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EXPORT RESTRICTIONS ON COVID-19 VACCINES: WHAT DEVELOPING COUNTRIES CAN DO UNDER THE WTO LAW?

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Abstract

The COVID-19 pandemic has wreaked havoc on the global economy and trade, since production and consumption have been reduced around the world. The production and distribution of COVID-19 vaccines caused unequal distribution as some developed countries have imposed export restrictions. As a result, wealthier countries are resuming normalcy, while the rest of the world continues to struggle to vaccinate its citizens. Article XI(2)(a) of The General Agreement on Tariffs and Trade exceptions allow members the legal ability to impose export restrictions if they meet specific criteria: they must be temporary, confined to foodstuffs and vital products, and enforced in the context of preventing and easing critical shortages. Export restrictions on COVID-19 vaccine applied by developed countries appear to meet these criteria, given that all of these countries are facing a shortage, and the restrictions are being placed to alleviate it. Responding to this unpleasant measure, this article finds that developing countries may employ two available alternative measures, namely compulsory licensing and security exceptions under the General Agreement on Tariffs and Trade, and the Agreement on Trade-Related Aspects of Intellectual Property Rights to protest unequal distribution of vaccines around the world.

Keywords : Covid-19 vaccines, developing countries, export restrictions, WTO law

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I. INTRODUCTION

Under the General Agreement on Tariffs and Trade (GATT), export restrictions did not get nearly as much attention as they did when it came to import restrictions in the past.¹ However, the situation has radically shifted over the last decade, and several countries – particularly natural resource producers – have imposed taxes, quotas and prohibitions on exports.² These actions are being taken for a variety of reasons. The first is due to a shortage of

¹ Stephanie Switzer, Leonardus Gerber and Francesco Sindico, “Access to Minerals: WTO Export Restrictions and Climate Change Considerations,” *Laws* 4 (2015): 631. [HTTPS://DOI.ORG/10.3390/LAWS4030617](https://doi.org/10.3390/LAWS4030617)

² Jack Quirk, “COVID-19 and Export Restrictions: The Case for Free Trade,” *Loyola University Chicago International Law Review* 17, no. 2 (2021): 154. <https://lawcommons.luc.edu/lucilr/vol17/iss2/4>

natural resources, among other things, by rising global population³ and BRICS countries' rapid economic expansion.⁴ Furthermore, environmental protection⁵ and the encouragement of downstream industries are crucial justifications for export limitations.⁶ Members of the World Trade Organization (WTO) are also increasingly issuing export restrictions on specific products. For instance, the United States implemented export controls to limit the export of petroleum products and western red cedar, deeming it important to protect domestic industries.⁷

Since 2020, export restrictions have been linked to the coronavirus outbreak. In 2020, 80 nations and customs territories imposed export restrictions on medical items such as ventilators and face masks.⁸ After it was discovered that a Chinese-backed company had transferred these products from Sydney to Shanghai, Australia imposed export limits on masks, gloves, gowns, goggles, visors, hand sanitizers, and alcohol wipes.⁹ In addition to that, South Korea also placed export restrictions on face masks. This led to people in South Korea wearing KF-94 (similar to N-95) face masks on the street, while healthcare workers in Europe became infected with COVID-19 due to a lack of face masks.¹⁰

In 2021, export restrictions have affected the distribution of COVID-19 vaccines. Most countries that can produce vaccines impose export restrictions in order to prioritize the needs of their citizens. For instance, the European Union (EU) passed Regulation 2021/111, which required an export authorization for COVID-19 vaccinations.¹¹ This kind of authorization can be delivered only when the volume of exports do not jeopardize the fulfillment of the Union's Advanced Purchase Agreements with vaccine manufacturers, which have

³ Mark Wu, "China's Export Restrictions and the Limits of WTO Law," *World Trade Review* 16, no. 4 (2017): 674, <https://doi.org/10.1017/S147474561700026X>

⁴ Mitsuo Matsushita, "A Note on the Appellate Body Report in the Chinese Minerals Export Restrictions Case," *Trade Law and Development* 4 no. 2 (2012): 401

⁵ Baris Karapinar, "Defining the Legal Boundaries of Export Restrictions: a Case Law Analysis," *Journal International Economic Law* 15, no. 2 (2012): 479. <https://doi.org/10.1093/jiel/jgs021> [hereinafter Baris Karapinar, "Defining the Legal Boundaries,"]

⁶ Bingwan Xiong and Paolo Davide Farah, "Contextualism in WTO Case Law on Mineral Export Restrictions: Puzzles and Implications," *Asian Journal of WTO and International Health Law and Policy* 15, no. 2 (2020): 504.

⁷ I Gusti Ngurah Parikesit Widiatedja, "Indonesia's Export Ban on Nickel Ore: Does It Violate the World Trade Organization (WTO) Rules?" *Journal of World Trade* 55, no. 4 (2021): 668

⁸ "WTO Report Finds Growing Number of Export Restrictions in Response to COVID-19 Crisis", accessed 14 September 2021, https://www.wto.org/english/news_e/news20_e/rese_23apr20_e.htm.

⁹ "Armed to Respond: Flu Jabs Crucial as Fight Ramps Up," *Herald Sun*, 1 April. 2020, 6.

¹⁰ *Ibid.*

¹¹ "Coronavirus: WHO criticises EU Over Vaccine Export Controls," Accessed 12 December 2021, <https://www.bbc.com/news/world-europe-55860540>. [hereinafter "Coronavirus: WHO criticises EU"]

been negotiated.¹² Along the same lines, India imposed COVID-19 vaccine export restrictions due to the significant impact the virus had on the country. Despite previous agreements and contracts with international customers, the government is limiting COVID-19 vaccine exports due to its vital necessity.¹³ Finally, under the Defense Production Act (DPA), the United States (US) has imposed export limitations on essential raw materials used in the creation of COVID-19 vaccines, with the goal of putting domestic distribution first and the use of COVID-19 vaccines as well as personal protective equipment.¹⁴

Export restrictions are ineffective in achieving fair and reasonable policy goals because they can result in significant domestic and global welfare losses.¹⁵ These kinds of restrictions have dire consequences in the distribution of COVID-19 vaccines. After eighteen months of the epidemic, about 1.5 billion vaccine doses have been delivered worldwide.¹⁶ However, only ten nations have gotten 75 percent of the vaccines available.¹⁷ Only 25 million vaccine shots have been distributed across the entire African continent, which has a population of 1.36 billion people.¹⁸ While wealthy countries race to buy enough vaccines to vaccinate their whole population multiple times, many of the world's poorest countries struggle to protect their health workers.¹⁹ This enormous vaccine disparity and injustice is not only a moral failing, as WHO Director Tedros Ghebreyesus had stated, it is also an economic and human rights disaster, as well as self-defeating²⁰

Under the WTO, Article XI(2)(a) GATT exceptions allow members to impose export restrictions if they meet specific criteria: they must be temporary, confined to foodstuffs and vital products, and enforced in the context of preventing and easing critical shortages. Export restrictions on COVID-19 vaccines applied by developed countries appear to meet these criteria, given that they are facing a shortage, and the restrictions are being placed to alleviate

¹² *Ibid.*

¹³ Sara Jerving, "Countries May Stall COVID-19 Vaccinations due to Indian Export Limits," Accessed 24 October 2021, <https://www.devex.com/news/countries-may-stall-covid-19-vaccinations-due-to-indian-exportlimits-99548>. [hereinafter Sara Jerving, "Countries May Stall COVID-19 Vaccinations."]

