

Legal Response to Excessive Trade Restrictions in the Context of PHEIC

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Abstract: The spread of excessive trade restrictions during the COVID-19 pandemic highlights the WHO and IHRs failure to effectively prevent the restrictions and failure of countries that impose restrictions to comply with their commitments to multilateral cooperation under the WHO. Compared with other dispute settlement mechanisms in the international legal system, such as the WTO, the IHR rules are overly simple and their procedures are overly informal. It is highly uncertain whether the restricted countries can effectively and promptly protect their rights, which would deter states parties from relying on the IHR process to make a claim. Neither WHO rules such as Article 43 nor its enforcement mechanisms could function as a “safety valve” to prevent the abuse and misuse of excessive measures. The current WTO dispute settlement mechanism plays a limited role in solving the problem of excessive trade restrictions. Although this mechanism is the most effective and successful one among inter-governmental dispute settlement forums, disputes concerning excessive trade restrictions under the WTO framework would not necessarily be resolved as effectively as precedent practices. It usually requires at least two years to complete the panel review, which makes it almost impossible to achieve effective relief that is very urgently needed in the context of COVID-19. Considering that the disputes will unavoidably involve a complicated review when the respondent Member invokes the exception clauses, the dispute settlement process will undoubtedly be delayed further. Considering the experience gained from major international public health crises, particularly during the COVID-19 pandemic, the idea of completely refraining from visiting countries affected by travel and trade restrictions seems both unrealistic and unreasonable. It should be recognized that in the early stages of a pandemic, a country has the sovereign right to adopt or maintain limitations necessary for ensuring public health security. On the other hand, the conditions for applying trade restrictions should be clarified to prevent abuse and misuse. In this regard, in addition to emphasizing and following the scientific and necessity tests under Article 43 of the IHR, it could be proposed that emergency trade measures should be targeted, proportionate, transparent, and temporary, and based on the principle of non-discrimination. Moreover, it could be discussed to allow for retaliatory measures against countries that abuse trade restrictions. The authors suggest improving IHR rules, especially by modifying Article 43 and calling for

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This paper is supported by the National Social Science Fund of China (Grant No. 18AFX027). The authors have benefited from valuable comments by Professor Shi Jingxia and Professor Gong Xiangqian. We thank Ms. Cai Linke and Ms. Cao Jingyi for their assistance for the translation of the draft paper. Any errors or oversights are the authors'.

establishing an expeditious dispute settlement mechanism under the IHR to ensure that all states parties abide by relevant obligations. International society urgently needs to resolve broad trade issues, including the phasing out of export restrictions. If countries repeat restrictive patterns, they might hinder the vaccine's efficient production and equitable distribution against COVID-19. Countries might arbitrarily impose export controls on supplies and input necessary for producing vaccines or on the vaccines themselves. These actions would likely severely impact the vaccines' availability, particularly in low-income countries.

Keywords: Excessive trade restrictions, COVID-19, PHEIC, WHO, WTO, Article 43 of the IHR

I. INTRODUCTION

IHR (International Health Regulations) is the WHO's legal framework, and its states parties respond to public health emergencies.¹ As the country first affected by COVID-19, China fulfilled its IHR obligation to report the outbreak to the WHO.² Although the temporary recommendations that the WHO Director-General Dr. Tedros issued emphasize that "restrictions on trade and travel are not recommended", a number of trade restrictive measures had been taken against countries where severe COVID-19 epidemics were occurring, such as against China in early 2020 and the United Kingdom at the end of 2020, which clearly exceed the scope of the WHO's recommended measures and could be characterized as "excessive trade restrictions".³ In addition to dealing with the spread of COVID-19 within their territory and the severe challenges it brought to their people's lives and health, these countries were also confronted with the double economic pressures of the domestic suspension of production as well as

1 International Health Regulations (IHR) was adopted by the World Health Assembly in 1969 and subsequently revised in 1973 and 1981. A revised version of IHR was adopted by the World Health Assembly on May 23, 2005 and entered into force on June 15, 2007. According to the IHR, PHEIC refers to "an extraordinary event which is determined, as provided in these Regulations to constitute a public health risk to other states through the international spread of disease and to potentially require a coordinated international response".

2 Since December 2019, the COVID-19 outbreak in Wuhan has spread across China and severely impacted the economy. On January 30, 2020, following the discovery of confirmed cases of COVID-19 in the United States and several other countries, Dr. Tedros, the Director-General of the World Health Organization (WHO), on the recommendation of the Emergency Committee, declared COVID-19 as a "public health emergency of international concern" (PHEIC). This is the sixth time WHO has recognized a PHEIC since the International Health Regulations (2005) (thereafter referred as "IHR 2005") came into effect in 2007. On March 11, 2020, the WHO declared the COVID-19 outbreak a "global pandemic".

3 According to Article 1 (Definition) of IHR 2005, "international traffic means the movement of persons, baggage, cargo, containers, conveyances, goods or postal parcels across an international border, including international trade". Therefore, in the context of IHR, "international traffic" includes international trade. For the convenience of discussion, this paper refers to the prohibitive and restrictive measures countries have taken regarding trade and travel that exceed the WHO's recommendations as "excessive trade restrictions".

its foreign trade and travel being subjected to restrictions. Those countries where COVID-19 had been effectively controlled are faced with the dilemma of whether to take trade restrictions. Considering that COVID-19 is still spreading throughout the world, and countries are still maintaining varying extents of excessive trade restrictions, it is necessary to study the insufficiency and improvement of IHR rules.

