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Analyzing Temporary Trade Restriction Imposed by India during Covid-19 from WTO Perspective

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ABSTRACT

In response to the corona virus pandemic, countries all around the world introduced temporary lockdown; India was not an exception. India introduced a temporary restriction on the exportation of medical goods, foodstuffs and some essential goods in order to mitigate the domestic shortage. India has been a member of the WTO agreement and GATT and is subject to certain rules and regulations. The Director-General of Foreign Trade (DGFT) on February 25, through notification, imposed a prohibition on the exportation of personal protective kit, every kind of clothing masks, N95 masks, other medical equipment, foodstuffs and hydroxychloroquine. Article XI (1) of the General Agreement of Trade and Tariff 1994(GATT) prohibits export bans and restrictions other than duties, taxes, or other charges. This short article examines and analyzes the trade restrictions which were introduced by India from in WTO perspective. Article XI (2) of GATT is the general exception of the general rule of XI (1); it allows member countries to impose trade restrictions to revive or relieve the critical shortage of essential staff at the domestic level, other than that Article XX (b) and XX (j) also allow member countries to take necessary steps to protect human life, animal life and take necessary steps to prevent the short supply of essential products in the local market. . Article XX (I) also lays down provision in the relevance of trade restrictions, when short supply arise or when the price of the material is below the world price. This short article explains how India may justify its decision on the said ground with relevant case laws.

I. INTRODUCTION

With a 2lakh death toll and more than 20 lakh people affected, India has greatly suffered from the coronavirus pandemic. 213 countries around the globe have been affected by the coronavirus pandemic so far. This pandemic has made a remarkable impact on the economy, health, society, and environment of the whole world. The most notable impact is the damage

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to the economy of the larger globalized world.

In one hundred years, it was the worst pandemic the world has witnessed. In the middle of April 2020, more than 80 countries around the globe imposed strict lockdowns to restrict the spread of the corona virus.

India is not an exception. In March, India announced its first nationwide lockdown, which led to an economic slowdown. During the lockdown, India has to impose certain restrictions. The World Trade Organization also, through its official website, published guidelines that were to be maintained.

The covid 19 pandemic represented an unprecedented challenge to the global economy and world trade, as imports and export across the globe were restricted. India has gone through several lockdowns, and not only India but the whole world has also gone through several lockdowns, so global trade has been affected deeply. Because of this, the supply chains were disrupted. Economic shutdown, which is the consequence of lockdown, led to a major rise in unemployment poverty.

The Indian government has taken several steps to meet the need of the hours. India imposed a temporary ban on the export of medical equipment like personal protective kits, N95 masks, hydroxychloroquine.⁵¹, and food supplies to ensure availability in India, also focused on increasing production. To increase production and boost the supply chain India also lowered the tariff barrier put export restrictions. All these measures and policies which are taken have fallen under the ambit of the World trade organization (WTO). And all policies regarding trade which are taken by India along with many other countries raise the debate in regards to flexibility of WTO rules and the space which allows the countries to take emergency steps.

(A) Statement of problems

The unprecedented pandemic challenge already struggled the Indian economy. India has the second-highest citizens around the globe. Because of this, people were highly affected. As a measurement step, the government announced the first lockdown on March 25 2020. Not only India, the whole world observed several lockdowns in 2020. Internal and external trade was restricted during the lockdown, and the economic downfall occurred. The smooth flow of goods was disrupted. The most important tool which helps to overcome this situation is medical equipment, and it is greatly affected by trade restrictions that are imposed by the Indian government and WTO. During the lockdown, the government essentially focused on medical equipment and foodservice. To meet the domestic need, the directorate general of foreign trade (DGFT) on February 25 prohibited the export of all personal protective equipment, including

clothing and masks used in healthcare activities where there is a risk of contamination, such as N-95 masks. India also banned the export of hydroxychloroquine. Though later on, the ban was lifted by the Indian government. During the lockdown, India also liberalized International trade by lowering the tariff rate on various medical tools. India put a ban on the export of important medical tools and masks, personal protection kits to ensure smooth supply at the domestic level. The Indian government also put effort into increasing the production of medicine, masks, medical devices and trying to ensure affordable access for the country. These all measures which India has taken come within the ambit of the World trade organization. All the countries which are a signatory of WTO have agreed to certain limits on their freedom to implement trade-related policies. India is also a signatory of WTO, and under that, India is also subject to certain terms and conditions.