¹⁴ Anshu Siripurapu, "What Is the Defense Production Act?" Accessed 7 January 2022, <https://www.cfr.org/in-brief/what-defense-production-act>. [hereinafter Anshu Siripurapu, "What is the Defense Production Act?"]

¹⁵ Baris Karapinar, "Defining the Legal Boundaries," 480

¹⁶ Els Torrelee, et al, "Equitable COVID-19 Vaccine Access," *Health and Human Rights Journal* 23, no. 1 (2021): 275.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Godwell Nhamo, et. al., "COVID-19 vaccines and treatments nationalism: Challenges for low-income countries and the attainment of the SDGs, *Global Public Health*, 16 no. 3 (2021): 320. <https://doi.org/10.1080/17441692.2020.1860249> [hereinafter "COVID-19 vaccines and treatments nationalism."]

²⁰ Els Torrelee, et al, "Equitable COVID-19 Vaccine Access," *Health and Human Rights Journal* 23, no. 1 (2021): 276.

it. Looking at the current unequal distribution of the vaccines, this paper analyzes what developing countries can do under the WTO Law to respond to export restrictions on COVID-19 vaccines.

To begin, this paper denotes a detailed account of the law relevant to export restrictions under the WTO. It analyzes the WTO judicial decisions, showing real evidence of the ways in which these laws work. There is also an overview of export restrictions on COVID-19 vaccines, stating why and how this measure gets underway. It examines whether this measure is consistent with the WTO Law. Finally, this paper explains any possible measures of developing countries to respond to these restrictions.

II. EXPORT RESTRICTIONS UNDER THE GATT 1994 AND THE WTO JUDICIAL DECISIONS

Export restraints are defined as follows in the WTO Panel Report in *the United States—Measures Treating Export Restraints as Subsidies*:

*"A border measure that takes the form of a government law or regulation which expressly limits the number of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the products calculated to limit the number of exports."*²¹

Export constraints were defined by some analysts as measures put in place by exporting countries to regulate export flows.²² Export limitations can take many forms, including taxes, tariffs, and fees, quotas, prohibitions, mandatory minimum export prices, and stringent export licensing procedures.²³ Export limitations are divided into two categories: economic and non-economic aims. Economic goals include increasing government revenue, bolstering downstream businesses, and limiting price volatility.²⁴ Non-economic goals, on the other hand, include environmental protection and national security.²⁵ Article XI: 1 of the 1994 GATT is the fundamental WTO article pertaining to quantitative export limits. It explains that:

²¹ Panel Report, "United States - Measures Treating Export Restraints as Subsidies," adopted 23 August 2001, WT/DS194/R, accessed 18 September 2021, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds194_e.htm

²² Jane Korinek and Jessica Bartos, "Multilateralising Regionalism: Disciplines on Export Restrictions in Regional Trade Agreements," *OECD Trade Policy Papers*, No. 139 (2012): 7.

²³ Eric W. Bond and Joel Trachtman, "China - Rare Earths: Export Restrictions and the Limits of Textual Interpretation," *World Trade Review* 15, no. 2 (2016): 191. <https://doi.org/10.1017/S1474745615000695>

²⁴ Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: WTO and Beyond* (Oxford University Press, 2011), 145–146.

²⁵ Dylan Geraets, "Export Restrictions on Critical Minerals and Metals - Testing the Adequacy of WTO Disciplines," *World Trade Review* 16, no. 1 (2017): 149. <https://doi.org/10.1017/S1474745616000422>

*“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party [...] on the exportation or sale for export of any product destined for the territory of any other contracting party.”*²⁶

In other words, export levies, taxes, and other charges are permitted, but any other measures limiting the amount of product exports are prohibited. Bans, quotas, minimum prices, and non-automatic licensing systems are examples of quantitative measures. Excessive customs fees are prohibited by Article VIII of the GATT, which pertains to measures imposed in connection to customs procedures, and fees must not be used to: (i) tax exports for fiscal purposes; or (ii) provide indirect protection to domestic products.²⁷ Article XI:2 (a) then makes an exemption to Article XI: 1, stating that “export prohibitions or limitations temporarily applied to prevent or relieve serious shortages of foodstuffs or other essential products to the exporting contracting party” are not included.²⁸ The following WTO Judicial Decisions then discussed export restrictions at length.

A. CHINA – MEASURES RELATED TO THE EXPORTATION OF VARIOUS RAW MATERIALS

The WTO’s first big case was *China – Measures Related to the Exportation of Various Raw Materials (2011) (China – Raw Materials)*. The lawsuit revolved around several violations of the GATT’s Articles XI and XX.²⁹ The U.S, the E.U, and Mexico filed a WTO case against China for imposing export limits and levies on raw resources such as bauxite, white phosphorus, lead, magnesium scrap, manganese scrap, zinc scrap, and silicon carbide.³⁰ When it set export limitations on those materials, China reportedly violated Article XI:1 of the GATT 1994. The Panel and the Appellate Body (AB) then investigated whether China’s export restrictions on specific minerals were in violation of Article XI, or whether Article XX(b) and XX(g) could be used to justify it.³¹

²⁶ See General Agreement on Tariffs and Trade 1994, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), art XI [GATT 1994].

²⁷ *Ibid.*, art. VIII.

²⁸ *Ibid.*, art. XI:2.

²⁹ Panel Report, “China - Measures Related to the Exportation of Various Raw Materials,” adopted 22 February 2012, WT/DS394/R; WT/DS395/R; WT/DS398/R, Accessed 17 October 2021, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm [hereinafter China Panel Report]

³⁰ Xiong and Farah, “Contextualism in WTO Case Law,” 505.

