

2021

Covid-19 and Export Restrictions: the Case for Free Trade

Jack Quirk

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Recommended Citation

Jack Quirk *Covid-19 and Export Restrictions: the Case for Free Trade*, 17 Loy. U. Chi. Int'l L. Rev. 151 (2022).

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COVID-19 AND EXPORT RESTRICTIONS: THE CASE FOR FREE TRADE

Jack Quirk

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I. Introduction

The world economy is dependent on international trade.¹ Although there are variations in trade laws among different countries, most nations follow the trade norms set forth by the General Agreement on Tariffs and Trade (“GATT”) along with the World Trade Organization (“WTO”).² In fact, over 164 trading countries are now a part of the WTO.³ Both GATT and the WTO have been big players in creating the familiar concept of globalization;⁴ they have worked to significantly reduce tariffs and many nontariff trade barriers.⁵ Even more than 95% of interna-

¹ Kimberly Amadeo, *International Trade: Pros, Cons, and Effect on the Economy*, THE BALANCE (MAY 19, 2021), <https://www.thebalance.com/international-trade-pros-cons-effect-on-economy-3305579> (last updated Feb. 17, 2021).

² *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Jan. 6, 2021) [hereinafter *The GATT Years*].

³ *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 6, 2021).

⁴ ALICE LANDAU, REDRAWING THE GLOBAL ECONOMY 79-108 (2001).

⁵ *General Agreement on Tariffs and Trade*, BRITANNICA (July 20, 1998), <https://www.britannica.com/topic/General-Agreement-on-Tariffs-and-Trade>.

tional trade is now covered by WTO agreements.⁶ Nevertheless, while GATT and the WTO are built around the framework of free trade, there are exceptions.⁷

In the early months of 2020, the Coronavirus disease 2019 (“COVID-19”) swept the world.⁸ In a panic, the United States (“US”) enacted trade restrictions on many pieces of medical gear needed to fight the COVID-19 pandemic.⁹ Countries from around the world followed suit and imposed temporary export restrictions of their own in order to mitigate potential shortages of key supplies.¹⁰ Export bans accounted for over 90% of trade restrictions that were imposed due to the pandemic.¹¹ These protectionist measures, however, were not done without controversy.

This article will address whether COVID-19 exportation restrictions are justifiable under international trade law. This article will then address whether COVID-19 should be used as a basis to impose limits on trade exports if countries consider it a priority to safeguard the lives of its own citizens first. It will further address the repercussions that these restrictions have had on the world and on developing nations. Lastly, this article will argue how trade liberalization should remain preferential despite the ongoing pandemic.

II. Background

A. Tariffs and Globalization

High tariffs were historically implemented to protect infant industries, while generating revenue for the federal government.¹² After the end of World War I, the “United States continued to embrace the high tariffs that had characterized its trade policy since the Civil War.”¹³ In 1922, in order to provide protection for American farmers, Congress enacted the Fordney-McCumber Tariff Act, one of the most punitive protectionist tariffs passed in U.S. history,¹⁴ raising the average import tax to roughly 40%.¹⁵

⁶ *Introduction and Summary*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/intro_e.htm (last visited Mar. 22, 2021).

⁷ *Article XX General Exceptions*, WORLD TRADE ORG., https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf (last visited Jan. 6, 2021).

⁸ See Yen-Chin Liu et al., *COVID-19: The First Documented Coronavirus Pandemic in History*, 43 *BIOMEDICAL J.* 328-33 (2020).

⁹ Chad Brown, *COVID-19: Trump’s Curbs on Exports of Medical Gear Put Americans and Others at Risk*, THE PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (Apr. 9, 2020, 2:15 PM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/covid-19-trumps-curbs-exports-medical-gear-put-americans-and>.

¹⁰ CHRISTOPHER CASEY & CATHLEEN CIMINO-ISAACS, CONG. RSCH. SERV., IF11551, *EXPORT RESTRICTIONS IN RESPONSE TO THE COVID-19 PANDEMIC* (2020).

¹¹ *Id.*

¹² *Protectionism in the Interwar Period*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/protectionism> (last visited Jan. 6, 2021) [hereinafter *Protectionism*].

¹³ *Id.*

¹⁴ *Smoot-Hawley Tariff Act*, BRITANNICA, <https://www.britannica.com/topic/Smoot-Hawley-Tariff-Act> (last visited Jan. 6, 2021) [hereinafter *Smoot-Hawley*].

