

# “TRADE RESTRICTIONS DURING COVID-19 JUSTIFICATION UNDER GATT”

**Dr. Nashat Mahmoud**

Jaradat college of Law Applied Science University, Bahrain nashat.jaradat@asu.edu,bh

## ABSTRACT:

**PURPOSE:** The outbreak of Covid-19 as a pandemic has deep-rooted health and economic crises in the fabric of various nations. The impact has been felt in all sectors of life, one crucial sector being that of trade. Nations in light of the outbreak have taken measures to impose trade restrictions and embargos. The reason behind this measure adopted by means of various arrangements and policies is to ensure that the State maintains the domestic security of its foodstuffs, medicines and other essential goods due to the uncertainty. The question that would arise due to such moves is the validity of the measures under the GATT provisions that regulates trade between various nations based on the principles enshrined under the same. The paper seeks to study the various intricacies of the GATT provisions, primarily Article XI, Article XX and Article XXI to understand the feasibility and justification of such measures surrounding trade restrictions that have arisen due to the Covid-19 Pandemic.

**METHODOLOGY:** The paper has adopted the doctrinal research methodology where due reading has been done to the GATT provisions and the SPS and TBT Agreements. The various tests as laid down by the WTO Panels and Appellate body has been observed to understand the grounds on which the provisions can be claimed for. The paper focuses on drawing linkages with the grounds of such bans with the precedents to understand the current situation in law and understand the shortfalls.

**FINDINGS:** Through the means of the research, it can be observed as to how the current position of law under the GATT provisions is able to adequately address the issue of trade ban in light of the Covid-19 Pandemic. The grounds for the imposition of the trade bans and restrictions under Article XX(b) and Article XXI can be seen to provide the nations a leverage to take such measures as the tests are met to impose such restrictions. But it is also pertinent to note the serious implications that such restrictions would have on the developing countries. The current scenario under law should be amended to incorporate the effects of Covid-19 Pandemic and subsequent issues around the same.

**RESEARCH IMPLICATIONS:** The research is conducted keeping in mind the primary provisions under GATT which are Article III, Article XI, Article XX and Article XXI along with the SPS and the TBT Agreements of 1995. Instances from the past and measures adopted by various Nations in light of the Covid-19 Pandemic have been considered as well.

**ORIGINALITY:** The paper intends to contribute to the research related to the developing knowledge and conditions of Trade related aspects under GATT, restricting to restrictions and bans on trade imposed by the GATT members under the vice of the hardships caused to their economy under the Covid-19 Pandemic.

## Key Words:

Covid-19, GATT, SPS Agreement, TBT Agreement, Trade Bans, Trade Restriction, WTO.

Article Received: 18 October 2020, Revised: 3 November 2020, Accepted: 24 December 2020

## INTRODUCTION:

The outbreak of the SARS-CoV-2, better known as the Corona virus/Covid-19 has lead to wide scale disruptions in the global health and economy. With nations going under Lockdowns to prevent the spread of the disease and to protect the lives of its citizenry, impacts have been felt in the global trade between Nations. There have been

prior instances where health-crisis have led to financial-crisis, nonetheless the Covid-19 Pandemic has led to a world-wide recession. Nations have taken steps to ensure that there is no looming shortfall in the quantity of the essentials

within their state facing the surge in the global demand for medicines, personal-protection equipment, foodstuffs and other materials, and have imposed various embargos on export and import.<sup>1</sup> The restrictions have been primarily placed on export of such materials by large exporters in lieu of facing shortages while ensuring that there is a better domestic availability due to lower domestic prices. In reality, these

<sup>1</sup>World Trade Organization, *Export Prohibitions and Restrictions*, Dt: Apr. 23<sup>rd</sup> 2020, [https://www.wto.org/english/tratop\\_e/covid19\\_e/export\\_prohibitions\\_report\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf) [last accessed: Oct. 12<sup>th</sup> 2020].

restrictions have led to domino effects withing various trading groups.

On one hand there is a stance given to commercial disruptions even though severe where such moves are considered to be necessary and is appropriate as a pandemic response, on the other hand export controls on essential commodities such as medical equipment, food items and other key goods that are widely exported would rather have negative effects on the global markets as well as individual domestic markets.<sup>2</sup> WTO members have exacerbated the availability of essential commodities to tackle the Pandemic by imposing restrictions and embargos to trade in order to preserve national interest and availability of these goods within their territory. A key question that presently exists is to determine the stance taken by States relating to their pandemic responses and understanding the legality of such measures adopted, keeping in mind the general obligations under GATT along with the exceptions given to trade restrictions and investment restrictions on grounds of public health (GATT Article XX(b)) and national security (GATT Article XXI).<sup>3</sup> The paper thus seeks to address the justifiability of the restrictions to trade imposed by such nations taking the justification to preserve their national interests over international relations and trade.