³¹ Appellate Body Report, “China — Measures Related to the Exportation of Various Raw Materials,” adopted 22 February 2012, WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R, Accessed 22 October 2021, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm [hereinafter China AB Report] (accessed 24 Jul. 2020)

1. Article XI of the GATT 1994

To assess whether China's measure met the requirements of Article XI:2(a) of the GATT 1994, the Panel and the AB looked at a number of key terms, including "temporarily applied", "to prevent or relieve critical shortages", and "foodstuffs or other essential products".³²

a. "Temporarily" Applied

The AB defined the notion of "temporary" under Article XI:2(a) of the GATT 1994 as "[l]asting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need".³³ It reflected a measure taken for a limited period, a measure taken to channel a "passing need" when it was related to the word "applied".³⁴ The AB agreed with the panel's conclusion in this issue, finding that China did not meet the standards of GATT Article XI:2(a) because its refractory-grade bauxite export quotas did not appear to be temporary or targeted at preventing a catastrophic shortage.³⁵ The export quotas in question, for example, had been in place for roughly ten years at the time of the dispute, and it appeared that China intended to keep them in place until their stocks were depleted.³⁶

b. Prevent or relieve a "critical shortage"

The AB stated that "critical shortage" referred 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".³⁷ The AB also looked at how the types of shortages that followed Article XI:2(a) were more limited than those that followed Article XX (j).³⁸ The AB used the phrase "general or local short supply" in Article XX(j) of the GATT 1994 to interpret the term "critical shortage" in Article XI:2(a).³⁹ The AB defined "in short supply" as "available only in a limited number, scarce" by the AB.⁴⁰ As a result, it had the same meaning as the word "shortage".⁴¹

If the scarcity was not temporary, the AB concurred with the panel that simply banning exports would not be enough to "relieve or prevent" it.⁴² To

³² *Ibid.*, para. 322.

³³ *Ibid.*, para. 323.

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 344.

³⁶ China Panel Report, para.7.350.

³⁷ China AB Report, para. 324.

³⁸ *Ibid.*, para. 325.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² China Panel Report, para.7.351.

put it another way, the keywords “critical shortage” and “temporarily applied” were linked. China’s plan was to keep the measure in place indefinitely, until the anticipated lifespan of 16 years had passed.⁴³ Hence, it should be considered something else than a “critical shortage.” As a result, the action would not be considered “temporarily applied” to prevent or relieve a “critical shortage,” as specified in Article XI:2 (a).⁴⁴

c. “Essential” Products

The term “essential to” was defined by the panel as “absolutely necessary” and “indispensably requisite”, among other things.⁴⁵ It was thus deduced that the relevance of a product should be assessed based on the country’s unique conditions. As a result, a product may be considered “essential” under Article XI:2(a) if it was “important”, “necessary”, or “indispensable” to a certain Member.⁴⁶ Article XI:2(a) offered a measure of what would be considered a product “important to the exporting Member” by incorporating the word “foodstuffs,” but it did not limit the scope of other necessary products to merely foodstuffs, according to the AB.⁴⁷

Iron and steel industries in China claimed to utilize 70 percent of refractory-grade bauxite.⁴⁸ Iron and steel were also items that were primarily employed in downstream production. The panel agreed with this contention, stating that refractory-grade bauxite was “important” to China under Article XI: 2 of the Agreement (a).⁴⁹ Despite the fact that the action was “necessary”, it was neither “temporary” nor “intended to prevent a critical shortage”. For these reasons, the AB affirmed the Panel’s finding that China failed to show that its refractory-grade bauxite export quota was “temporarily applied”, as defined by Article XI:2(a) of the GATT 1994, to either avert or relieve a “critical shortage.”⁵⁰

d. Article XX(b) of the GATT 1994

GATT Article XX(b) was then invoked by China, which stated that export limitations were principally aimed at reducing dangers to human, animal, and plant life and health.⁵¹ China claimed that scrapping limitations would boost domestic supply, facilitating a shift in Chinese finished product manufacturing

⁴³ *Ibid.*

⁴⁴ *Ibid.*,

⁴⁵ *Ibid.*, para. 7.261–63.

⁴⁶ *Ibid.*, para. 7.275–76.

⁴⁷ China AB Report, para. 326.

⁴⁸ China Panel Report, para. 7.313

⁴⁹ *Ibid.*, para. 7.340.

⁵⁰ China AB Report, para. 344.

⁵¹ China Panel Report, para. 7.470-71.

from primary resources (extracted minerals) to secondary materials (scraps).⁵² China also claimed that imposing mineral export restrictions was part of its environmental policy aimed at safeguarding the lives and health of its citizens.⁵³

The Panel looked into whether these limits fell within the framework of policies aimed at protecting human, animal, and plant life and health.⁵⁴ They looked at the form and design of restrictions with a degree of deference to Members' policies aimed at "protecting human, animal, or plant life or health."⁵⁵ The second test was to see if these constraints were "necessary" to achieve the stated policy objectives.⁵⁶ The Panel defined three characteristics for *Brazil – Retreaded Tyres*, namely "the importance of the interests or values at issue; the extent of the contribution to the achievement of the measure's aim; and the measure's trade restrictiveness."⁵⁷ The restriction must then be validated by comparing it to possible alternatives suggested by the complainants, if a preliminary determination that it is essential exists.⁵⁸

After reviewing some of China's legislation and regulations, the Panel decided that they did not touch on health or environmental issues.⁵⁹ The Panel looked through China's Eleventh Five-Year Plan for Environmental Protection (2006-2010) and found no mention of export limitations on raw materials having the purpose of decreasing pollution caused by their manufacturing and thereby enhancing public health.⁶⁰ There was also no mention of export restrictions in general in the Plan.⁶¹ As a result, export restrictions did not contribute to or form part of a cohesive strategy for meeting the government's stated environmental goals.⁶²

The Panel highlighted various measures, such as incentive schemes, research grants, labeling, and recycling laws, that have been employed in industrialized nations to promote the development of the secondary industry when assessing possible alternative measures.⁶³ The Panel discovered that China was implementing recycling infrastructure measures to help the scrap

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*, para. 7.479.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, para. 7.480.

⁵⁷ *Ibid.*, para. 7.481.

⁵⁸ *Ibid.*, para. 7.489.

⁵⁹ *Ibid.*, para. 7.501.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, para. 7.501.

⁶² *Ibid.*, para. 7.512.

⁶³ *Ibid.*, para. 7.610.

supply grow faster.⁶⁴ As a result, the Panel determined that China's export limitations did not come within the spectrum of policies aimed at protecting human, animal, or plant life or health, and that they were not "necessary" to address these health or environmental concerns, and hence were not justified under Article XX (b).⁶⁵

B. CHINA – MEASURES RELATED TO THE EXPORTATION OF RARE EARTHS, TUNGSTEN, AND MOLYBDENUM

China imposed export levies and quotas on certain rare earth elements, tungsten, and molybdenum in 2012, reinforcing its export restrictions.⁶⁶ Based on Article XX(b), China maintained that they were required to preserve human and animal life and health from the damaging impacts of such mining.⁶⁷ Furthermore, they were justified under Article XX(g) since they "relate to the conservation of finite natural resources" and are "implemented in combination with domestic production or consumption limits."⁶⁸ China broke its promises under paragraph 11.3 of its Accession Protocol and GATT Article XI:1.4, according to the EU, Japan, and the US, who filed a lawsuit with the WTO.⁶⁹

China claimed that rare earth, tungsten, and molybdenum mining and production harmed the environment and, as a result, the health of the Chinese people, plants, and animals.⁷⁰ According to Article XX(b), export limitations were necessary to prevent these environmental and health problems from the harmful effects of such mining.