Because of the economic fall, International trade in India took a serious hit. In 2021 important commodities like silver, pulses, and newsprint faced more than 21 declines compared to the year 2020.

Petroleum products were the most affected commodities in terms of exports from India, with a decline of about 32 per cent in January 2021, compared to the same month in the previous year.

After the outbreak of the corona virus, India observed lockdown; India has witnessed a massive downfall of the economy, large scale job cuts, millions of deaths which increased the poverty level of India by 15-20 per cent. According to a report, 100-150 additional people fall into poverty this year. According to the CMIE report, 7 million people lost their jobs between February 2020 to February 2021.

(B) Research question

This short paper addresses the following questions —

1. Whether or not article XI (2) of GATT permit trade restrictions that are adopted by India
2. What are the other general exceptions under which India can justify its trade policy?

(C) Objective

As a measurement step, governments all over the world, including India, imposed certain temporary restrictions on the export of medical supplies food services in order to maintain a smooth flow at the domestic level. According to the World Trade Organization (WTO), for G-20 countries, export bans

Accounted for more than 90% of trade restrictions related to

The pandemic. Not every measure was banned, but it varies from licensing requirements. India,

during its lockdown, imposed restrictions on exporting personal protective equipment, N95 masks, medicine, some food, and also focused on increasing production of medical equipment. This restriction and increasing production methods of countries raised questions about the consistency of such action with WTO rules and its impact on the global trading system.

The term research denotes a systematic and scientific study of a particular problem. The objective of any research paper is to

Underline the purpose of the investigation.

Tread as a measurement step of the Indian government and how it affected the Indian economy. Lockdown and tread restrictions cause economic fall down, and India has witnessed poverty and unemployment. Also, the restrictions which are imposed by the Indian government on exports and imports are subject to WTO rules and regulations. As a signatory of WTO, India is also subject to certain rules and regulations. This paper examines whether WTO rules are flexible enough to allow emergency trade restrictions related to national security and health that might otherwise be contrary to the WTO rules.

(D) Research methodology

The paper has adopted the doctrinal research methodology. The readings are mostly done to the WTO official website, leading journals. Also, various information is taken from Indian government officials' websites, other appellate bodies, and newspapers. The various tests which are led down by WTO members, the Indian government and in some cases, other countries' governments have been observed in order to understand the ground on which the provisions can be claimed. The paper mainly focuses on the measurements step, temporary tread restrictions which are imposed by the Indian government on import and export in international trade and examines the flexibility of WTO rules and do the rules allow India or any other countries to take emergency steps in this crisis. This paper is also focused on the poverty and unemployment rate of India during the lockdown and the economic crisis India is struggling with.

II. WHETHER ARTICLE XI(2) OF GATT PERMITS THE TREAD RESTRICTIONS WHICH ARE ADOPTED BY INDIA DURING COVID

During the lockdown, India adopted various tread measures to maintain a smooth flow of necessary goods in the domestic market. India imposed various types of trade restrictions like

- Put a ban on the export of personal protective kits, various types of clothing masks and N95 masks, surgical masks, breathing equipment, and other medical equipment with immediate effect
- The active pharmaceutical ingredients and formulation made from API, including 23 drugs, were restricted
- export policy regarding Hydroxychloroquine was a matter of concern² ; the Indian government imposed a condition on the exportation of this drug
- during the lockdown, the issuance of a physical copy of the certificate of origins was temporarily halted. To ease the process authority has decided to issue a digitally signed electronic certificate of origin.
- The ministry of home affair exempted seaports from ensuring the supply of goods³ .

India is a signatory and a founder member of WTO is subject to rules and regulations of WTO rules. The measures which were taken by India also come within the purview of WTO rules.

(A) General rule of WTO (GATT article XI) - Article 11(1) talks about the General elimination of quantitative restriction. art.11 (1) prohibits the restriction of trade other than duties, taxes and other charges.

This article is applicable to all the measures prohibition on the restriction of importation, exportation, and sale for export of product other than duties, taxes and other charges.

In other words, WTO completely prohibits any type of trade restriction. The WTO panel interpret the phrase ‘ quantitative restriction on importation’ as a measure that prohibits the importation of products from any other member from accessing their market⁴. In the China Raw material case,⁵ the panel found out that china violated article 11(1) of GATT by imposing export quotas and by setting the minimum export price.