#### **ECONOMIC IMPACTS OF THE TRADE RESTRICTIONS:**

Despite taking sufficient measures to ensure that there are no disruption to the availability of domestic supplies at lower rates by adopting restrictions to trade, this move would yet entail negative effects. For instance, when a large exporter implements such a restriction/prohibition over the good, this affects the global supply thus increasing the price of the good. The impact that is felt by domestic players such as local producers is a lack of incentive of these producers to

manufacture internally as the domestic prices drop due to the larger supply that is available. This further leads to a domino effect which other nations would adopt to tackle the effect exerted by the other nations, leading to an overall increase in the prices of the products on the global platform. Ultimately such moves would erode international confidence that exist due to bilateral or multilateral treaties, affecting the developing countries due to their economic insufficiency to tackle the outbreak in a systemic manner.

The trade restrictions can be seen to be acts of economic liberalization which are partaken by States to confront security concerns that have arisen due to the threat that the Covid-19 puts forth being an infectious disease.<sup>4</sup> The narrative is rapidly shifting to how threats that arise from health concerns have a direct impact on the economy and such threats to the economy is a potential threat to the national security of a State as well. If this narrative is furthered into the fabric of the present legislation and regulations, it could create a permanent ground of State exception under commercial laws that would justify such protectionist measures.<sup>5</sup> Presently, the international commercial and economic law favors trade and commerce and considers measures undertaken on grounds of health and national security as grounds of exceptions.

#### **INSTANCES OF TRADE RESTRICTIONS:**

Since the outbreak of the Covid-19 Pandemic, more than 80 Nations have imposed trade bans and restrictions on export of medical equipment, foodstuffs and other essential goods.<sup>6</sup> The European Union in March 2020 had imposed a 'prior authorization' requirement for the export of protective equipment and the Eurasian Economic Union banned the export of certain food and medical supplies. Nations like Russia,

<sup>4</sup>Oona A. Hathaway, After Covid-19, We Need to Redefine 'National Security', SLATE, Apr. 7, 2020.

<sup>5</sup>Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, Toward a Geoeconomic Order in International Trade and Investment, 22 J. INT'L ECON. L. 655 (2019).

<sup>6</sup> Data has been taken from the WTO Portal, *accessible here* [https://www.wto.org/english/tratop\\_e/covid19\\_e/trade\\_relat\\_ed\\_goods\\_measure\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/trade_relat_ed_goods_measure_e.htm).

<sup>2</sup> Chad P. Bown, Trump's Curbs on Exports of Medical Gear Put Americans and Others at Risk, PETERSON INST. FOR INT'L ECON., Apr. 9, 2020.

<sup>3</sup> Caroline Simson, Covid-19 Claims May Test Tribunals with Thorny Questions, LAW360, Apr. 30, 2020.

Kazakhstan, Vietnam had implemented trade bans on export of grains, flour, rice and other pulses. USA, India and UK had imposed restrictions on export of PPE kits and medicines as well. India's move to ban the export of hydrochloroquine and other malaria medicines had been opposed by Nations such as USA and Brazil due to which after strong criticisms from the International forum, India lifted the ban.

#### **LEGALITY OF BAN IMPOSITION UNDER GATT ARTICLE XI:**

The GATT deals with the aspects of bans and restrictions of goods under Article XI that deals with Quantitative Restrictions, which as a rule prohibits members from imposing bans to trade (export and import), having a few grounds of limitations. Article XI(1) prevents members from imposing any restriction to trade that is created through license-cancellation or any other measure. This provision is equally applicable to imports as well as exports.<sup>7</sup>

Understanding the validity of the bans imposed and the exception under Article XI, the procedure under Article XI(2) and Article XX are to be followed. Bans, embargos and restrictions under Article XI(1) can be allowed under Article XI(2) provided that such measures are to provide for means for the revival of the domestic market, foodstuffs or other products that are exported. Measures under Article XI(2) can be enforced when the shortage would result into a crisis.<sup>8</sup> GATT Article XI(2) can be seen to have open-ended implications associated to it requiring a lacunae to be filled. States are permitted to take any measure it deems necessary in order to protect its essential security interest during such a pandemic that is seen to be an international emergency.

#### **EXCEPTIONS TO IMPOSE RESTRICTIONS UNDER GATT ARTICLE XX:**

GATT Article XI lays down a prohibition on quantitative restrictions on the importation or

exportation of products to ensure a protective effect over trade. But these quantitative restrictions bear distorted and negative effects on trade than tariffs by the means of having prohibitions to be a fundamental principle under GATT.<sup>9</sup> The GATT provides for exceptions to the above mentioned fundamental principle on grounds that are specific to GATT Article XI or general exceptions under Article XX and Article XXI.<sup>10</sup> The GATT provides for "justifiable reasons" to the contracting parties that would provide for trade liberalizations to the rights under the GATT, through Article XX and Article XXI. GATT Article XX(b) provides contracting parties to give human health priority over trade liberalization.<sup>11</sup>

GATT Article XX deals with 'General Exceptions' that are applicable to the parties adopting the GATT where parties can adopt any measure that are not arbitrary, unjustified or discriminatory to protect aspects such as public morals, human life along with containing a chapeau which provides that such acts undertaken through GATT Article XX should not be abused or undertaken to restrict trade in an arbitrary/unjustifiable manner.<sup>12</sup> GATT Article XX consists of 10 grounds on which policies adopted by nations related to restrictions or any other obligation under the treaty that exists or general principles under GATT is subjected to justification in order to prevent abuse of trade liberalization. The impositions applied by means of GATT Article XX have to be examined closely keeping in mind the chapeau<sup>13</sup> and the burden of proof for the application of Article XX is on the member that has introduced such a policy.