Similar to *China – Raw Materials*, the Panel considered whether export limitations fell within the framework of regulations aimed at protecting human, animal, or plant life or health when examining a defense under Article XX(b).⁷¹ The next criterion was whether the measure was "necessary" to achieve the policy goal, which was determined by weighing four factors: the importance of the interests or values at stake, the degree of contribution to the measure's goal, its trade restrictiveness, and the existence of possible

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, para. 7.611.

⁶⁶ Panel Report, "China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum," adopted 29 August 2014, WT/DS431/R; WT/DS432/R; WT/DS433/R, Accessed 18 November 2021, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm [hereinafter China 2 Panel Report]

⁶⁷ *Ibid.*, para. 7.49-7.114.

⁶⁸ *Ibid.*, para.7236.

⁶⁹ Appellate Body Report, "China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum," adopted 29 August 2014, WT/DS431/AB/R; WT/DS432/AB/R; WT/DS433/AB/R, Accessed 19 November 2021, https://www.wto.org/english/tratop_e/dispu_e/431_432_433abr_e.pdf [hereinafter China 2 AB Report]

⁷⁰ China 2 Panel Report, para. 7149

⁷¹ *Ibid.*, para. 7144.

alternative measures proposed by the complainants.⁷²

The Panel agreed that rare earth, tungsten, and molybdenum mining and production have harmed the environment, as well as the lives and health of humans, plants, and animals in China.⁷³ However, the Panel found no meaningful evidence that export limitations were designed and structured to protect human, animal, or plant life or health, similar to *China - Raw Materials*.⁷⁴ After reviewing some of China's national policies, it became clear that they mostly contained language emphasizing the importance of limiting the export of "highly polluting, highly energy-consuming, and resource-intensive" products without specifying whether and how such a restriction would help reduce pollution as part of a comprehensive environmental policy.⁷⁵

Because China has failed to show that these limits are "essential" to protect human, animal, or plant life or health, the Panel may not be required to weigh in on recommended alternatives.⁷⁶ Nonetheless, the Panel decided to look into the complainants' alternative proposals.⁷⁷ The EU demonstrated that China had used "complimentary measures" to achieve its goal of environmental protection, such as complying with the Emission Standards of Pollutants from Rare Earths Industry and requiring mines to build an ecological recovery deposit.⁷⁸ These initiatives eventually made a "substantial contribution" to China's health and environment protection.⁷⁹

III. EXPORT RESTRICTIONS ON COVID 19 VACCINES

A. HOW AND WHY THESE RESTRICTIONS ARE IMPOSED

The phrase "vaccine nationalism" was introduced during the development of the COVID-19 vaccine to describe some countries' efforts to get the vaccine for their own populations.⁸⁰ The UK is expected to get 90 million doses of two vaccine candidates from a partnership between Pfizer Inc and BioNTech, as well as the French company Valneva on 20 July 2020.⁸¹ If the vaccination

⁷² *Ibid.*, para. 7146

⁷³ *Ibid.*, para. 7156

⁷⁴ *Ibid.*, para. 7171

⁷⁵ *Ibid.*, para. 7166

⁷⁶ *Ibid.*, para. 7181.

⁷⁷ *Ibid.*, para. 7182.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Ana Santos Rutschman, "The COVID-19 Vaccine Race: Intellectual Property, Collaboration(s), Nationalism and Misinformation," *Washington University Journal of Law & Policy* 64 (2021) [hereinafter Ana Santos Rutschman, "The COVID-19 Vaccine Race"]; 167.

⁸¹ Joanna Patridge, "Government to develop £100m Covid-19 vaccine manufacturing centre," Accessed 17 October 2021, <https://www.theguardian.com/world/2020/jul/23/government-to-develop-100m-covid->

proves to be effective, an additional 40 million doses will be purchased. Earlier this year, the UK secured 100 million doses of AstraZeneca's vaccine, bringing the total number of doses sold in the UK to 230 million as of July 26, 2020.⁸²

On 29 January 2021, the EU passed Regulation 2021/111, requiring an export permit for vaccines against SARS-related corona viruses, as well as active substances such as master and working cell banks used in vaccine production.⁸³ An export authorization will only be provided if the amount of shipments does not pose a threat to the execution of the Union Advanced Purchased Agreements with vaccine manufacturers.⁸⁴ The EU claimed that the restrictions were merely transitory in its explanation.⁸⁵ Furthermore, in March 2021, Italy halted the export of 250,000 AstraZeneca (AZ) vaccinations to Australia. The main point presented was that AZ had caused supply shortages and delays in the EU and Italy.⁸⁶

Similarly, India also imposed restrictions on these exports as a result of the major COVID-19 outbreak that has decimated the country.⁸⁷ Despite prior agreements and contracts with international customers, the government is banning COVID-19 vaccine exports due to the vaccine's essential necessity.⁸⁸ Finally, on the basis of the Defense Production Act (DPA), the US has set limits on the export of critical raw materials used in the creation of COVID-19 vaccines, prioritizing domestic production and usage of COVID-19 vaccinations and personal protective equipment.⁸⁹ The DPA clearly states that the domestic industrial base's ability to "provide products and services for national defense and to prepare for and respond to military conflicts, natural or man-made disasters, or acts of terrorism" is critical to the country's security.⁹⁰

The concern that wealthy nations may hoard and/or purchase all available pandemic vaccinations is not new. During the 2009 Influenza A (H1N1) pandemic, all vaccines on the market were depleted, with the proceeds going to affluent nations.⁹¹ Following the World Health Organization's call

19-vaccine-manufacturing-centre.

⁸² *Ibid.*

⁸³ Ana Santos Rutschman, "The COVID-19 Vaccine Race," 168.

⁸⁴ *Ibid.*

⁸⁵ "Coronavirus: WHO criticises EU"]

⁸⁶ Benjamin Mueller and Matina Stevis-Gridneff, "Desperate Italy blocks exports of vaccines bound for Australia," Accessed 22 November 2021, <https://www.nytimes.com/2021/03/04/world/europe/Covid-AstraZeneca-vaccines-Europe.html>. [hereinafter "Desperate Italy blocks exports of vaccines."]

⁸⁷ Sara Jerving, "Countries May Stall COVID-19 Vaccinations."

⁸⁸ *Ibid.*

⁸⁹ Anshu Siripurapu, "What Is the Defense Production Act."