The spread of excessive trade restrictions during the COVID-19 pandemic highlights the failure of the WHO and IHR to effectively prevent the restrictions and failure of countries that impose restrictions to comply with their commitments to multilateral cooperation under the WHO. Could a country resort to the enforcement mechanism under the IHR, including the dispute settlement mechanism, to safeguard its rights and benefits? If the existing IHR mechanism is weak and unreliable, is it feasible under World Trade Organization (WTO) rules to protect the rights of countries that suffered from trade restrictions? Which loopholes exist in the existing IHR system to effectively prevent excessive trade restrictions and maintain global public health security, and how could these loopholes be addressed? This paper aims to discuss these issues and propose policy suggestions.

II. THE CHALLENGES TO INTERNATIONAL HEALTH LAW IN THE CONTEXT OF COVID-19

Preventing and controlling the spread of infectious diseases has always been a major problem facing human society. As human hosts frequently transmit viruses, trade and travel are important factors contributing to a pandemic's spread. The widespread use of aircraft and high-speed rail as well as the increasing frequency of cross-border travel has meant that the outbreak of infectious diseases in one country tends to spread out at an unprecedented pace and through an unpredictable route of transmission. Infectious diseases affect neighboring countries and even the whole world, thus being a common risk and challenge facing human society.

There has been tension between the goal of "preventing the cross-border spread of infectious diseases" and "avoiding restrictions on trade and travel". These goals and related policies are not only relevant to public health security regarding effective prevention and control of the spread of diseases but also to economic security issues related to methods of avoiding severe negative economic

impacts on the country that has suffered from the pandemic. The international community has yet to reach a consensus regarding which goal is more important as well as when and how to determine whether one goal should be prioritized over another.

Since the International Sanitary Conference in 1851, the “classical regime” of international law related to the control of infectious diseases has always consisted of two basic elements: first, the obligation of states parties to notify each other about the outbreak of a specific infectious disease within their territories; second, limiting restrictive measures on international trade and travel that states impose so they can ensure prevention and control of infectious diseases to the extent that these measures should be based on scientific evidence and principles of public health.⁴ IHR 2005 marks a revolution in international health law. This greatly expanded the applicable scope by breaking away from the traditional enumeration method.⁵ It also expanded on the source of information regarding infectious diseases, which is no longer limited to notifications from the country where the pandemic started. More importantly, it gives the Director-General the authority to identify a PHEIC (Public Health Emergencies of International Concern) and issue temporary recommendations after considering the recommendations of the Emergency Committee. Although IHR 2005 has repeatedly emphasized that “unnecessary interference with international traffic and trade” should be avoided and it has introduced several specific legal provisions and enforcement mechanisms, the balance that IHR attempts to maintain has been repeatedly disrupted due to relevant provisions and mechanisms that have not been followed or implemented.

Even though the WHO has issued the International Traffic Advice and repeatedly updated it before and after declaring COVID-19 as a PHEIC, advising

4 David P. Fidler, From International Sanitary Conventions to Global Health Security: The New International Health Regulation, *Chinese Journal of International Law*, Vol. 4, No. 2, 2005, p. 328.

5 From the International Sanitary Conference held by 12 European countries in 1851 to the WHO’s adoption of the International Sanitation Regulations (ISR) in 1951, the “classical regime” adopted the enumeration method to indicate its scope of application. The initial list mainly included three infectious diseases prevalent in Asia, namely cholera, plague and yellow fever. In 1926, infectious diseases common throughout European history, namely smallpox and typhus were added, and later relapsing fever was supplemented. IHR that the World Health Assembly adopted in 1969 listed the six infectious diseases mentioned above. Subsequent revisions in 1973 and 1981 reduced the infectious diseases covered from six to three, namely cholera, plague and yellow fever. IHR 2005 stipulates that the scope of the Regulation is not limited to any specific disease or mode of transmission, but covers any “illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans”.

against “unnecessary restrictions of international traffic” and opposing “any restrictions”,⁶ many trade restrictions had been announced or/and imposed, including: travel restrictions;⁷ suspension on air, rail, and road transport; quarantine measures on vessels and other modes of transportation; closing border ports; suspension on the import of goods, including live animals and frozen food; export control on medical equipment.

III. IHR’S MECHANISM FOR EXCESSIVE TRADE RESTRICTIONS AND ITS DYSFUNCTION

A. IHR’s Regulation on Restrictive Trade Measures of States Parties

Sovereign states undoubtedly have the inherent right to take measures shielding themselves from an infectious disease spreading from other countries. However, this does not mean that the approaches to achieve this right can be absolute and unlimited. The states parties of WHO accept restrictions on their inherent rights, that is, to balance “preventing the cross-border spread of infectious diseases” with “avoiding unnecessary restrictions on trade and travel”. The purpose, decision-making mechanism, and additional measures in IHR 2005 reflect this balance, particularly the regulation on unnecessary trade restrictions.

First, IHR explicitly states that its purpose is “to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade”.⁸ Article 15 (“Temporary recommendations”) and Article 16 (“Standing recommendations”) further emphasize that relevant measures aim to “prevent or reduce the international spread of disease and avoid unnecessary interference with international traffic and trade”.

6 WHO, *Key Considerations for Repatriation and Quarantine of Travellers in Relation to the Outbreak of Novel Coronavirus 2019-nCoV*, February 27, 2020, https://www.who.int/ith/2019-nCoV_advice_for_international_traffic/en/ (Last Visited on March 15, 2021).

7 Such measures include: completely refusing entry of foreign nationals and passengers arriving through one country or certain countries; conditionally restricting entry of passengers with recent (mostly 14 days) records of stays in certain countries; entry control; suspension of visa issuance; strengthening entry quarantine inspection and administration.