<sup>9</sup> Quantitative Restrictions, available at [https://www.meti.go.jp/english/report/data/2015WTO/02\\_03\\_01.pdf](https://www.meti.go.jp/english/report/data/2015WTO/02_03_01.pdf)

<sup>10</sup> Report, US-Import Restriction on Yellowfin Tuna, BISD 39S/115.

<sup>11</sup> Report, Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, 1990, DS10/R 37S/200.

<sup>12</sup> General Agreement on Tariffs and Trade (1947), Art. XX, July 1986, U.N.T.S 194.

<sup>13</sup> Appellate Body Report, US-Gasoline (DS2).

<sup>7</sup> Report, Colombia – Indicative Prices and Restrictions on Ports of Entry (DS366).

<sup>8</sup> Report, China – Measures Related to the Exportation of Various Raw Materials, (DS394, 395, 398).

The chapeau ensures that the general principle of international law, the principle of good faith is met and prevents the abuse of measures and powers vested under Article XX and the interpretation should be in lights of drawing a balance between the rights of members, trade liberalization benefits, Article XI and Article XX or other GATT provisions.<sup>14</sup> The burden of proof regarding the validity and justifiability of the restrictions would vest with the State imposing such restrictions.

The GATT Article XX(b) that deals with the measures taken to protect human, animal or plant life can be closely construed under the sanitary and phytosanitary measures through the SPS Agreements<sup>15</sup>, covering aspects of trade restrictions for the purpose of preserving food-security, safety to life and aspects of environment preservations. It has been observed through cases and precedents discussed by WTO, 90% of the cases regarding with trade restrictions to trade applied through GATT Article XX(b) have been held to be unjustifiable<sup>16</sup> as the tests under the chapeau have not been duly met with. It is pertinent to observe that when such impositions are forwarded and implemented by nations, the policy should be able to justify the stance of such restrictions. Policies relating to trade restrictions due to Covid-19, implemented to be protect human life/health is considered to be the most crucial policy objective implemented<sup>17</sup>, which would mean that if the Nation is able to justify the reasons for the imposition of restrictions and embargos, they can claim the grounds under GATT Article XX.

Another relevant provision under GATT is Article XXI that deals with measures that can be adopted by members to protect the 'security' interest of the State. Article XXI is wider in application as it provides no fixed meaning to

what would entail to fall under 'security interest' and the discretion is vested with the member nation to determine as to what can be determined as acts done for ensuring security interest; along with Article XXI not having a chapeau that prevents abuse of the powers, hence giving the nations discretion to determine the same. It is observed that apart from the 2019 Russia-Ukraine dispute<sup>18</sup>, members have not presented issues under Article XXI before the WTO dispute settlement bodies.<sup>19</sup>

When it comes to restrictions surrounding foodstuffs, States would find it feasible to approach these measures under Article XXI rather than Article XX. The measures under GATT Article XXI can arise when there exists an international emergency regarding the relationships between States. The Pandemic would fall under such an emergency due to international tension and can in the meanwhile assist in strengthening the relationships between Nations.<sup>20</sup> Member States are to establish that such measures are not implausible and have been adopted to ensure that there is adequate domestic food security<sup>21</sup>, while simultaneously ensuring that there is not disruption to the global supply chains. But the approach under Article XXI comes with its own shortfall of justifications as claims around 'public health' would not justify the trade restriction.

## NON-GATT MEASURES:

<sup>18</sup> Panel, Russia- Measures concerning traffic in transit, WT/DS512/R.

<sup>19</sup> Justifiable reasons, available at [https://www.meti.go.jp/english/report/data/2016WTO/pdf/02\\_06.pdf](https://www.meti.go.jp/english/report/data/2016WTO/pdf/02_06.pdf)

<sup>20</sup> Vikoriia Lapa, *GATT Article XXI as a way to Justify Food trade restrictions adopted as a response to COVID-19*, Regulating for Globalization, Apr.10<sup>th</sup> 2020, WOLTERS KLUWER, available at: <http://regulatingforglobalization.com/2020/04/10/gatt-article-xxi-as-a-way-to-justify-food-trade-restrictions-adopted-as-a-response-to-covid-19/>

<sup>21</sup> Robert L. McGeorge, *Accommodating Food Security Concerns in a World of Comparative Advantage: A Challenge for GATT's International Trade System*, 71 NEBRASKA LAW REVIEW 368 (1992).pp.416-420.

<sup>14</sup> Report, US – Shrimp (DS58).

<sup>15</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493.

