# Justifying COVID-19 Exportation-Related Quantitative Restrictions within the framework of the World Trade Organization Law

**By:**

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The reading of the travaux préparatoires of Article XXI GATT indicates that the GATT Contracting Parties did not envisage that a global pandemic such as a virus could amount to a national security exception under the said Article. However, the drafters of GATT 1947 cannot be put to blame since no global health crisis has ever necessitated the applicability of the Article. The 2020 Corona virus (Covid 19) is an example of a global health crisis. In response to the crisis and in a bid to protect their nationals, states are restricting the exportation of medical related equipment. This amounts to quantitative restrictions which is a violation of the World Trade Organisation rules of trade.

This paper analyses such measures in lieu of WTO member's obligations. To

this end, it is divided into five parts. **Part I** lays a background on the paper by briefly highlighting corona virus as a global pandemic. **Part II** highlights examples of quantitative restrictions that have been taken by states in response to Covid-19. **Part III** focuses on quantitative restrictions as a form of a non-tariff barrier and its regulation under GATT 1994. **Part IV** analyses whether such quantitative restrictions are excusable under Article XI, XX and XXI GATT 1994. **Part V** provides a brief analysis and concludes the paper.

## Corona virus as a global pandemic

Corona virus disease (Covid 19) is a type of infectious disease caused by the newly discovered corona virus. The virus whose origin can be traced to China spreads through droplets of saliva from an infected person. Up to date, there is no vaccine or treatment for Covid 19. The number of infected persons has risen to over one million, three hundred thousand(1,300,000) and over one hundred thousand (100,000) have died as a result of contracting the virus. Both the number of infected persons and those who have died from the virus are still on the rise. As of 26th February 2020, the World Health Organisation (WHO) had not officially declared corona virus a pandemic. Concerns had been raised as to whether national responses to the corona virus would combat the virus. However, on 13th March 2020, the WHO declared the virus a global pandemic after the number of infection outside china had increased thirteen-fold bringing the number of countries with reported cases to 114.

## Export restriction measures as a response to Covid-19

With the influx of the number of corona virus case, countries started restricting the exportation of medical related equipment. On 15th March 2020, the European Union issued a directive that restricted the exportation of personal protective equipment including; surgical gowns ,masks and face shields. As a consequence of this directive, exporters who wish to export such products outside the Union will require an export authorization from their member country. On 24th March 2020, India banned the exportation of ventilators and sanitizers. On the same day, Switzerland followed suit by requiring exporters of masks, gloves, goggles and swabs to have a license. According to the WTO, eighty countrieshave now imposed export prohibitions or restrictions related to Covid-19. While countries see such measures as essential in protecting their

national interest, Professor Simon Ernest argues that this trend could lead to countries from the global south being cut off from essential technology that could aid them in fighting the corona virus.

**Regulation of quantitative restrictions under GATT, 1994**

Several Articles in GATT 1994 deal with quantitative restrictions; these include Articles XI, XII, XIV, XIX, XX and XXI. The scope of prohibited acts under Article XI GATT include restrictions other than tariffs that are instituted or maintained by a WTO member on the imports or exports of goods. Such restrictions may take the form of quotas, embargos, export or import licensing procedures among others. The elimination of quantitative restriction was included in GATT 1994 due to its ability to restrict trade more than tariffs actually do. The imposition of quantitative restrictions may also not be done in a transparent manner and they have the effect of placing absolute limits on imports thereby distorting competition.

**Quantitative restrictions on imports**

The WTO panel in *Brazil Retreated Tyres* interpreted the phrase "quantitative restriction on imports" to mean measures that prohibit the importation of products from any other members from accessing their markets. Such import restrictions can take the form of embargos. Cases in point is the *US-Shrimp* case and the *Canada Periodical* case. In the latter case, the Panel found that Canada's regulation that completely banned certain periodicals was in violation of Article XI (1) of GATT 1994. In the former case, the US had placed a moratorium on both shrimp products and shrimp that had not been harvested using methods that protected sea turtles.