8 Article 2, IHR 2005.

Second, the decision-making mechanism for identifying a PHEIC and issuing temporary recommendations includes the concern of “avoiding unnecessary restrictions on international trade”. As a core provision of identifying a PHEIC, Article 12 of IHR 2005 provides that, when determining whether an event constitutes a PHEIC, the Director-General shall consider “an assessment of the risk of interference with international traffic”, and it should be noted that this factor is juxtaposed with “an assessment of the risk to human health, of the risk of international spread of disease”.⁹ When considering issuing temporary recommendations, Article 17 of IHR 2005 stipulates that the Director-General shall consider the following factors: first, the views of the States Parties directly concerned; second, the advice of the Emergency Committee; third, scientific principles as well as available scientific evidence and information; fourth, “health measures that, on the basis of a risk assessment appropriate to the circumstances, are not more restrictive of international traffic and trade and are not more intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection”.¹⁰ The design of this decision-making process confirms the balance between the “inherent rights” nature of response measures and restrictions on these rights. The latter requires the states parties to follow the WHO’s recommendations and refrain from taking any action that may cause unnecessary or unscientific damage to international travel and trade.

Third, while Article 43 of IHR allows states parties to take measures that exceed temporary recommendations, it sets more stringent substantive and procedural conditions for “additional measures”.¹¹ This provision states clearly that “these regulations shall not preclude States Parties from implementing health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern”. However, these measures should conform to the following substantive conditions based on “necessity” and

9 Sub-paragraph (5), Paragraph 4, Article 12, IHR 2005. Sub-paragraphs (1) to (4) include information provided by the state party; the decision instrument contained in Annex 2; the advice of the Emergency Committee; scientific principles as well as available scientific evidence and other relevant information.

10 Paragraph 1 to 4, Article 17, IHR 2005.

11 In addition to Article 43, the following provisions of IHR also stipulate additional health measures: Paragraph 2, Article 23 (Health measures on arrival and departure); Paragraph 1, Article 27 (Affected conveyances); Paragraph 2, Article 28 (Ships or aircraft should not be refused *free pratique*); and Paragraph 2(3), Article 31 (Additional established health measures that prevent or control the spread of disease, including isolation, quarantine or placing travellers under public health observation).

“scientificity”: first, the contribution of the measures to the objectives, that is, whether the measures can achieve health protection that is the same as or greater than that of WHO recommendations; second, the external effects of these measures, that is, they shall not be more restrictive of international trade and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.¹² Third, regarding the objectivity and scientificity of measures, the decision-making of relevant countries should be based on the following three elements: firstly, scientific principles; secondly, available scientific evidence of a risk to human health, or where this evidence is insufficient, the available information should include that from WHO and other relevant intergovernmental organizations and international bodies; thirdly, any available specific guidance or advice from the WHO.¹³ Moreover, these measures should also meet the procedural requirements for “notification”: firstly, provide WHO with the public health rationale and relevant scientific information for the measures taken; secondly, within 48 hours of implementation, inform the WHO of these measures and their health rationale.¹⁴

WHO states parties have accepted the treaty obligations based on ratification of or accession to the IHR. When examining the legality of excessive trade restrictions, the substantive and procedural conditions set out in Article 43 of the IHR shall be considered.¹⁵ The states parties could also justify their response measures based on Article 43.

The legality of specific measures must be reviewed case-by-case based on IHR provisions. It is worth noting that, from a treaty interpretation perspective, once a trade restrictive measure was used, the measure was not completely indefensible. Owing to the lack of relevant dispute settlement practice and case

¹² Paragraph 1, Article 43, IHR 2005.

¹³ Paragraph 2, Article 43, IHR 2005. There is some overlap and similarity between the above provisions and Article 2 and Article 3.3, and Article 5 of the SPS Agreement under the WTO system. Some scholars have pointed out that this indicates that relevant rules of the SPS agreement have been drawn upon in the formulation of IHR 2005. See Tsai-Yu Lin, *The Forgotten Role of WHO/IHR in Trade Responses to 2009 A/H1N1 Influenza Outbreak*, *Journal of World Trade*, Vol. 44, No. 3, 2010, pp. 521-522.

¹⁴ Paragraph 3 and 5, Article 43, IHR 2005.

¹⁵ Some researchers believe that the WHO's temporary recommendations are not legally binding. Therefore, the restrictive measures, basing on their own discretion, are not subject to WHO intervention, nor is it illegal to take measures that exceed the scope of temporary recommendations. The authors disagree with this view. Rules including the first sentence of Article 43(1) of the IHR would be redundant or invalid if the trade restrictive measures are unrestricted. The position that the response measures are totally unrestricted not only violates the principle of good faith compliance with treaties, but also leads to the redundancy or invalidity of key provisions of Article 43.

law, it remains unclear whether the claims based on Article 43 can be fully adopted. Moreover, from an international relations perspective, if these measures are found illegal, this would mean that almost every country would have to face endless challenges to their response measures. This dispute's unforeseeable outcome and complex COVID-19 cross-border control make it necessary to consider solutions more comprehensively and pragmatically rather than relying solely on legal rules.

B. Dysfunctions in the IHR Enforcement Mechanism

If the states parties seek the WHO to deal with restrictive measures, they would face the problem of dysfunctions in the assessment and dispute settlement mechanisms.