(B) General exception under article XI(2) of GATT and justifying trade measures adopted by India - Article 11(2) is the general exception of the general rule of article 11(1). It allows member countries to impose temporary trade restrictions to relieve or revive critical shortages of pro essential stuff to the exporting country. To impose this provision, the pre-requisites⁶ are - (A)to prevent a critical shortage of foodstuff (b) from preventing a shortage of essential goods © temporary applied. The term ‘temporary’ means that the restrictions should

² Ministry of external affair,official spokespersons response to media queries on COVID 19 related drug and pharmaceutical dated 07.04.2020.

³ MH order no. 40-3/2020 DMJ (A) dated 25.032020.

⁴ Brazil Retreated tyres case.

⁵ China- Measures related to the exportation of various raw material case.

⁶ WTO panel laid down in china - raw material cases.

last only so long as necessary. Such restrictions should not be non-discriminatory, unjust and arbitrarily. In order to invoke this provision, The burden of proof (art.20) is on the challenging party.

For instance, in the china-raw material case appellate body found that Chinese export restriction on raw material such as bauxite(which is used to produce steel) to prevent alleged shortage did not meet the condition under Article 11(2) of GATT. The appellate body stated that the trade restriction which was imposed by China for more than 10 years was not a 'limited' time and not a 'temporary' applied⁷. Moreover the appellate body interpreted the term 'essential product' as those products which are absolutely indispensable and necessary. The appellate body observed that the determination of the product which is essential or not is not the decision of china alone to make, the interest of another member country should be taken into interest, and the raw material such as bauxite is important to China as an important material to produce steel and iron. This industries are important to China as it is a significant source of development and employment. This case is important as it is laid down the scope of the provision and how it is applied. The shortage must cause a crisis.

In order to justify trade restrictions that were adopted by India during covid-19, India have to demonstrate that the export restrictions are needed to prevent a critical shortage of essential good and foodstuff; without any restrictions, it may cause the crisis.

(C) Article XII of Agreement on Agriculture - When it comes to imposing restrictions on the export of foodstuff, a few more rules can be added. India also can justify an export restriction on foodstuff under article 12 of AOA⁸. Article 12 of AOA allows a member state to impose export restrictions on foodstuff when it is necessary to protect food security or prevent a critical shortage of food. This provision also says that before introducing any export restriction, the country needs to give a notice in writing. This provision is widely used during the 2007-2008 global food crises.

III. THE GENERAL EXCEPTION UNDER GATT

Following are the general exception of GATT. India also can justify tread measures under the following articles.

(A) A necessary measure to protect health - Article 20(b) allows a member country to take necessary steps to protect human life, animal and plant life and health. It is also a general exception to the general rule of GATT. Any violation of general obligation under GATT can

⁷ Appellate body report china-raw material case, page 323 and page 344

⁸ The Agreement on agriculture was introduced during the Uruguay round of WTO conference

be justified under this provision. Member countries are allowed to take necessary steps to protect human, animal, plant life and health provided that they do so in a way that does not arbitrary, unjust and not discriminatory among countries⁹. In the Brazil-tires case, the appellate body observed that a ban could be necessary; the member country needs to demonstrate that the ban on export restriction is needed to achieve the objective.

As said earlier, a member country cannot impose health restrictions in a manner that would not be arbitrary and discriminatory between other member countries where the same condition prevails or disguised restrictions on the international trade (chapeau of article 20). In the EC-seals case, the appellate body observed that export restriction on the basis of a health crisis is totally justifiable under GATT. So India can take the plea of this provision to justify the export restriction.

(B) Short supply of essential goods in the local market - India also can justify its export restriction under article 20(j) of GATT. It allows member countries to take necessary measures to prevent the short supply of essential products in the general or local market provided that such measures should not be inconsistent with the principle of WTO, i.e. they do so in a way that should not be arbitrary, unjust and discriminatory between another member country. The provision should be discontinued as soon as the condition ceases to exist; the restrictions should last only as long as possible. The burden of proof rests upon the exporting country. Article 20(j) was widely used after World War 2 to prevent short supply at the domestic level. With time it evolved and stated that this provision would apply to meet the emergency situation which may arise in future¹⁰; natural catastrophic is also included in this provision¹¹. In this context, COVID 19 pandemic include in this provision.