⁹⁰ *Ibid.*

⁹¹ Godwell Nhamo, et. al., "COVID-19 vaccines and treatments nationalism," 321.

for donations, The US, Australia, Canada, and six other countries agreed to donate 10 percent of their vaccine stockpiles to poorer countries, but only after establishing that their remaining supplies would meet domestic needs.⁹²

Due to these constraints, there is a considerably unequal distribution of COVID-19 vaccines in least-developed and developing countries. The US, the UK, and the EU had stated 1,392,249 (44 percent) of all 3,192,782 global fatalities as of 1 May 2021, despite accounting for only ten percent of the world's population of 7.67 billion people – owing to an older population than less-resourced countries.⁹³ In the most basic scenario of very limited vaccine supply, less fortunate countries do not have enough doses to vaccinate even the most high-risk populations, including health-care workers and vulnerable elderly, who make up 1–10 percent of the population, according to the WHO.⁹⁴ The researchers noted that by the end of May 2021, the entire African continent has received fewer than two percent of all doses provided worldwide.⁹⁵

For both ethical and pragmatic reasons, vaccine disparity is becoming a more prominent topic in public health debates. First and foremost, everyone's fundamental human right to health requires access to vital medications and immunizations.⁹⁶ Pandemics then strike in waves, wreaking havoc on health systems, notably in developing and least-developed countries.⁹⁷ Finally, the longer a pandemic virus spreads throughout the world, the greater the chance of more transmissible or virulent variations emerging, which might evade present vaccine formulations and put global health at risk.⁹⁸

B. ARE EXPORT RESTRICTIONS CONSISTENT WITH THE WTO LAW?

After explaining how and why export restrictions get underway, this section examines whether these kinds of measures are consistent with the WTO Law by looking at previous judicial decisions. Referring to *China – Raw Materials*, there are three crucial terms in assessing the justification of

⁹² Thomas J. Bollyky and Chad P. Bown. "The Tragedy of Vaccine Nationalism: Only Cooperation Can End the Pandemic," *Foreign Affairs*, Accessed 29 November 2021, <https://www.foreignaffairs.com/articles/ united-states/2020-07-27/vaccine-nationalism-pandemic>

⁹³ Remco Van De Pas, et al., "COVID-19 vaccine equity: a health systems and policy perspective," *Expert Review of Vaccines*, Accessed on 17 December 2021, <https://doi.org/10.1080/14760584.2022.2004125>

⁹⁴ Mzukisi Qobo, Mills Soko and Matlala Setlhalogile, "The Political Economy of Global Vaccine Nationalism: Towards Building Agency for Africa's Drug Manufacturing Capacity," *African Security*, Accessed on 18 December 2021. <https://doi.org/10.1080/19392206.2021.2009099> [hereinafter Qobo, Soko and Setlhalogile, "The Political Economy of Global Vaccine Nationalism."]

⁹⁵ *Ibid.*

⁹⁶ Hogerzeil HV, "Essential medicines and human rights: what can they learn from each other?" *Bull World Health Organ* 84, no. 5 (2006):372. <https://doi.org/10.2471/blt.06.031153>

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

imposing COVID-19 vaccines, namely whether the measures are “temporarily applied”, “to prevent or relieve critical shortages”, and “foodstuffs or other essential products”.

Under Article XI:2(a) of the GATT 1994, the AB defined “temporary” as “[l]asting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need”.⁹⁹ Temporary measures are always the reason behind these restrictions. The EU, for example, imposed export permit for COVID-19 vaccines to reassure that the number of exports will not adversely affect the domestic need.¹⁰⁰ It goes on to say that this permit is only temporary, and that after the vaccination has been extensively distributed within its jurisdiction, the export permit will no longer be required. The restrictions imposed by developed countries may no longer be applied if the vaccine was evenly distributed and more people were getting vaccinated. Therefore, it will likely be qualified as “last for a limited time only or not permanent” following the AB interpretation in *China – Raw Materials*.

Assessing the term “critical shortage”, the AB explained that it referred 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”.¹⁰¹ The COVID-19 disease, which is caused by the SARS-CoV-2 virus, has a high infectivity rate among humans. COVID-19 illness has infected nearly every continent, resulting in approximately twenty-seven million infections and over ninety thousand documented deaths.¹⁰² The elderly are also more vulnerable to this condition. In comparison to individuals under 60 years old, the time from commencement of illness to death is shorter in older patients, especially those over 60 years old.¹⁰³

Referring to the above nature of this disease, vaccines are the best way to end this pandemic and its shortage can lead to more people getting infected and even death. The following countries’ experience with the virus have seen it take away many of their citizens’ lives. For instance, the outbreak of COVID-19 in Italy forced its government to block the export of 250,000 vaccines produced by AZ to Australia.¹⁰⁴ The “second wave” outbreak in India resulted in the government stopping vaccine exports due to the country’s critical need for the

⁹⁹ China AB Report, para. 324.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Shamala Salvamani, et al., “Understanding the dynamics of COVID-19; implications for therapeutic intervention, vaccine development and movement control,” *British Journal of Biomedical Science* 77, no. 4 (2020):169 <https://doi.org/10.1080/09674845.2020.1826136>

¹⁰³ Fei Zhou, et al. “Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study,” *Lancet* 395 (2020): 1055. [https://doi.org/10.1016/S0140-6736\(20\)30566-3](https://doi.org/10.1016/S0140-6736(20)30566-3).

¹⁰⁴ “Desperate Italy blocks exports of vaccines.”

vaccine.¹⁰⁵ As a result, those countries experienced the effects of the outbreak and the cause of this situation, to some extent, is related to the shortage of vaccines. Therefore, the export restriction on COVID-19 vaccine will likely satisfy the meaning of “critical shortage” according to Article XI:2(a) of the GATT.

Regarding the term “essential to”, the Panel in *China – Raw Materials*, concluded that a product may be qualified as “essential” under Article XI:2(a) if it was “important”, “necessary”, or “indispensable” to a certain Member.¹⁰⁶ In this context, COVID-19 vaccines could be a necessity for countries who are affected by the virus outbreak. Export restrictions are justifiable because vaccines are absolutely necessary or “indispensable” to save the lives of their citizens. In other words, nothing is more important than the safety of citizens.

Export restrictions will also satisfy the requirement of general exception under Article XX of the GATT. Specifically, referring to Article XX (b), export restrictions on vaccines will be mainly aimed at reducing dangers to human, animal, and plant life and health.¹⁰⁷ Three factors must be considered when determining if the restrictions are “necessary,” such as “the relevance of the interests or values at issue, the extent of the contribution to the measure’s goal, and the measure’s trade restrictiveness”.¹⁰⁸ The constraint must then be validated by comparing it to other feasible measures.¹⁰⁹

COVID-19 is a highly infectious disease that has spread rapidly around the world. The death toll skyrocketed when it first broke out. Patients who contracted the virus may experience long-term lung impairment if they survive.¹¹⁰ In addition to that, some people who had severe COVID-19 experience a cytokine storm, which is a type of cytokine release syndrome.¹¹¹ When further examined, many people lost their jobs and money as a result of the COVID-19 outbreak, which affected basic requirements like food and housing. Furthermore, the death of loved ones can amplify the impacts of dread and resource depletion.¹¹² Therefore, a COVID-19 vaccine is arguably the best option for halting the pandemic, and vaccinations are especially important

¹⁰⁵ *Ibid.*

¹⁰⁶ China Panel Report, para. 7.275–76.