First, the assessment mechanism is merely symbolic. The IHR authorizes the WHO to assess the measures the restricting country submits and the information the measures are based on, and may request this country to reconsider applying these measures. This country shall also review these measures within three months while considering WHO advice and scientific criteria.¹⁶ However, there are several problems. Firstly, the WHO's assessment has limited effectiveness because it cannot assess these measures if the restricting country does not fulfill their obligations to submit the restrictive measures and their information. Secondly, even if the restricting country submits this information, there is no specific assessment procedure or criteria, and the WHO has never actually fulfilled its assessment mandate. Thirdly, the wording of "may request" and "reconsider" indicates that assessment is only recommended. Even if it produces negative results, it will not have a binding effect on the restricting country. Fourthly, there is no specific supervision procedure or criteria for practically implementing the restricting country's review duty.

Second, the dispute settlement mechanism is virtually useless. The IHR has established two dispute settlement mechanisms for trade restrictions: the special dispute settlement mechanism under Article 43 and the general dispute settlement mechanism under Article 56. The former enables states parties impacted by the measures to request consultations with the restricting country. These consultations are intended to clarify the measures' underlying scientific and public health rationale and to find a mutually acceptable solution.¹⁷ This

¹⁶ Paragraph 4 and 6, Article 43, IHR 2005.

¹⁷ Paragraph 7, Article 43, IHR 2005.

mechanism is limited to “consultation”, a political method for international dispute settlement, and does not provide legal methods or other political methods. The restricted country’s direct requests to consult with the restricting country may impose diplomatic pressure on the latter, which could contribute to easing or lifting trade restrictions, thus quickly and effectively resolving the issue. However, this approach’s effectiveness is also constrained since governments are too focused on coping with domestic outbreaks to promptly initiate consultations. Moreover, since consultations have no timeline, the restricted country would be helpless if the restricting country willfully delays consultations to prevent an effective resolution.

The general dispute settlement mechanism under Article 56 provides the following methods: 1) political methods such as negotiation, good offices, mediation, or conciliation; 2) referring the dispute to the Director-General for settlement upon consent of both parties; and 3) accepting compulsory arbitration upon written statement, the award of which shall be legally binding and final.¹⁸ The function of the mechanism also has several problems. Firstly, resolving problems quickly and effectively is difficult without a strict procedure timeline; secondly, the solution involving political methods depends on both parties’ consensus, and no solution can be reached if the restricting country refuses to relax the measures and rejects any remedy; thirdly, referring the dispute to the Director-General for settlement and to compulsory arbitration is conditional on both parties’ prior agreement, which means the restricting country can block this process; fourthly, the Director-General’s or the arbitration tribunal’s dispute settlement procedure has no clear timeline, and the disputes would be protracted and inconclusive; fifthly, even if the Director-General or the arbitration tribunal decides that the restrictive measures are inconsistent with the IHR, there is no follow-up enforcement mechanism available in case the restricting country does not comply with the Director-General’s decision or the arbitral award.

In short, compared with the international legal system’s other dispute settlement mechanisms, such as those in the WTO, the IHR rules are overly simplified, their procedures are overly informal, and it is highly uncertain whether the restricted countries can effectively and promptly protect their

¹⁸ Paragraphs 1-3, Article 56, IHR 2005 provides procedures for dispute settlement between its states parties. In addition, any dispute between the WHO and one or more of the states parties concerning the interpretation or implementation of the IHR shall be referred to the Health Assembly.

rights. This would deter states parties from relying on the IHR process to make a claim.¹⁹ Neither the WHO rules such as Article 43 nor its enforcement mechanisms could function as a “safety valve” to prevent the abuse and misuse of excessive measures.²⁰

IV. AVAILABILITY OF THE WTO TO REGULATING EXCESSIVE TRADE RESTRICTIONS

The WTO is an international organization that regulates its Members’ trade administrative measures. Given that it is difficult to promptly and effectively solve the excessive trade restrictions in the present WHO system, would the WTO be a suitable forum for safeguarding the restricted country’s rights?²¹ This section will focus on two issues: First, whether WTO rules, such as the General Agreement on Trade in Services (GATS), the General Agreement on Tariffs and Trade (GATT) and the Agreement on Sanitary and Phytosanitary Measures (SPS), could be relied on for claiming relevant rights; second, whether the WTO’s operating mechanism, especially its dispute settlement mechanism, can promptly and effectively resolve disputes arising from excessive trade restrictions.

A. Whether WTO Rules Could Be Relied on to Claim Relevant Rights

1. Export Control on Certain Medical Goods and Foodstuffs

In response to the COVID-19 pandemic, countries throughout the world have imposed temporary restrictions on exports of certain medical goods and some foodstuffs to mitigate actual or potential shortages of key supplies.²² According

¹⁹ So far, states parties have not yet initiated special or general dispute settlement mechanisms for the interpretation and application of IHR Article 43, and there is no jurisprudence or case law for the relevant provisions of Article 43.

²⁰ Some scholars believe that this situation allows states parties to adopt any excessive trade restrictions that are not supported by scientific evidence without fear of prosecution under the IHR. In the absence of effective remedies, excessive trade restrictions would not be deterred and Article 43 would in fact be invalidated. See Lawrence O. Gostin and Rebecca Katz, *The International Health Regulations: The Governing Framework for Global Health Security*, *The Milbank Quarterly*, Vol. 94, No. 2, 2016, pp. 264-313.

²¹ Note that related business activities such as the estimated decline in passenger traffic due to the pandemic or airlines’ decisions on reducing or cancelling international flights are not regulated under WTO agreements.