<sup>16</sup> Data has been taken from [https://www.meti.go.jp/english/report/data/2016WTO/pdf/02\\_06.pdf](https://www.meti.go.jp/english/report/data/2016WTO/pdf/02_06.pdf)

<sup>17</sup> Report, Brazil – Retarded Tires (DS332).



The GATT provisions are supplemented with the SPS Agreement and the TBT Agreement since 1995.<sup>22</sup> The SPS Agreement stands in furtherance of the GATT Article XX(b) as it covers protection of human, animal or plant health, and the measures under the SPS agreement are the subset of health measures that facilitate the grounds under GATT Article XX(b). Article XX(b) while being wide, the SPS Agreement covers a limited ground of measures that can be adopted to protect against disease-carrying organisms, plants or animals and other restriction on additives, toxins imposed on food and feedstuff.<sup>23</sup> The SPS Agreement encourages parties to adopt international set standards/ guidelines/ principles/ recommendations or any other measure that is at par with such general set of principles which can be equally enforced and is scientifically justified. The difference between the SPS Agreement and the TBT Agreement is that SPS Agreement deal with measures that can be imposed while imposing bans or restrictions and the TBT Measures provide for technical measures and practices to be adopted while determining as to what goods are to be allowed, or prevent deceptive trade practices keeping in mind the safety to life and environment. Measures against the Covid-19 would fall under the former provisions of the SPS Measures.

The TBT Agreement on the other hand pertains to technical restrictions and regulations such as product standards (mandatory and non-mandatory). These measures are to be taken when the SPS Agreement falls short of addressing such measures. The TBT Agreement under Article 22 deals with technical regulations that can be undertaken to protect the grounds under GATT Article XX. Testing and justifying the measures

and any breach under SPS Agreement, GATT and the TBT agreement are considered to be independent of each other. The TBT Agreement provides for a set of international standards that are to be used and conformity with assessment procedures to be followed when a State is to restrict or ban trade. TBT also imposes members are not to discriminate the goods of other members and must seek to avoid unnecessary obstacles to trade. Hence, when a State is to impose a ban on goods, it is obliged to follow the set standards under international practice or those under the TBT Agreement or even the standards that are set by the WTO.

### **MAINTENANCE OF ARTICLE III WHILE IMPOSING RESTRICTIONS:**

Trade restrictions must keep close consideration of not violating the two essential underlying principles of international commercial law- National Treatment (NT) as provided under GATT Article III and the Most Favored Nation (MFN) as provided under GATT Article I. National treatment ensures that member nations of the WTO do not discriminate imports from various nations vis-à-vis domestic products and the MFN principle requires that all interacting members in the trade group are given the equal stance and benefits. These two principles can be seen to have been embedded under GATT Article XI that has been discussed above.

It is observed that unlike GATT Article III, measures under Article XI cannot be interpreted in a manner that would consider social and cultural factors motivating the restrictions. This aspect can nevertheless be linked to the provisions under the ICESCR.<sup>24</sup> Interpretation of GATT Article XI have been limited to its scope rather than its substance.<sup>25</sup> The interplay between GATT Article XI and Article III can be seen to depict as to how members are prohibited from

<sup>22</sup> Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) (Marrakesh, 15 April 1994); Agreement on Technical Barriers to Trade (TBT Agreement) (Marrakesh, 15 April 1994).

<sup>23</sup> SPS Agreement Annex A (summary of the detailed definition drawn from S Charnovitz 'The Supervision of Health and Biosafety Regulation by the World Trade Rules' (2000) Tulane Env'tl LJ 271, 176).

<sup>24</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1996, United Nations Treaty Series, vol. 993, p. 3.

<sup>25</sup> Button, Catherine. "Review of Health Measures under GATT." *The Power to Protect: Trade, Health and Uncertainty in the WTO*. London: Hart Publishing, 2004. 9–42. BLOOMSBURY COLLECTIONS.

imposing restrictions that bar market access primarily, provided that these measures are in consonance with the exceptions under GATT Article XX and Article XI along with ensuring that such acts do not impede with the non-discriminatory test under Article III.<sup>26</sup> There exists a paradox which cannot be adequately addressed under GATT when it comes to drawing a line as to what measures can be validly held under Article XX or Article XXI so that it is not violative of Article III, and whether or not such measures can be taken to protect domestic interests and security which are crucial to the State's sovereignty even when it can be seen to be discriminatory against other Nations. Such drastic measures can be allowed if the State imposing it can defend their stance by being able to establish a strong 'health case'.<sup>27</sup> Restrictions on grounds of legitimate health concerns can be translated into regulatory measures if it can be established that these measures and policies are not arbitrary nor discriminatory and can be scientifically justified.<sup>28</sup>

Hence, for the validity of the exclusionary measures adopted, the acts can be justified under Article XI if grounds under Article III can not be well established. But nevertheless, under Article XX, these grounds can be furthered in justification provided that the application is narrow as they are exceptions which are to be interpreted in accordance with the general rules of treaty obligations and interpretations. GATT Article XI has been interpreted under a straight-jacket formula as there is little jurisprudence around it that can tackle the arising concerns around such unprecedented impacts on trade due to the outbreaks of such Pandemics.

