes for Improving the Regulations

There are two schemes proposed for improving the regulations for export restrictions on medical supplies in times of pandemic: one is to establish a globally planned regulatory scheme for export restrictions and the other is to formulate a comprehensive package of obligations that a state applying export restrictions should respect.

As regards the globally planned regulatory scheme, it includes the following five items. First, WHO shall assess the degrees of virus risk that each state is encountering and assess the volumes of medical products that each state needs. Second, states applying export restrictions shall notify the WTO, within 24 hours of implementation, with complete information on any

⁷⁵ See 'Statement on the Trade Policy Response to COVID-19: A Call for Urgent OECD Action' and 'G20 Actions to Support World Trade and Investment in Response to COVID-19', available at <http://biac.org/wp-content/uploads/2020/04/Statement-on-the-Trade-Policy-Response-to-Covid-19-2.pdf> and <http://www.g20.utoronto.ca/2020/2020-g20-trade-0514.html>, last visited 12 July 2020.

⁷⁶ Article 6(1) of the 2005 International Health Regulations requires a state party to notify the WHO within 24 hours of the public health information of all events which may constitute a PHEIC within its territory.

export restrictions imposed on medical products, including a general description of such export restrictions, tariff line codes affected by the restrictions, detailed product descriptions, the justification for export restrictions, and the duration of export restrictions or sunset clauses. Third, the WTO shall review each state's application of export restrictions on the basis of relevant information submitted by WHO for the concerned state, and may require the state to adjust the volume of export restrictions if the WTO considers that the export restrictions are disproportionate. Fourth, with the aim of ensuring sustainable supply of medical products, the WTO shall monitor trade-restrictive measures that affect the global production capacity and urge the concerned states to remove unnecessary trade restrictive measures on the basis of WHO's advice. Fifth, the WTO shall be responsible for the distribution of donations of medical products, establish a database recording the data of each donor state's donations, distribute the donations to the states in need on the basis of WHO's advice, and establish a reward mechanism for the donor states.

The globally planned regulatory scheme has the advantage of improving efficiency through a centrally planned regime, similar to China's effective control of coronavirus. This will strengthen the soundness of the application of export restrictions given that WHO's advice is involved, safeguard the sustainability of medical production, and promote rational assistance for the countries that are most in need. However, this scheme requires the states to submit their regulatory authority on the application of export restrictions in times of pandemic to the WTO and WHO, which is difficult against the backdrop that the US-China trade war is ongoing and the multilateralism represented by the WTO is in crisis. Therefore, this scheme may be optimal but utopian.

With respect to the second scheme to formulate a comprehensive package of obligations, it imposes less restrictions on states' sovereignty but intensifies states' obligations. First, each state shall notify the WTO of its applied export restrictions within 24 hours of implementation. Second, each state applying export restrictions shall specify end dates or sunset clauses. Third, upon the requirement of the affected importing states, each state applying export restrictions shall be obligated to provide technical assistance in helping the affected importing states build the capacity of producing medical products under the supervision of the WTO.

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