²² According to the WTO, up to April 2020, 80 countries and separate customs territories have introduced export prohibitions or restrictions as a result of the COVID-19 pandemic, including 46 WTO Members (72 if EU Member States are counted individually) and eight non-WTO Members. https://www.wto.org/english/tra-top_e/covid19_e/export_prohibitions_report_e.pdf (Last Visited on March 16, 2021).

to the Global Trade Alert, as of October 2020, 110 export curbs on medical goods and medicines remain in force. Sixty-eight of these curbs have no phase-out date, creating the possibility of long-term scarring.²³ Export bans accounted for more than 90% of G20 countries' pandemic-related trade restrictions. Many measures are not explicit bans, but vary from licensing requirements to mandates for sales to the state. These restrictions have started debates about the consistency of these actions with WTO rules and their potential impact on the global trading system. Some markets depend heavily on countries that have implemented restrictions. Most leading exporters are also major importers of critical supplies, risking integrated supply chains. The proliferation of these measures has prompted some countries to commit to limiting restrictions or abiding by certain principles during their temporary application.

Export control on certain medical goods and foodstuffs could be challenged based on Article XI of GATT, which includes the obligation prohibiting quantitative restrictions.²⁴ The restricting party has two options as its defence: 1) temporary export prohibitions or restrictions under Article XI:2(a) of GATT; 2) a public health exception under Article XX(b) of GATT.²⁵

Article XI:2(a) of GATT excludes certain temporary export prohibitions

23 Evenett, S. J. and J. Fritz, *Collateral Damage: Cross-Border Fallout from Pandemic Policy Overdrive*, The 26th Global Trade Alert Report, CEPR Press, 2020.

24 GATT Article XI:1. In the context of Article XI of the GATT 1994, a "prohibition" means a legal ban on the trade or importation of a specified commodity, while a "restriction" implies a limiting condition or regulation. The coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported. Therefore, not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that limit the importation or exportation of products, as demonstrated by the design and structure of the measure. See Appellate Body Reports, *Argentina — Import Measures*, para. 5.217.

25 By the way, the authors do not believe the Member would justify the export control on the basis of Article XXI (Security Exception). Article XXX(b)(iii) of GATT provides: "Nothing in this Agreement shall be construed ... (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests ... (iii) taken in time of war or other emergency in international relations". According to the Panel of *Russia — Measures Concerning Tariff in Transit*, "an emergency in international relations would appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests". See Panel Report, *Russia — Measures Concerning Tariff in Transit*, WT/DS512/R, April 5, 2019, para.7.76. If the "maintenance of law and public order interests" would be interpreted strictly, neither the declaration of "public health emergency of international concern" (PHEIC) in the WHO nor the announcement of emergency within a Member could be classified as "an emergency in international relations" within the meaning of Article XXI.

or restrictions from the applicable scope of Article XI:1.²⁶ This provision includes several elements. The phrase “temporarily applied” indicates that the restrictions apply to short-term measures and are taken to meet a “passing need”. In turn, “critical shortage” refers to deficiencies in crucial goods that are of a decisively important situation, or that reach a vitally important or decisive stage, or a turning point. The word “foodstuffs” indicates what might be considered a product “essential to the exporting Member” but does not limit the scope of these products. These terms have interdependent meanings. For example, whether a shortage is “critical” may be informed by the “essential” nature of a particular product, while a product’s characteristics and factors of a critical situation may inform the duration that a measure can be maintained to meet a passing need. The expectation of reaching a time when conditions are no longer “critical” is inherent in the notion of criticality, such that measures will no longer fulfil the requirement of addressing a critical shortage.²⁷ These conditions are most likely consistent with the situation that countries adopt export restrictions to meet domestic demand in the context of COVID-19. It is worth noting that Article XI:2(a) provides an exemption exclusively to export Members. Moreover, the phrase “to prevent or relieve” identifies the export restrictions’ purpose instead of the actual or real link between purpose and means. Therefore, the defence under Article XI:2(a) could relieve the burden of proving the measures and satisfy the necessity test and the chapeau of Article XX.

The defence under Article XX(b) entails a two-step test: firstly, the measures are “necessary to protect human, animal or plant life and health”, secondly, the measure satisfies the chapeau of Article XX. If a measure is justified under Article XX (b), it must, first, fall within the range of policies “designed” to

26 GATT Article XI:2(a) provides that “the provisions of paragraph 1 of this Article shall not extend to the following: (a) export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member”. The WTO defines Article XI:2(a) as “carve-out”. A carve-out is different from an exception. Members can resort to exceptions, such as those under Article XX of GATT, to justify a measure that would otherwise be inconsistent with their GATT obligations. By contrast, an exemption or a carve-out, such as Article XI:2, excludes certain measures from the scope of a GATT obligation, thereby removing certain measures from its coverage. Accordingly, where the requirements of Article XI:2 (a) are met, there would be no scope for the application of Article XX, because no obligation exists. See Appellate Body Reports, *China — Raw Materials*, para. 334. This distinction has implications for the burden of proof in the context of WTO disputes. See WTO, *Export Prohibition and Restriction*, April, 23 2020, https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf (Last Visited on March 15, 2021).