¹⁰⁷ *Ibid.*, para. 7.470–71.

¹⁰⁸ *Ibid.*, para. 7.481.

¹⁰⁹ *Ibid.*, para. 7.489.

¹¹⁰ Paolo Spagnolo, et al. “Pulmonary fibrosis secondary to COVID-19: a call to arms?” *Lancet Respir Med* 8 (2020): 750–752. [https://doi.org/10.1016/S2213-2600\(20\)30222-8](https://doi.org/10.1016/S2213-2600(20)30222-8)

¹¹¹ Sara Bindoli, et al. “The amount of cytokine-release defines different shades of Sars-Cov2 infection” *Exp Biol Med* 245 (2020): 970. <https://doi.org/10.1177/1535370220928964>

¹¹² Berthold P. R. Gersons, et.al. “Can a ‘second disaster’ during and after the COVID-19 pandemic be mitigated?” *European Journal of Psychotraumatology* 11, no. 1 (2020):4 <https://doi.org/10.1080/20008198.2020.1815283>

for front-line health care professionals and other vulnerable segments of the public who are at increased risk.¹¹³ Referring to Article XX (b), the policy to limit the export of COVID-19 vaccine will be mostly aimed at reducing the danger to humans and health.

Apart from minimizing the impact of the virus, export restrictions on vaccines will most likely be “necessary” following Article XX (b) of the GATT. Limiting the export of vaccines for saving the lives of the people within its territory is undeniable in the current pandemic. This will also provide significant contribution to end the critical shortage of the vaccine in order to control the spread of the virus. Finally, for developing countries like India, there will be no available alternative measures other than export restrictions to secure the supply of the vaccine for the most vulnerable community within its territory.

IV. WHAT DEVELOPING COUNTRIES CAN DO?

The fact that export restrictions on COVID-19 vaccines will most likely be justified under Article XI:2 and XX of the GATT have discouraged least developed and developing countries to bring this measure before the WTO settlement body. Nevertheless, there are other available alternative measures to respond to these restrictions. Compulsory licensing and security exceptions under the GATT 1994 and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) are two options for dealing with COVID-19 vaccine export restrictions.

A. COMPULSORY LICENSING

When a government forces someone other than the patent holder to produce a patented product without the patent holder’s approval, this is known as compulsory licensing.¹¹⁴ Compulsory licensing is a legal tool that developing countries can utilize to protect public health in the event of a national emergency or for public non-commercial use.¹¹⁵ Most least-developed and developing countries, on the other hand, have not imposed compulsory licensing.¹¹⁶

¹¹³ Marco Ciotti, et.al., “The COVID-19 pandemic,” *Critical Reviews in Clinical Laboratory Sciences* 57 no. 6 (2020): 365. <https://doi.org/10.1080/10408363.2020.1783198>

¹¹⁴ Kyung-Bok Son and Tae-Jin Lee, “Compulsory licensing of pharmaceuticals reconsidered: Current situation and implications for access to medicines,” *Global Public Health* 13, no. 10 (2018): <https://doi.org/10.1080/17441692.2017.1407811> [hereinafter Son and Lee, “Compulsory licensing of pharmaceuticals.”]

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

Article 31 of TRIPs deals with “use without the right holder’s authorization” or the compulsory license. According to Article 31(b), the license may only be used if the potential user has first attempted to get authorization from the rights holder “on reasonable commercial terms and conditions” and such attempts have failed within a reasonable time. There is no definition of “acceptable business terms and conditions” in Article 31.¹¹⁷ It further states that in times of national emergency or other severe urgency, the previous need of first asking permission from the rights holder may be removed.¹¹⁸ According to Article 31(f), a compulsory license must be used predominantly for the supply of the domestic market of the country issuing the license. Nevertheless, a country that lacks drug-manufacturing capacity may import compulsorily licensed pharmaceuticals from another country”, according to Article 31bis of the TRIPs Agreement.

The identified attempts were examined at pharmaceutical, national, and claimant levels, as well as the consequences of the attempts. Since 1995, 108 attempts to obtain compulsory licensing for 40 medications have been made in 27 countries.¹¹⁹ The majority of the efforts took place in Latin American, African and Asian countries, and were mostly for HIV/AIDS medications.¹²⁰ Furthermore, the likelihood of approval and positive results increased when the claimant was the government.¹²¹ Compulsory licensing has since become a practical strategy in a number of Asian and Latin American countries, even for non-HIV/AIDS drugs.¹²²

In the current pandemic, India and South Africa have submitted an application to the TRIPs Council for a waiver of certain TRIPs restrictions. They cited reports of intellectual property rights obstructing or potentially obstructing the timely delivery of affordable medical items to patients.¹²³ They criticized, in particular, the time-consuming and inefficient process for importing and exporting pharmaceutical products under Article 31bis.¹²⁴ They asked the TRIPs Council to approve a waiver of sections 1, 4, 5, and 7 of Part II of the TRIPs Agreement in connection to COVID-19, which would be in

¹¹⁷ William N. Monte, “Compulsory licensing of patents,” *Information & Communications Technology Law* 25, no. 3 (2016): 249. <https://doi.org/10.1080/13600834.2016.1230928>

¹¹⁸ *Ibid.*

¹¹⁹ Son and Lee, “Compulsory licensing of pharmaceuticals,” 1433.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ Nivedita Saksena, “Global justice and the COVID-19 vaccine: Limitations of the public goods framework,” *Global Public Health*, 16 No. 8-9, (2021): 1512. <https://doi.org/10.1080/17441692.2021.1906926> [hereinafter Saksena, “Global Justice and the COVID-19 Vaccine.”]