Existing quantitative restrictions on imports that have been notified to the WTO by its members are those relating to narcotic drugs, environmental protection, weapons and nuclear materials. Some quantitative restrictions extend beyond WTO members' WTO obligations. Such is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Convention on the protection of endangered species and the Montreal Convention on substances that deplete the ozone layer. The introduction of such a quantitative restriction should be followed by a notification to the WTO. This requirement was

introduced by the 2012 WTO's decision on notification procedures for quantitative restrictions.

### Quantitative restrictions on exports

Such restrictions may take the form of export quotas or setting the minimum price for the sale of goods to be exported. Export quotas refer to quantitative restrictions that have been placed on the volume of certain exports. They are designed to either improve the world price of a product by causing shortages or to protect local consumers and producers. Export quotas that are aimed towards increasing the world price of a product are only possible where a country dominates in the production of the product being protected. Export quotas and exports price setting were both dealt with by the Panel in *China Raw Materials*. The Panel found that China had violated Article XI (1) of GATT by imposing export quotas on minerals such as coke, fluorspar and silicon and setting their minimum export price.

### Exceptions to quantitative restrictions

Article XI GATT recognizes the right of members to place import or export quantitative restrictions on goods in order to respond to general welfare objectives. To this end, paragraph 2 of Article XI allows members to impose quantitative restrictions in order to; (a) temporarily address shortages of foodstuffs and other items that are essential to a country, (b) implement standards and regulations necessary for the grading or classification of goods and lastly, (c) regulate quantities of agricultural produce and fish in order to balance them with what is the locally produced. However, in imposing such quantitative restrictions a state is required to issue out a public notice on the quantity of imported products allowed to be imported and the duration of the quantitative restriction.

### Interpretation of Article XI (2) GATT

In interpreting the terms temporarily, foodstuff and items essential to a country, the WTO Appellate Body in *China Raw Materials* has clarified that such measures should only be taken in time of need and to respond to critical short time shortages of food or items that are indispensable to a country. The scope

of critical shortages was also expounded by the same Appellate Body to mean crucial deficiencies in quantities. The Preparatory Committee of GATT saw it fit to include agricultural produce and fish in the exceptions to quantitative restrictions due to the variability of the prices of agricultural produce and fish and the fact that some countries have a large economic dependency on them.

## Article XX GATT general exceptions and the national security exception under Article XXI GATT 1994

- *Article XX GATT*

An analysis of whether a measure is excusable under Article XX GATT is a two-part test; the paragraph and the chapeau elements. On the paragraph part, the Article allows members to take measures otherwise inconsistent with their WTO obligation in order to protect consumer, animals or plants, conservation of the environment, among others. The Article goes ahead to list out other nine circumstances that allows states to seek an exception under it. Apart from the position that covid-19 export related restrictions are aimed at the protection of human, animal, plant life or health, this paper takes the position that countries could also seek refuge under Article XX(j) GATT. The latter paragraph convers measures that are essential to the acquisition or distribution of products in general or short supply. The paragraph goes ahead to provide a caveat in the sense that; all WTO members are entitled to an equal supply or share of the products in short supply and the measures/restrictions must be discontinued when the conditions giving rise to the short supply cease to exist.

The chapeau part on Article XX exits to ensure that states do not unjustifiably seek exception under the Article. It also aims to ensure that a balance is created between states right to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members. The chapeau lays down the obligation such measures taken under the Article must not create unnecessary obstacles to trade, be discriminatory in nature or be a disguised restriction to international trade.

The panel in *US-Shrimp* has subsequently interpreted the phrase "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" to include a three-tier test. First, the application of the measure must

result in discrimination, second, the discrimination must be discriminatory or unjustifiable in character and lastly, this discrimination must prevail between countries where the same conditions prevail. Further, in analyzing on whether a measure is discriminatory focus must be placed on objective of the discrimination.