27 Appellate Body Reports, *China — Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, January 30, 2012, paras. 323-328.

protect public health (Members would have significant deference in determining this element); second, the measures must be “necessary” to protect public health. The determination of “necessity” involves “weighing and balancing” several factors: 1) the importance of the interests or values at stake; 2) the measure’s contribution to achieving the objective pursued; and 3) its trade-restrictiveness. Furthermore, the country challenging the restrictions may suggest reasonably available alternative measures that are technically and financially feasible for the country imposing restrictions and that will offer the same level of protection. Once a measure is determined as provisionally justified under (b) subparagraph of Article XX, an examination of the measures’ actual application is conducted under the chapeau of Article XX.²⁸ This requirement expresses the principle of good faith and ensures that measures are not applied to abuse the exceptions of Article XX. For instance, a measure may fail to comply with the chapeau of Article XX because it is applied incoherently or inconsistently. In the context of COVID-19, Article XX(b) of GATT could be used to justify a ban or quantitative restriction on the exportation of goods, so long as this measure would be necessary and effective in contributing to protecting the public health of that country’s people. However, the justification in response to this restriction may be that it is detrimental to protecting the public health of an importing Member. Moreover, the trade-restrictiveness of the export ban or restriction must be weighed against the contribution it makes to achieving the objective of protecting human health. The importing Member could have reasonably available alternatives, e.g. arguing that a less stringent export restriction would have the same level of contribution and would be reasonably available to the exporting Member. Compared with Article XI:2(a), the proof burden under Article XX(b) seems too burdensome for the Members implementing export controls on certain medical goods and foodstuffs.

2. Mandatory Suspensions on Airlines and Entry Bans on Foreigners

The WTO agreements do not contain provisions that directly regulate Members regarding measures of mandatory suspensions on airlines and entry bans on foreigners. These measures could be considered based on GATS. When applied to measures affecting trade in services, GATS covers four models of

28 The chapeau of Article XX of the GATT 1994 imposes the requirement that measures justified under one of the sub-paragraphs of this provision “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.

service supply: cross-border supply, consumption abroad, commercial presence, and presence of natural persons.²⁹ If GATS applies to scheduled and non-scheduled air services, the mandatory suspension on airlines and entry bans on foreigners that WTO Members have taken could be challenged as violating the following provisions of GATS: Article 2 (Most-favoured-nation Treatment), Article 6 (Domestic Regulation), or/and Article 16 (Market Access) and Article 17 (National Treatment). However, according to the *Annex on Air Transport Services*, GATS applies only to measures affecting aircraft repair and maintenance services, the selling and marketing of air transport services, and computer reservation system (CRS) services. Therefore, it does not cover measures that affect “traffic rights” or services directly related to their exercise.³⁰ In short, GATS could not apply to measures affecting trade in scheduled and non-scheduled flight services.³¹

An entry ban on foreigners could not be regarded as a restriction on consumption abroad (mode 2). The term “consumption abroad” is defined as the supply of a service “in the territory of one Member to the service consumer of any other Member”.³² The service suppliers exist outside the territory of the Member that made the specific commitment and supply the services. In the case of tourism or education services, most WTO Members make specific commitments to market access and national treatment for “consumer movement”. The commitments under model 2 mean that a Member may not restrict their own tourists or students from travelling to other Members or receiving education services from other Members. Instead, tourists or students of other Members have the right to full access to tourism and education services within this Member’s borders. As a result, GATS could hardly provide a legal basis for this claim.

3. *Suspension on Cross-border Transport of Goods*

The suspension on cross-border transport of goods, such as on air, rail, and

29 GATS Article I (Scope and Definition).

30 “Traffic Rights” mean the right for scheduled or non-scheduled services to operate and/or carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, route to be operated, type of traffic to be carried, capability to be provided, tariffs to be charged and their conditions, and the criteria for designation of airlines, including such criteria as number, ownership and control.

31 In the Trade in Services Agreement (TISA) negotiated by some WTO Members, the application scope is extended to “ground handling services” and “airport operations services”, but “traffic rights” are still excluded.

32 GATS Article I:2(b).

road transport, quarantine measures on vessels and other modes of transportation, and closing border ports could be claimed as inconsistent with GATT Article I (Most-favoured-nation Treatment), Article III (National Treatment), Article VIII (Fees and Formalities connected with Importation and Exportation) and Article XI (General Elimination of Quantitative Restrictions).³³ In addition, “freedom of transit” under GATT Article V could be invoked, but would only be applicable to transit of goods,³⁴ while excluding entry of persons and importation of goods. While these measures could be challenged based on GATT provisions, the restricting Member could justify itself by invoking the public health exception under Article XX(b) of GATT. According to the jurisprudence of precedent GATT/WTO cases, the necessity test under Article XX requires that “there are no reasonably available alternatives that are free from restrictions or less restrictive”, and the chapeau of Article XX requires that the measure at issue does not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.³⁵ The challenges in the WTO would exacerbate tension between free trade and public health. These complicated disputes could not be expected to strictly follow the DSU timeline.

4. Suspension on Import of Goods

The suspension on import of goods, especially live animals and frozen food, could be challenged based on GATT or/and the SPS Agreement. The SPS Agreement established more detailed and strict obligations for WTO Members, such as “based on scientific principles” and “assessment of risk”,³⁶ and permits the Member to take provisional measures “where relevant scientific evidence is insufficient”.³⁷ According to the definition under the SPS Agreement, it applies primarily to sanitary or phytosanitary measures addressing risks arising

33 GATT Article I:1 “with respect to all matters referred to in paragraphs 2 and 4 of Article III”, Article III: 4 “transportation”, Article VIII: 4(h) and Article XI: 1.

34 The term “traffic in transit” means goods (including baggage), vessels and other means of transport, transit across a Member’s territory when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of the complete journey beginning and terminating beyond the frontier of the Member across whose territory the traffic passes.

35 Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, 4th Edition, Cambridge University, 2017, pp. 554-563.