## CORRELATION OF CUSTOMARY INTERNATIONAL LAW DEFENCES AND GATT DEFENCES:

The Covid-19 Pandemic has caused challenges to investors, trading parties, States across the globe due to which many have ceased or suspended their treaty obligations due to lockdowns imposed by the nations. Going on the grounds of general international law principles, the burden would be on the State to establish that their acts have not breached or frustrated the Treaty requirements between the nations. States can be seen to have implemented the two wide grounds of defenses available, viz. (a) treaty exception or (b) customary international law defenses.

Treaty exceptions can either be included in the Investment treaty or can even fall under the general exceptions under GATT. The exceptions carve out the way for no liability that can be imposed on the defaulting party. The customary defenses, codified under the ILC Articles on State Responsibility<sup>29</sup> that can be related to the breaches due to Covid-19 would be *force majeure*, necessity and distress. Under the chapeau of GATT Article XX or under Article XXI, measures adopted which restrict trade have to be adopted when there are significant threats and such measures adopted to tackle the threat has to be reasonable, proportional and adopted in good faith.

It is observed that the ground of 'necessity' as a ground of defence can be associated with GATT Article XX and Article XXI. The grounds of necessity arise when the 'essential interest' of the State or the other parties are threatened, especially when such a threat is towards the population.<sup>30</sup> Under both the grounds, the parties are to establish that such measures taken should be the most feasible action that is undertaken to prevent any impending harm and must be 'proportional'. Furthermore such grounds can be claimed when there are no alternatives that

<sup>26</sup> Weiler 'The Constitution' (n 18) 356, 361. For a contemporary account of Art XI being moribund, see: RE Hudec Adjudication of International Trade Disputes (Trade Policy Research Centre London 1978) 19.

<sup>27</sup> 4 EC-Measures Affecting Asbestos and Asbestos-Containing Products WT/DS135/AB/R AB Report adopted 6 April 2001 ('Asbestos').

<sup>28</sup> WTO Agreements & Public Health: A joint study by the WHO and WTO Secretariat, 2002, available at [https://www.wto.org/english/news\\_e/pres02\\_e/pr310\\_e.htm](https://www.wto.org/english/news_e/pres02_e/pr310_e.htm)

<sup>29</sup> Responsibility of States for Internationally Wrongful Acts, 2001, Dec. 12<sup>th</sup> 2001, UNGA Resolution 26/83.

<sup>30</sup> National Grid P.L.C v. Argentine Republic, Case: 1:09-cv-00248-RBW, Award Decided on Nov. 3<sup>rd</sup> 2008.

the State can adopt to prevent the spread or impact of the threat, nor would there exist a Less Trade Restrictive (LTR) measure that can be available to the parties in order to substitute the trade restriction or embargo.<sup>31</sup>

### ADDRESSING THE SHORTCOMINGS:

Since the outbreak and the imposition of Trade restrictions, Nations and trading groups have begun realizing the shortcomings and potential harms that such trade restrictions would pose in the near future. Nations are permitted to imposed restrictions on grounds of meeting the conditions such as they have to notify the WTO and other members prior to imposing the restrictions and such restrictions should be temporary. Many nations due to the suddenness hadn't abided by these two grounds of requirements and have only recently begun providing the information and the compliance requirement under the GATT provisions.

Trade between nations are built on the grounds of trust and confidence and are primarily entered into by means of Bilateral Treaties and Regional Trade Agreements. Nations through these arrangements have ensured that their trade chains are least disrupted. A few of the possible means through which nations have tried and tackled the restraints in trade are by the following measures:

a. Knee-jerk Policy: This measure is usually adopted by nations with a strong economic and trade foundation. The Knee-jerk policy approach tends to promote national production by means of improving domestic capacities in crucial sectors along with re-shoring the products closer to the producing nation. Through this approach, companies are even provided with incentives such as tax deductions and subsidies.<sup>32</sup> This approach

ensures that there is no distortion in trade between the other nations while ensuring domestic safety and availability of goods.

b. Regional Supply chains: Nations and trading groups can extend their arms to welcome dependent/developing nations within their trade circles to ensure that they are able to create and ensure strong international relations. Groups like OPEC, ASEAN NAFTA can focus on developing practices and policies to ensure a better economic recovery for the worst hit nations due to the Pandemic.

c. G20s approach- the G20s has begun taking steps to ensure that nations do not face shortages in food items and have also directed nations to ensure that they do not engage in excessive and unnecessary stockpiling of essentials. But this approach taken by the G20 nations is mere declaratory and not mandatory. The G20 can approach this mechanism and proposal in a stronger manner by setting set standards for economic-growth by partnering with the OCED, WTO, IMF and World Bank.

d. Stronger reliance on sound practices regarding Agricultural trading: Measures taken by the Cairns Group, Ottawa Group to ensure a strong and sound agricultural trading market by increasing the engagement and flux of trade between the WTO members, which can ensure an overall sustainable and beneficial economic recovery.<sup>33</sup> The Nations can adopt and amend the measures and grounds provided under the GATT Agreement on Agriculture<sup>34</sup> to provide for redressal to the shortfall in trade due to the Covid-19 Pandemic.