- *Article XXI GATT*

Article XXI GATT 1994 allows WTO members to take measures other inconsistent with their obligations in order to protect their national security in three specific instances. The first and second instances are quite closely related as they both extend towards the restriction of fissionable materials, arms, ammunitions and other implements of war. The third instance provides a wider interpretation of measures taken in response to the protection of national security. It allows “measures taken in time of war or any emergency in international relations”. The whole Article XXI national security exception has been criticized for allowing a wider leeway to state parties to use the exception because the WTO does not go ahead to define critical terms such as “considers necessary” “essential security interests” “time of war” and emergency in international relations”. There have also been questions relating to whether the WTO has jurisdiction to determine matters related to Article but the same was settled in the panel in Russian-Traffic in Transit.

## How the African Continental Free Trade Area (AfCFTA) addresses quantitative restrictions and the exceptions thereto

The African Continental Free Trade Area extensively addresses quantitative restrictions through the AfCFTA Agreement, the protocol on trade in goods and the protocol on trade in goods. Article 4 of the Agreement sets out one of its objectives as the progressive elimination of tariff and non-tariff barriers. Quantitative restrictions fall with the definition of non-tariff barriers.

Quantitative restrictions are also prohibited by Article 9 of the Protocol on trade in goods. It maintains that state parties shall not impose quantitative restrictions on imports from or exports to other states except where it is provided for under the protocol itself, its annexes, Article XI of GATT 1994 and

other relevant WTO Agreements.

The general exceptions to the AfCfTA Agreement are comprehensively covered by Article 26 of the Protocol on trade in goods. In addition to the Article 26 of the Protocol providing for the paragraph and chapeau analysis, it mirrors and copies word-for word Article XX of GATT 1994. Article 27 of the Protocol on trade in goods addresses national security exceptions. The provision is also similar to the one in Article XXI GATT 1994. This paper is of the view that the interpretation of the two Articles; 26 and 27 of the protocol in trade in goods should be interpreted in light of Article XX and Article XXI GATT for two reasons. First, because AfCfTA as a regional economic community established under Article XXIV GATT derives its authority from the WTO. Secondly, a lot of cases have been decided on the two Articles in GATT and this would shed some light in the interpretation of Article 26 and 27 of the Protocol.

**Conclusion**

This paper takes the position that either export or import covid-19 restrictions are justifiable under the GATT framework in three ways; Article XI, XX and XXI GATT 1994.  First, quantitative restrictions relating to general welfare objectives and consistent with both Article XX and XXI GATT. However, the aforementioned Articles do not provide a blank exception.  Article XX (2) allows its application in a three-part test. (i) the export restriction must be temporarily applied. (ii) it must be applicable to prevent or relieve crucial shortages and (iii) the crucial shortages must relate to foodstuff or other essential stuff. Member states also seeking to rely on Article XX are under an obligation to issue a public notice to the effect that medical related items restricted for exportation in their country due to corona virus are essential and that the restriction would be temporary in nature.

Covid -19 export related restrictions on medical related products are intended to protect human life and health. This satisfies the paragraph analysis part of Article XX GATT. However, this is not enough.  WTO member states intending to rely on Article XX GATT are under an obligation to ensure that quantitative restrictions taken in light of Covid- 19 are neither discriminatory in nature nor distort international trade. Such discrimination would arise in circumstances where for example, county A imposes export restriction on gloves but still

export gloves to other countries and excludes others.

Article XXI GATT on national security exception explicitly allows member states to restrict disclosure of information which it considers critical to its national security. However, the definition of essential security interests has been clarified to extend to interests relating to the quintessential functions of the state including protection of its territory and its population from external threats and maintenance of law and public order. Finally, states wishing to make reference to Article XXI GATT have the onus of proving that the quantitative restrictions imposed as a result of Corona are aimed at ensuring national security in an emergency in international relations, because clearly, Corona virus is not a war. The panel *Russia -Traffic in Transit* in expounding on the term other emergency in international relations has stated that political or economic differences between states do not constitute an emergency in international relations unless they result in either defense and military interests or the maintenance of law and public order.

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