36 SPS Agreement Article 2 and Article 5.

37 SPS Agreement Article 5(7).

from plant, animal, or food-borne transmission,³⁸ instead of measures addressing risks of human-to-human transmission.³⁹ Therefore, it is unclear whether the definition of “pest” and “disease” under the SPS Agreement, particularly “pest” under Paragraph 1(d) of Annex A, covers the risk of human-to-human transmission of disease. As WTO jurisprudence could not answer this question, the panel had to clarify it, which entails a process lasting for at least two years.

The complaining Member may claim that the above measures violate Article I, Article VIII and Article XI of GATT. As there is evidence that COVID-19 could spread through goods, especially though frozen seafood and product packaging, the restricting Member could justify itself by invoking the public health exception under Article XX(b) of GATT.

B. The WTO’s Limited Role

The WTO has called on Members to abide by notification obligations and improve transparency on any trade-related measures taken in response to COVID-19.⁴⁰ However, even if the obligations of notification and transparency are properly observed, this would not substantially improve the situation that export control measures are widely used and affect the global supply chain of essential goods.

The current WTO dispute settlement mechanism hardly helps to solve the problem of excessive trade restrictions. Although this mechanism is the most effective and successful among inter-governmental dispute settlement forums, disputes concerning excessive trade restrictions under the WTO framework would not necessarily be resolved as effectively as precedent practices. The WTO dispute settlement process includes several stages such as consultation and panel review. It usually takes at least two years to complete the panel review, which makes it almost impossible to achieve effective relief that has

38 SPS Agreement Annex A (Definitions) reads: Sanitary or phytosanitary measure — Any measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

39 *Supra* n. 13, Tsai-Yu Lin (2010), pp. 522-523.

40 For this purpose, the WTO has set up the website page “COVID-19 and World Trade” in response to the pandemic, https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm (Last Visited on March 15, 2021).

been very urgently needed in the context of COVID-19. As disputes will unavoidably involve this review process when the respondent Member invokes exception clauses, the dispute settlement process will undoubtedly be delayed further. Moreover, WTO rulings are not retroactive, which means the complaining party cannot claim compensation for losses due to the measures taken, regardless of whether the respondent party withdraws the measures in issue.⁴¹ Lastly, the Appellate Body was paralyzed after December 2019 due to the Trump administration's consistent blockage of its elections. If the respondent party deliberately appealed in a case even if the panel finds that the measure is inconsistent with certain WTO rules, this case would lack any effective solution.

V. POSSIBLE IMPROVEMENTS TO PREVENTING EXCESSIVE TRADE RESTRICTIONS

Preventing excessive trade restrictions is an integral part of global public health security. Using excessive trade restrictions is not the best means of responding to the COVID-19 pandemic. These not only severely weaken the affected countries' economies but also likely make international cooperation too difficult to effectively block the pandemic's spread. Export control on certain medical goods and foodstuffs would hinder the pandemic's long-term prevention and control. As the country first affected by COVID-19, China has more firsthand experience with the harm resulting from trade restrictions. As one of the world's major producers of medical goods, it is also responsible for doing its best to ensure global supply. Therefore, China should collaborate with like-minded countries to call for the international community to more effectively supervise excessive trade restrictions.

When faced with the unprecedented COVID-19 pandemic, one of the most urgent tasks for all countries is to respond to it and its complex health, social, and economic impacts. As stated in the *G20 Leaders' Summit Statement on COVID-19* from March 26 2020, countries must address disruptions to international trade caused by the pandemic and minimize disruptions to trade and

41 Tsai-Yu Lin, *Cross-cutting Issues under the WTO, Non-economic Concerns and Enhancement of Healthier Trade Ties*, Angle Publishing Co., Ltd., 2011, p. 105. In the event of non-implementation of the ruling, the complaining party may apply to the WTO Dispute Settlement Body for authorization of retaliation against the respondent party.

global supply chains.⁴² China and like-minded countries should strengthen multilateral and bilateral consultation and cooperation to work towards implementing the objectives of the *G20 Leaders' Summit Statement on COVID-19*.⁴³

Considering the experience gained during major international public health crises, particularly the COVID-19 pandemic, the idea of refraining completely from implementing travel and trade restrictions seems both unrealistic and unreasonable. It should be emphasized that in a pandemic's early stages, a country has the sovereign right to adopt or maintain limitations that are necessary for ensuring public health security. On the other hand, the conditions for applying trade restrictions should be clarified to prevent abuse and misuse. In this regard, in addition to emphasizing and adhering to the scientific and necessity tests under Article 43 of IHR, it could also be proposed that emergency trade measures should be targeted, proportionate, transparent, and temporary, as well as based on non-discrimination. Moreover, it could be discussed to allow for retaliatory measures against countries that abuse trade restrictions.

As the *Report of the High Level Panel on the Global Response to Health Crises* that the UN General Assembly adopted in 2016 states: "building better mechanisms to prevent or address economic consequences from health crises is an integral part of any global system to respond to health crises".⁴⁴ The COVID-19 pandemic's gloom has not dissipated, and we should prepare institutionally to overcome it, as it might still continue into the future. Promoting improvements in the existing IHR system and minimizing economic losses are not only critical for benefitting the affected countries, but also for improving global public health governance. The authors suggest improving the IHR rules, especially by modifying Article 43, and call for establishing an expeditious dispute settlement mechanism under the IHR to ensure that all states parties abide by relevant obligations.

In view of the importance of unimpeded trade for controlling the pandemic

42 G20 Leaders' Summit statement on COVID-19: 26 March 2020, <https://www.gov.uk/government/news/g20-leaders-summit-statement-on-covid-19-26-march-2020> (Last Visited on March 15, 2021).