This provision applies to “local” and “general” short supply. This provision justifies not only when the local short supply arises but also when the international short supply arises and when an exporting country distributes goods to the country where it is needed most¹².

For instance, in a case, Czechoslovakia (in 1949) registered a complaint against US licensing system that favoured exporting to the countries which are under the European Recovery Program. The United States took the plea of Article XX(j), which talks about short-supply exception under GATT; it also took the plea of Article XXI (National security) and argued that they imposed this restriction to the promoted distribution of goods to the country where short-

⁹ For example appellate body report Brazil-tires case

¹⁰ GATT analytical index, Article 20 page 594

¹¹ Ibid, page 593

¹² GATT analytical Index article 20 at p. 593

supply arose, and it was needed most. The WTO Appellate Body defined the term “essential” as “absolutely necessary and indispensable good”. The appellate body further stated that this provision does not include the word “critical”. The shortages covered under article XI(20 is different from article XX(j), and at the time of determining the shortage of a particular geographical area, the reference of availability of supply of domestic and foreign or international source would be taken into account¹³. Like in the case of the India-solar cell, the Appellate Body held that mere lack of producing sufficient solar cell product was not a shortage; relevant factors like a supply of the foreign or international product would be taken into account.

Hence, to take the plea of this article, India needs to demonstrate that during a covid pandemic, short supplies arise not only at the domestic level but also in the international market, and India imposed export restrictions in all the country(not discriminated between the countries), it only allowed exportation on Humanitarian ground.

(C) Article XX(I) - India also can justify the export ban under article XX(I) of GATT.

This provision is relevant where short supply arises or when the price of the material is below the world price, in other words, when the price is high in the International market. This provision allows member states to impose restrictions where “domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry”, but this is applicable until the domestic price of this particular product is below the world price. Under this provision, member countries allow imposing trade restrictions provided that they do so in a way that does not violate the principle of the WTO regime; in other words, the trade restrictions should not be unjust, arbitrary and discriminatory between another member country also the export restrictions must meet the chapeau under Article XX.

IV. CONCLUSION

Every country all around the globe has taken some kind of trade policy to tackle COVID 19 pandemic. India is not an exception. India also adopted various trade policies like imposing trade restrictions, lowering tariff barriers, introducing licensing etc. and trying to prevent a shortage of necessary products in the domestic market. Member countries are permitted to impose trade restrictions provided that they have to notify WTO and other member countries and have to follow WTO principles regarding trade restrictions. These trade restrictions pose significant damages to India, including other developing countries.

¹³ Appellate body report, China Raw Material case

The exchange of goods among states and countries is important. Only trade can revive the economy and maintain the flow of money in the market, but the sudden hit of covid not only rush to produce more but also impose trade restrictions on all kinds of mask, personal protective kit, medicine, various medical equipment, ventilation etc. India is a signatory and founder member of WTO; all the policies raise questions on limitation of WTO principle like so many trade analyses¹⁴ before it.

The general rule of WTO Article XI talks about the General Elimination of Quantitative restrictions; this provision prevents member countries to imposed trade restrictions. GATT also provides some general exceptions, which member countries use in general exceptions. WTO provides a broad range of carve-out and exception -

- A. export restrictions to address critical shortage (article XI(a))
- B. Health protection (article XX(b))
- C. Products in general or local short supply (article XX(j))

India can justify its trade restrictions under these provisions provided that it does so in a way that does not arbitrary, unjust, and discriminatory among other countries.

According to EU law, in an emergency period, the force of legal constraints may be limited. The pandemic period also comes under the emergency provision.

It can be seen that India and all other countries take the plea of aforesaid provisions to justify trade restrictions. This regulation can be seen to just ad quickly address such concern but are not well established.

In order to address such shortfalls and international relations, the G20 nations on march stated that the measures which are taken to tackle covid-19 must be “targeted, proportional, transparent and temporary” so that they do not unnecessarily create any barriers or disruption to global trade.

¹⁴ For example, Jost Pauwelyn, *Carbon Leakage Measures and Border Tax Adjustment Under WTO Law*, in research handbook on environment, health and the WTO, Edward Elgar 2013.