¹²⁴ Amnesty International, “Urgently Waive Intellectual Property Rules for Vaccine,” Accessed on 14 December 2021, <https://www.amnesty.org/en/latest/news/2020/12/urgently-waive-intellectualproperty-rules-for-covid-19-vaccine/>

effect until universal immunization was in place and the majority of the world's population had obtained immunity.¹²⁵ When the proposal was first presented, it was backed by a number of developing countries, including China.¹²⁶

Pharmaceutical corporations and politicians, including German Chancellor Angela Merkel, have been vocal in their opposition to the waiver plan. Merkel claimed that “production capacities and high-quality standards, not patents,” were the limiting constraints in vaccine availability, and that intellectual property protection “is a source of innovation and must remain so in the future.”¹²⁷ Vaccine manufacturers have argued that lifting patent protections will stifle risk-taking and innovation.¹²⁸

Unlike the European Parliament, some EU countries, such as Spain, supported the waiver, while others remained open to dialogue and persuasion.¹²⁹ According to a joint piece by many world leaders, such as France's Emmanuel Macron, Rwanda's Paul Kagame, South Africa's Cyril Ramaphosa, and Senegal's Macky Sall, the key to combating future pandemics is passing not only licenses, but also experience to developing nations' vaccine producers.¹³⁰ The U.S also supports the South African and Indian proposal within the WTO. Katherine Tai, the US Trade Representative, revealed the US' position in early May 2021, “For the sake of ending this pandemic, the US Trade Representative stated that global health and extraordinary circumstances of the pandemic requires extreme actions, such as waiving protections under the TRIPs for COVID-19 vaccinations.”¹³¹

B. NATIONAL SECURITY EXCEPTION

The original GATT 1947 included a broad definition of national security. This kind of exception was incorporated into the current WTO. The exception allows a contracting party to take “any action it considers necessary for the protection of its essential security interests”, despite other commitments if certain conditions are met.¹³² Article XXI(b) of the GATT 1994 and Article 73(b) of the TRIPs are considered to be the key to national security

¹²⁵ Sakesena, “Global Justice and the COVID-19 Vaccine,” 9.

¹²⁶ *Ibid.*

¹²⁷ Qobo, Soko and Setlhalogile, “The Political Economy of Global Vaccine Nationalism.”

¹²⁸ *Ibid.*

¹²⁹ Nichos Chrysoloras and Rodrigo Orihuela, “EU Split on Covid-Patent Waivers Casts Doubt on U.S. Plan,” Accessed 18 December 2021, <https://www.bloomberg.com/news/articles/2021-05-07/spain-backs-ip-waivers-for-vaccines-ahead-of-eu-leaders-summit>.

¹³⁰ *Ibid.*

¹³¹ “Taking ‘Extraordinary Measures,’ Biden backs Suspending Patents on Vaccines.” Accessed 20 December 2021, <https://www.nytimes.com/2021/05/05/us/politics/biden-covid-vaccine-patents.html>

¹³² Jacob Gladysz, “The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction,” *Georgetown Journal of International Law* 52, no. 3 (2021): 836 [hereinafter Jacob Gladysz, “The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction,”]

exception. It provides that nothing in this Agreement is intended to prevent any contracting party from taking any action which it considers necessary to protect its essential security interests:

“(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations.”

In other words, Section (b) of those agreements lays out three scenarios in which a member state may take “action” to restrict trade if it is “necessary” to protect its “essential security interests”. These include “fissionable material”, “arms... and other materials...for the purpose of supplying a military establishment”, and “war or other emergency”. This section’s substantive content is relatively open-textured.¹³³ No further definitions of ambiguous terms such as “necessary”, “essential”, “security interests”, or “emergency” are provided in Article XXI(b) of the GATT 1994 and Article 73(b) of the TRIPs.

WTO members can use this kind of exception to justify their non-compliance with the GATT 1994 and TRIPs. This type of guarantee is necessary to preserve their vital security interests, confirming the principle of territoriality in international commerce law and international intellectual property law in general.¹³⁴ Concerning the pandemic, members could employ Article 73(b)(iii) of the TRIPs to justify measures that suspend intellectual property rights protection and enforcement in order to facilitate the purchase, importation, or production of diagnostics, vaccines, and medicines needed to combat the COVID-19 pandemic.¹³⁵

Under the Dispute Settlement Body (DSB) of the WTO, both panels and the Appellate Body (AB) were rarely invoked and even less frequently decided cases concerning the national security exception. They had not reasoned the range of the national security exception authoritatively. However, in 2019 and 2020, there were two panel reports interpreting the range of security exceptions, namely *Russia-Measures Concerning Traffic in Transit*, and

¹³³ *Ibid.*

¹³⁴ Susy Frankel, “WTO Application of the Customary Rules of Interpretation of Public International Law to Intellectual Property,” *Virginia Journal of International Law* 46, no. 2 (2006): 366. See also Emmanuel Kolawole Oke, “COVID-19, Pandemics, and the National Security Exception in the TRIPS Agreement,” *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 12, no. 3 (2021): 399.

¹³⁵ *Ibid.*

Saudi Arabia-Measures Concerning the Protection of Intellectual Property Rights. These two reports were the basis for a nascent national security trade jurisprudence.¹³⁶

In *Russia-Measures Concerning Traffic in Transit*, due to political tensions with Ukraine, Russia limited international transit freight by road and rail from Ukraine headed for Kazakhstan or the Kyrgyz Republic, and prohibited such transit cargo for specific kinds of commodities.¹³⁷ Ukraine alleged that the transit limitations breached Article V(2) of the GATT 1994, which ensures “freedom of transit” via the territory of other signatory countries.¹³⁸ Russia employed Article XXI(b) (iii) of the GATT 1994, claiming that the panel lacked authority to consider the national security exemption.¹³⁹ In other words, Russia claimed that Article XXI was self-contained.¹⁴⁰

The panel dismissed Russia’s claims after reviewing the provision’s wording, object and purpose, and negotiation history.¹⁴¹ Firstly, it determined that the chapeau of Article XXI(b) was self-contained; the “which it considers” wording in the chapeau, which was relied on for the non-justifiably argument, does not apply to the listing of particular instance included in sub-paragraphs (i)-(iii). The wording of each sub-paragraph “relating to” for (i) and (ii) and “taken at the time of” for (iii) supports the claim that they reflect an objective relationship rather than a subjective determination.¹⁴² As a result, the panels have the authority to review Article XXI invocations.¹⁴³

After determining that the invocation of Article XXI(b) was justifiable, the panel considered the substance of Russia’s claim. The panel differed between the chapeau of Article XXI(b) (“necessary for the safeguarding of its essential security interests”) and the language of Article XXI(b) (iii) (“taken in time of war or other emergency”). The panel determined that the existence of “war or other emergency” was an objective question.¹⁴⁴ Article XXI(b), on the other hand, leaves it to “any member to determine what it regards to be its core security interests,” subject to the condition that such evaluation be undertaken

¹³⁶ Jacob Gladysz, “The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction,” 839

¹³⁷ Panel Report, “Russia — Measures Concerning Traffic in Transit,” adopted 26 April 2019, WT/DS512/7, accessed 11 June 2022, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm (Russia – Traffic in Transit)

¹³⁸ *Ibid.* para. 7.2

¹³⁹ *Ibid.* para. 7.4.

¹⁴⁰ *Ibid.* para. 7.57.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.* para. 7.69, 7.70, 7.77, 7.79.

¹⁴³ *Ibid.* para. 7.102-7.104.

¹⁴⁴ *Ibid.* para. 7.82.

in good faith.¹⁴⁵ As a result, the identified security interest must be “essential” and cannot be utilized to avoid the state’s commitments under GATT 1994.