e. Developing 'Green Lanes': Nations can develop their 'Green Lanes' at their borders to ensure that the customs and flux of trade through borders to facilitate smoother clearance of essential goods that are imported from their

<sup>31</sup> US-Section 337 of the Tariff Act of 1930 Report adopted 7 November 1989 BISD 36S/345 ('Section 337') para 5.10 confirmed in: Japan-Alcohol II AB Report (n 4) DSR 1996:I97, 111

<sup>32</sup> Rajesh Chadha, *Fractured Global Value Chains post COVID-19: Can India gain its missed glory?*, 2020, <https://www.brookings.edu/blog/up-front/2020/05/11/fractured-global-value-chains-post-covid-19-can-india-gain-its-missed-glory/>

<sup>33</sup> "COVID-19 Initiative: Protecting Global Food Security through Open Trade", 17 June 2020, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filenam e=Q:/WT/GC/218.pdf>.

<sup>34</sup> Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S 410.

trading partners. This can also improve the situation under the TBT Agreement.

f. Arriving at new trade relations and compromises to ensure that the disruption is reduced.

g. Setting up fixed standards that can be attributed to GATT Article XI and Article XX by having a limitation on the extent to which Nations can adopt such practices by ensuring that they are able to sufficiently support the economically worse off nations whilst ensuring their own national interest.

### RESOLVING CONFLICT OF INTERESTS:

The GATT provisions had anticipated that contractual trading relationships between nations would potentially lead to a rise in inter-state strains due to conflict of interest, hence to address and provide for amicable means of conflict resolution on grounds of “sympathetic consideration” it has provided for redressal of conflicts through means of consultation between contracting nations.<sup>35</sup> This approach includes but is not restrictive to diplomatic adoption of practices such as conciliation, mediation, negotiation and arbitration as well in order to resolve trade conflicts. The above mentioned practices should be followed keeping two key principles in mind which are good faith and non-contentious proceedings.

In order to primarily resolve such disputes either by adopting formal or informal measures using diplomatic relations, the GATT formulated the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) which had seen major reforms until 1994. The DSU majorly addresses disputes between

contracting parties who are members of the WTO by creating a special Dispute Settlement Body (DSB) and Appellate Body, where the DSB is to oversee the process of dispute resolution as adopted by the various panels that are formed to address such issues.

To prevent any conflict that would arise due to trade restrictions arising due to the pandemic, the G20 nations on 26<sup>th</sup> March 2020 had also declared that the member nations would take measures to ensure that there are no conflicts that would arise due to trade disruptions by adopting measures to facilitate a smooth cross border transaction between contracting nations.<sup>36</sup>

The orders passed by the adjudicatory panels are deemed to be binding on the disputing parties and have been seen to be one of the greatest achievements of the GATT under the WTO regime. To tackle the restrictions that arise due to adoption of measures restricting trade under the veil of Articles XI, XX and XXI of the GATT, nations are to adopt practices where the agreements between the, should try and provide for provisions that refrains traders and exporters in resorting to export restrictions, but such an approach is practically challenging as there are exceptions that arise to facilitate emergency responses to crisis, yet the challenge that such measures would face is that in a temporality, it would be seen to be incompatible to the rule-based dispute settlement mechanisms.<sup>37</sup>

### CONCLUSION:

Measures taken under the grounds of GATT Article XX, Article XXI or based on the principles of international customary law, it is

<sup>36</sup>DDG Wolff outlines measures taken in response to COVID-19, highlights key role of WTO, WTO, April 1<sup>st</sup> 2020, accessible at:

[https://www.wto.org/english/news\\_e/news20\\_e/ddgaw\\_01apr20\\_e.htm](https://www.wto.org/english/news_e/news20_e/ddgaw_01apr20_e.htm).

<sup>37</sup>Sebastian Jean, *How the Covid-19 Pandemic is Reshaping the Trade Landscape and What to do about it*, Intereconomics Vol 55, pp-135-139, available at:

<https://www.intereconomics.eu/contents/year/2020/number/3/article/how-the-covid-19-pandemic-is-reshaping-the-trade-landscape-and-what-to-do-about-it.html#footnote-005>

<sup>35</sup>General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXII, XXIII:1, 61 Stat. A11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. See also GATT art. VI:7, XII:4, XVI:1, XIX:2, XXVIII (bilateral or multilateral consultations for resolution of restrictive trade measures); GATT art. XII:4, XIX:3, XXIV:7, XXIV:10, XXV:5, XXVIII:4 (multilateral dispute resolution); GATT Secretariat, Negotiating Group on Dispute Settlement GATT Dispute Settlement System Note, MTN.GNG/NG13/W/4 (June 5, 1987).



essential for the States to observe utmost good-faith while implementing the policies or measures. Measures adopted should not be disguised to meet other vested interest of the State and policies can fail to receive the protection if they are found to be 'well-intended but ill-conceived'. It can be seen as to how WTO panels have not considered regulatory measures as trade restrictions while applying the provisions under GATT Article XI, Article XX and Article XXI whilst keeping in mind the general principles of trade law.