43 The Statement call on "we will work to ensure the flow of vital medical supplies, critical agricultural products, and other goods and services across borders, and work to resolve disruptions to the global supply chains, to support the health and well-being of all people. We commit to continue working together to facilitate international trade and coordinate responses in ways that avoid unnecessary interference with international traffic and trade. Emergency measures aimed at protecting health will be targeted, proportionate, transparent, and temporary. We task our Trade Ministers to assess the impact of the pandemic on trade".

44 UN General Assembly, *Protecting Humanity from Future Health Crises: Report of the High Level Panel on the Global Response to Health Crises*, A/70/723, February 2016.

and the post-pandemic recovery, the IHR should be strengthened to remove the obstacles to international trade by improving its rules and enforcement mechanisms to achieve crucial objectives such as making “public health” and “free trade” more compatible and mutually supportive.

First, Article 43.2 could be modified to reflect the existing situation. The authors have the following proposals: 1) Where a PHEIC occurs, a state party may adopt or maintain necessary restrictions on international traffic and trade to safeguard public health security. 2) Restrictions on international traffic and trade shall not result in discrimination between states parties and shall not exceed the limits necessary to deal with the pandemic’s spread, and in particular, avoid unnecessary damage to the commercial, economic, and financial interests of any other state party; such restrictions shall be temporary and phased out as the pandemic eases; and shall be removed based on WHO recommendations. 3) In determining the scope or effects of restrictions on international traffic and trade, states parties may prioritize measures that are more important for preventing the spread of infectious diseases. These restrictions shall not, however, be applied or maintained to prevent the supply of medical protective equipment to the affected country. 4) The information of any restrictions on international traffic and trade as well as their scientific evidence and justification shall be promptly submitted to the WHO Director-General, and be circulated to all states parties. 5) When discussing temporary recommendations, trade and economic experts could join an Emergency Committee and temporary recommendations should advise the Members concerned regarding economic consequences of the restrictive measures.⁴⁵

Second, the authors propose the provisions for an “expeditious dispute settlement mechanism” as following: 1) The state party imposing the restrictions shall promptly consult the state party affected, or the WHO Director-General shall act as good offices, with respect to the restrictions adopted under this Article. These consultations or good offices shall assess the situation and the constraints imposed or maintained in accordance with this Article, particularly considering, the degree of infection, the scope of spread, the economic

45 The appointment procedure under Article 50.6 of the IHR requires that “the Director-General shall select the members of the Review Committee on the basis of the principle of equitable geographical representation, gender balance, balance of experts from developed and developing countries, representation of scientific views, methods and practical experience from various regions of the world, and an appropriate interdisciplinary balance”. However, there is no such requirement for the appointment of an Emergency Committee.

and trade environment of the country where the pandemic is occurring, as well as other alternatives. The consultations shall address any question regarding whether the restrictions are consistent with non-discriminatory, necessary, and temporary requirements, particularly the question of their progressive elimination. All statistics and facts regarding the pandemic that the WHO provides shall be accepted in these consultations. The conclusions shall be based on the WHO assessment of the pandemic's spread among Parties participating in the consultations. These consultations shall be conducted no later than 10 working days and completed within 30 days from the date of the measure's implementation; 2) Once the Parties fail to reach an agreement on the matters related to the consultation within the stipulated timeline, either Party may submit the disputed measures for arbitration. The Arbitral Tribunal shall consist of three members appointed by the Parties selected from the List of Arbitrators or the existing members of the Emergency Committee or Expert Committee. If the Parties fail to agree on the selection of arbitrators, the WHO Director-General shall make the appointments. The Arbitral Tribunal should review the disputed matters, including an assessment and conclusion regarding whether the disputed trade restrictions are consistent with the IHR rules. The Arbitral Tribunal shall be composed within 15 working days from the date on which the claim is raised, and an award shall be rendered within 60 days from the said date. The Arbitral Award shall be final and binding upon the Parties, and the parties shall abide by the award. If a party refuses to enforce the award, the other party shall be entitled to adopt equivalent retaliatory measures.

VI. CONCLUSION

Countries have reached a consensus on the scope of the spread and severity of the COVID-19 pandemic. We believe the scientists will eventually produce effective medicines and vaccines for treating and fighting COVID-19. However, everyone's patience and cooperation is necessary to slow the spread of this virus until it can finally be controlled. It seems there is no definitive answer for how to slow this virus' cross-border spread, what measures are needed, and how long they will need to last. We are still searching for a way through the darkness.

Trade restrictive measures disrupt supply chains, depress production, and prolong and exacerbate the health and economic crisis — with the most serious

effects affecting the poorer and more vulnerable countries. Fortunately, some countries and intergovernmental organizations have taken coordinated action. In March 2020, for example, Germany, France, and the European Commission negotiated an end to intra-European export restrictions on medical supplies. Some countries have lifted emergency measures and removed restrictions. International society urgently needs to resolve broad trade issues, including phasing out export restrictions. If countries repeat their restrictive patterns, they might hinder the efficient production and equitable distribution of the COVID-19 vaccine. Countries might also impose arbitrary export controls on supplies and inputs necessary for producing vaccines or on vaccines themselves. These actions would likely have a severe impact on the availability of these vaccines in low-income countries.

The COVID-19 pandemic should not be an excuse for anti-globalization. In an era of globalization, international law can truly play an effective role in dealing with pandemics only when it becomes a legal mechanism of “cooperation” rather than “coexistence”. This disaster for mankind can be overcome only if the international community coordinates and cooperates in efficiently fighting the pandemic, creating necessary institutional communication and arrangements, and using a better system to promote mutual trust and solidarity.