In this case, the Panel determined that, given the nature of the international emergency, which is extremely near to the “hard core” of war or armed conflict, Russia’s articulation of its basic security interests cannot be regarded opaque or indefinite.¹⁴⁶ Furthermore, the measures were related to the 2014 political emergency that it is improbable that Russia took action to preserve its vital security interests as a result of that emergency.¹⁴⁷ As a result, and in accordance with the adjectival word “which it considers” in the chapeau of Art. XXI(b), the Panel determined that the Russian Federation satisfied the criteria for invoking Art. XXI(b)(iii) of the GATT 1994.¹⁴⁸

In Saudi Arabia - Intellectual Property Rights, the panel reviewed the legitimacy of Saudi Arabia’s sanctions against some Qatari stations under the TRIPS.¹⁴⁹ Prior to the challenged measures, Qatar and Saudi Arabia were involved in a diplomatic conflict, which resulted in Saudi Arabia and many other states, including the United Arab Emirates, Bahrain, and Egypt, cutting ties with Qatar.¹⁵⁰ Soon after Qatar responded to Saudi Arabia began implementing a system of coercive economic measures against Qatar by allowing pirating of sports broadcasts licensed to Qatari companies.¹⁵¹ It also fined Saudi attorneys who defended Qatari nationals.¹⁵² Saudi Arabia responded by citing the security exemption in TRIPS Article 73(b), claiming that its actions were permissible because they were required to preserve Saudi Arabia’s essential security interests.¹⁵³

The panel employed the same analytical framework as the *Russia – Traffic in Transit* panel.¹⁵⁴ Applying this scheme, the panel determined that, first and foremost, the severance of all diplomatic and economic ties between Saudi Arabia and Qatar constituted “the ultimate State expression of the existence of an emergency in international relations,”¹⁵⁵ and that Saudi Arabia’s action occurred during that ongoing emergency.¹⁵⁶ Hence, the Panel concluded

¹⁴⁵ *Ibid.* para. 7.131-7.132.

¹⁴⁶ *Ibid.* para. 7.122.

¹⁴⁷ *Ibid.* para. 7.145.

¹⁴⁸ *Ibid.* para. 7.136.

¹⁴⁹ Panel Report, “Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights,” adopted 28 July 2020, WT/DS567/11, accessed on 12 June 2022, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm

¹⁵⁰ *Ibid.* para. 2.16.

¹⁵¹ *Ibid.* para. 2.30-2.45.

¹⁵² *Ibid.* para.2.47.

¹⁵³ *Ibid.* para. 3.3-3.4.

¹⁵⁴ *Ibid.* para. 7.241.

¹⁵⁵ *Ibid.* para. 7.259.

¹⁵⁶ *Ibid.* para. 7.280-7.282.

that Saudi Arabia had met the requirements for invoking article 73(b)(iii) of the TRIPs, but not in relation to Saudi Arabia's non-application of criminal procedures of piracy and penalties to attorneys.¹⁵⁷

Referring to article 73(b) of the TRIPs and the previous WTO judicial decisions, developing countries may impose security exceptions to suspend the protection and enforcement of intellectual property rights for facilitating the availability of COVID-19 vaccines. As stated in *Russia-Traffic in Transit*, this article enables WTO members to determine what it regards to be its core security interests as long as it is undertaken in good faith and it is not employed to avoid members' commitments under the GATT 1994. Hence, some developing countries can impose this kind of exception on the basis to protect their essential security interests taken in this pandemic era, that may be within the meaning of "other emergency in international relations" as stated in Article 73(b) (iii).

However, while it is feasible, at least in theory, scholars have argued that the application of the security exception under Article 73(b) of the TRIPS Agreement is not a realistic option.¹⁵⁸ Only governments with the capacity to manufacture pharmaceutical items domestically can potentially claim this measure to justify suspending patent protection and enforcement to preserve their essential security interests.¹⁵⁹ Under the waiver criteria, proposed countries must notify the WTO of their plan to import and must adhere to a set of complex requirements designed to protect patent holders' interests.¹⁶⁰ Measures to prevent drugs from being re-exported to more affluent countries are among them (presumably at a profit).¹⁶¹ Given these circumstances, it is no wonder that just one notice has been filed under the TRIPs waiver of 2001—for Canada to supply Rwanda with the second-line HIV medicine TriAvir.¹⁶²

Although these two options require difficult requirements, developing countries such as India and South Africa have shown that they must continue to strive for compulsory licensing and security exceptions under the TRIPs. The WTO, along with developed countries, should put the equal distribution of vaccines as a main priority. The availability of vaccines in some

¹⁵⁷ *Ibid.* para. 7.286.

¹⁵⁸ Oke, "COVID-19, Pandemics, and the National Security Exception in the TRIPS Agreement," 399. See also Zoheir Ezziane, "Essential Drugs Production in Brazil, Russia, India, China and South Africa (BRICS): Opportunities and Challenges," *International Journal of Health Policy and Management* 3 no. 7 (2014): 365 <https://doi.org/10.15171/IJHPM.2014.118>

¹⁵⁹ Van De Pas, "COVID-19 vaccine equity."

¹⁶⁰ Jagjit Kaur Plahe and Don McArthur, "After TRIPS: Can India Remain 'the Pharmacy of the Developing World?'" *South Asia: Journal of South Asian Studies* 44, no. 6 (2021): 1167. <https://doi.org/10.1080/00856401.2021.1980839>

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

underdeveloped countries is still not sufficient. With this gap still in place, the goal of ending this pandemic will be delayed.. It is possible that some countries with a shortage of vaccines will experience viral mutations that cannot be overcome by currently available vaccines. When that happens, the act of securing vaccines for domestic purposes, which is usually undertaken by developed countries, could be a boomerang for efforts to end the pandemic that has lasted for 2 years.

V. CONCLUSION

The COVID-19 pandemic has wreaked havoc on the global economy and trade, since output and consumption have been curtailed globally. Due to several wealthy countries imposing export restrictions, the manufacture and distribution of COVID-19 vaccines resulted in unequal distribution. As a result, while wealthier countries are returning to normalcy, the rest of the world struggles to vaccinate its citizens. Article XI(2)(a) of the GATT exclusions gives members the legal authority to impose temporary export restrictions on foodstuffs and vital products that are applied in the context of preventing and alleviating critical shortages. Export restrictions on COVID-19 vaccines imposed by industrialized countries appear to fit these criteria, given that all of these countries are experiencing a scarcity and the limitations are imposed to remedy the shortage. To protest the unequal vaccine distribution around the world, this paper concludes that developing countries may use two alternative mechanisms, namely compulsory licensing and security exceptions under the GATT 1994 and the TRIPs. Nonetheless, this paper recognizes that these two mechanisms are only possible if those countries develop and improve their vaccine manufacturing capacity.

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