The Quantitative Restrictions under GATT Article XI does bear wide economic distortions on trade. The short term implications affect the distribution of benefits between the exporters and importers as foreign companies tend to shift their investments in import-restricting States and boost their production unfavorably. The effect that it has on the consumers, especially in the developing nations that are not able to tackle the Covid-19 Pandemic due to lack of self-sustenance is that there would be a loss to accessing such essential and competing products, whose quality would be better than the domestically available goods. This leads to a long term effect where domestic producers would tend not to improve the quality of their goods and would also downstream the production.

The measures taken to tackle the Covid-19 Pandemic by States in regulating the paradigms of their trade activities and relations have been seen to be acts that would fall under the 'exceptions'. This paints a general image of a *prima facie* illegal act adopted as the States are prevented from doing so but are given immunity through the general exceptions provided that these measures are confined to the strict limits of the provisions. The exceptions to Article XI through the means of Article XX can be justified only if there exists a reasonable nexus between the objective, the measure and the protection of life, which is the crucial ground to enforce such exceptions to trade.

It is to be observed as well that under the 2014 Agreement on Trade Facilitation, States imposing restrictions and bans are to inform the

WTO about these measures and policies before the enforcement. Due to the unprecedented and sudden spread of the virus which has taken lives at a rapid pace, Nations implemented such restrictions and have subsequently informed the WTO about the same. This initial lack of transparency in trade restrictions made it difficult to record and quantify the changes along with causing severe hardships to import reliant nations due to supply shocks.

When it comes to seeking exceptions and adopting measures to tackle the Covid-19 Pandemic by adopting measures to regulate and restrict trade, the provisions of GATT can be seen to bear open interpretations and can be used in a manner that is feasible by the State to adopt and get away from any legal implications. The provisions merely provide for wide restrictions and exceptions that are to be followed based on a certain pattern. Firstly, the restriction and regulatory actions must be legitimate and should fall within the strict shackles of GATT Article XX(b) which provides for acts that can be undertaken by the State to 'protect human health' or the essential 'security interests' of the State under Article XXI(b). The next requirement is that such measures if adopted should have a well-reasoned and well-established nexus with the aim of the regulatory measures implemented. Lastly, the measures should not disguise itself in having overarching objectives nor should it be arbitrary or discriminatory and must be adopted with utmost good faith. These restrictions should not be perpetual but should be mere temporary measures that do not disrupt the international trade in the long run.

Hence it can be seen as to how Nations have in order to protect their national security and the lives of its citizens have taken such measures under the GATT, SPS and TBT Agreements in light of the Covid-19 Pandemic. These regulations can be seen to just adequately address such concerns but are not well established to provide for sufficient ground of recourse and remedies especially to the developing and import

reliant nations. Nevertheless in order to quickly address such shortfalls and to prevent future losses and strains in international relations, the G20 nations in March have stressed and deliberated on the fact that measures to tackle the Covid-19 must be “targeted, proportionate, transparent and temporary” so that there are no unnecessary barriers and disruptions to the global trade.

## REFERENCES

- [1] World Trade Organization, *Export Prohibitions and Restrictions*, Dt: Apr. 23<sup>rd</sup> 2020, [https://www.wto.org/english/tratop\\_e/covid19\\_e/export\\_prohibitions\\_report\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf) [last accessed: Oct. 12<sup>th</sup> 2020].
- [2] Chad P. Bown, Trump’s Curbs on Exports of Medical Gear Put Americans and Others at Risk, PETERSON INST. FOR INT’L ECON., Apr. 9, 2020.
- [3] Caroline Simson, Covid-19 Claims May Test Tribunals with Thorny Questions, LAW360, Apr. 30, 2020.
- [4] Oona A. Hathaway, After Covid-19, We Need to Redefine ‘National Security’, SLATE, Apr. 7, 2020.
- [5] Anthea Roberts, Henrique ChoerMoraes& Victor Ferguson, Toward a Geoeconomic Order in International Trade and Investment, 22 J. INT’L ECON. L. 655 (2019).
- [6] Data has been taken from the WTO Portal, *accessible here* [https://www.wto.org/english/tratop\\_e/covid19\\_e/trade\\_related\\_goods\\_measure\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm).
- [7] Report, Colombia – Indicative Prices and Restrictions on Ports of Entry (DS366).
- [8] Report, China – Measures Related to the Exportation of Various Raw Materials, (DS394, 395, 398).
- [9] Quantitative Restrictions, *available at* [https://www.meti.go.jp/english/report/data/2015WTO/02\\_03\\_01.pdf](https://www.meti.go.jp/english/report/data/2015WTO/02_03_01.pdf)
- [10] Report, US-Import Restriction on Yellowfin Tuna, BISD 39S/115.
- [11] Report, Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, 1990, DS10/R 37S/200.
- [12] General Agreement on Tariffs and Trade (1947), Art. XX, July 1986, U.N.T.S 194.
- [13] Appellate Body Report, US-Gasoline (DS2).
- [14] Report, US – Shrimp (DS58).
- [15] Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493.
- [16] Data has been taken from [https://www.meti.go.jp/english/report/data/2016WTO/pdf/02\\_06.pdf](https://www.meti.go.jp/english/report/data/2016WTO/pdf/02_06.pdf)
- [17] Report, Brazil – Retarded Tires (DS332).
- [18] Panel, Russia- Measures concerning traffic in transit, WT/DS512/R.
- [19] Justifiable reasons, *available at* [https://www.meti.go.jp/english/report/data/2016WTO/pdf/02\\_06.pdf](https://www.meti.go.jp/english/report/data/2016WTO/pdf/02_06.pdf)
- [20] Vikoriia Lapa, *GATT Article XXI as a way to Justify Food trade restrictions adopted as a response to COVID-19*, Regulating for Globalization, Apr.10<sup>th</sup> 2020, WOLTERS KLUWER, *available at*: <http://regulatingforglobalization.com/2020/04/10/gatt-article-xxi-as-a-way-to-justify-food-trade-restrictions-adopted-as-a-response-to-covid-19/>
- [21] Robert L. McGeorge, *Accommodating Food Security Concerns in a World of Comparative Advantage: A Challenge for GATT’s International Trade System*, 71 NEBRASKA LAW REVIEW 368 (1992).pp.416-420.
- [22] Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) (Marrakesh, 15 April 1994); Agreement on Technical Barriers to Trade (TBT Agreement) (Marrakesh, 15 April 1994).

- [23] SPS Agreement Annex A (summary of the detailed definition drawn from S Charnovitz 'The Supervision of Health and Biosafety Regulation by the World Trade Rules' (2000) Tulane Env't LJ 271, 176).
- [24] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1996, United Nation Treaty Series, vol. 993, p. 3.
- [25] Button, Catherine. "Review of Health Measures under GATT." *The Power to Protect: Trade, Health and Uncertainty in the WTO*. London: Hart Publishing, 2004. 9–42. BLOOMSBURY COLLECTIONS.
- [26] Weiler 'The Constitution' (n 18) 356, 361. For a contemporary account of Art XI being moribund, see: RE Hudec *Adjudication of International Trade Disputes* (Trade Policy Research Centre London 1978) 19.
- [27] 4 EC–Measures Affecting Asbestos and Asbestos-Containing Products WT/DS135/AB/R AB Report adopted 6 April 2001 ('Asbestos').
- [28] WTO Agreements & Public Health: A joint study by the WHO and WTO Secretariat, 2002, available at [https://www.wto.org/english/news\\_e/pres02\\_e/pr310\\_e.htm](https://www.wto.org/english/news_e/pres02_e/pr310_e.htm)
- [29] Responsibility of States for Internationally Wrongful Acts, 2001, Dec. 12<sup>th</sup> 2001, UNGA Resolution 26/83.
- [30] National Grid P.L.C v. Argentine Republic, Case: 1:09-cv-00248-RBW, Award Decided on Nov. 3<sup>rd</sup> 2008.
- [31] US–Section 337 of the Tariff Act of 1930 Report adopted 7 November 1989 BISD 36S/345 ('Section 337') para 5.10 confirmed in: Japan–Alcohol II AB Report (n 4) DSR 1996:I 97, 111
- [32] Rajesh Chadha, *Fractured Global Value Chains post COVID-19: Can India gain its missed glory?*, 2020, <https://www.brookings.edu/blog/up-front/2020/05/11/fractured-global-value-chains-post-covid-19-can-india-gain-its-missed-glory/>
- [33] "COVID-19 Initiative: Protecting Global Food Security through Open Trade", 17 June 2020, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/GC/218.pdf>.
- [34] Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S 410.
- [35] General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXII, XXIII:1, 61 Stat. A11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. See also GATT art. VI:7, XII:4, XVI:1, XIX:2, XXVIII (bilateral or multilateral consultations for resolution of restrictive trade measures); GATT art. XII:4, XIX:3, XXIV:7, XXIV:10, XXV:5, XXVIII:4 (multilateral dispute resolution); GATT Secretariat, Negotiating Group on Dispute Settlement GATT Dispute Settlement System Note, MTN.GNG/NG13/W/4 (June 5, 1987).
- [36] *DDG Wolff outlines measures taken in response to COVID-19, highlights key role of WTO*, WTO, April 1<sup>st</sup> 2020, accessible at: [https://www.wto.org/english/news\\_e/news20\\_e/ddgaw\\_01apr20\\_e.htm](https://www.wto.org/english/news_e/news20_e/ddgaw_01apr20_e.htm).
- [37] Sebastian Jean, *How the Covid-19 Pandemic is Reshaping the Trade Landscape and What to do about it*, *Intereconomics* Vol 55, pp-135-139, available at: <https://www.intereconomics.eu/contents/year/2020/number/3/article/how-the-covid-19-pandemic-is-reshaping-the-trade-landscape-and-what-to-do-about-it.html#footnote-005>