¹⁵ *Id.*

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In 1930, in response to the stock market crash, protectionism gained even more strength. Calls to raise tariffs in all sectors of the economy became prevalent.¹⁶ Consequently, Congress passed the Smoot-Hawley Tariff Act (“Smoot-Hawley”), which further raised import duties to protect American businesses and farmers.¹⁷ Over 1,000 economists urged President Herbert Hoover (“Hoover”) to veto the high tariff legislation.¹⁸ Hoover ignored their pleas and signed the bill into law; tariffs radically increased once more.¹⁹ Unsurprisingly, foreign governments retaliated, and European imports and exports fell drastically.²⁰ The depression worsened for US workers and farmers despite promises of prosperity from high Smoot-Hawley tariffs.²¹ Fortunately, Smoot-Hawley marked the end of high tariffs in 20th century American trade policy.²² To this day, they are a reminder of the dangers of protectionism.²³

Near the end of the Second World War, the modern era of globalization and free trade emerged.²⁴ These concepts can be traced back to the 1944 Bretton Woods Conference.²⁵ After a global depression and two world wars, the Bretton Woods Conference sought to create a world economy that would create and foster world peace.²⁶ This idea centered around economic interdependence.²⁷ Put simply, cooperation between nations would surely result in prosperity and peace.²⁸ If nation states were highly trade dependent on each other, war between nations would be less likely;²⁹ this idea prompted the eventual creation of GATT.³⁰

GATT implemented tariff cuts and served as a temporary governing body for commercial relations among its participants.³¹ Under GATT, multilateral trade was characterized by reciprocity, non-discrimination, and predictable trade.³² GATT members agreed to liberalize their own trade in return for comparable

¹⁶ *Protectionism*, *supra* note 12.

¹⁷ *Smoot-Hawley*, *supra* note 14.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Protectionism*, *supra* note 12.

²³ *Id.*

²⁴ Peter Vanham, *A Brief History of Globalization*, WORLD ECONOMIC FORUM (Jan. 17, 2019), <https://www.weforum.org/agenda/2019/01/how-globalization-4-0-fits-into-the-history-of-globalization>.

²⁵ *Bretton Woods-GATT, 1941-1947*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1937-1945/bretton-woods> (last visited Jan. 6, 2020) [hereinafter *Bretton Woods*].

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Bretton Woods*, *supra* note 25.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² KAMAL MALHOTRA & UNITED NATIONS DEVELOPMENT PROGRAMME, *MAKING GLOBAL TRADE WORK FOR PEOPLE* 52 (2012).

commitments from other countries.³³ Accordingly, this framework gave member nations an incentive to increase their own trading commitments.³⁴ In addition, GATT members were all given most favored nation status (“MFN”), which meant that members were not permitted to discriminate between any trading partners.³⁵ Further, in order to make trade more predictable, GATT encouraged members to reduce tariffs through trade negotiations and eliminate non-tariff trade barriers altogether.³⁶ GATT even laid out special provisions for developing countries which provided them greater flexibility when it came to developing trade policies.³⁷

GATT provided initial rules for world trade and oversaw some of the highest growth rates seen in international trade.³⁸ From its signing until the late 1970s, global gross domestic product (“GDP”) grew nearly 70% per year.³⁹ Eventually, this growth started to wane, and further discussions surrounding GATT followed.⁴⁰

In the late 1980s, world leaders and economists came together in Uruguay for another round of GATT negotiations.⁴¹ This time, negotiations were focused on global efficiency, rather than world peace and economic interdependence.⁴² It was decided that GATT could better serve global trade expansion if it became a formal organization;⁴³ from these negotiations the WTO was established.⁴⁴ As an international arena, the WTO provides member nations with the opportunity to address all types of international trade issues and concerns.⁴⁵ It oversees the implantation of trade agreements and provides dispute settlement mechanisms.⁴⁶

Essentially, these frameworks encourage countries to specialize in what they can most efficiently produce with the least number of resources.⁴⁷ This, in turn, would promote economic growth on a global scale and lower prices of goods and

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Bretton Woods*, *supra* note 25.

³⁹ *The GATT Years*, *supra* note 2.

⁴⁰ *Id.*

⁴¹ *The Uruguay Round*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Jan. 6, 2021).

⁴² *The WTO Can . . . Contribute to Peace and Stability*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi09_e.htm (last visited Jan. 6, 2021).

⁴³ Susan Ariel Aaronson, *From GATT to WTO: The Evolution of an Obscure Agency to One Perceived as Obstructing Democracy*, ECON. HIST. ASS’N, <https://eh.net/encyclopedia/from-gatt-to-wto-the-evolution-of-an-obscure-agency-to-one-perceived-as-obstructing-democracy-2/> (last visited Jan. 6, 2021).

⁴⁴ *The GATT Years*, *supra* note 2.

⁴⁵ *What Is the WTO?*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Jan. 6, 2021).

⁴⁶ *Id.*

⁴⁷ See *Comparative Advantage and the Benefits of Trade*, THE LIBRARY OF ECON. AND LIBERTY, <https://www.econlib.org/library/Topics/College/comparativeadvantage.html> (last visited Jan. 6, 2021) [hereinafter *Comparative Advantage*].

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services around the world.⁴⁸ This framework was established under the theory that each country should produce only what they can produce efficiently and sell within a reasonable price.⁴⁹

B. The COVID-19 Pandemic

In late December 2019, an infectious respiratory disease, now namely known as COVID-19, emerged from Wuhan, China.⁵⁰ By the end of January, China imposed aggressive lockdowns to help contain the spread of the virus; however, these efforts by this point were too little too late.⁵¹ COVID-19 spread rapidly through the rest of the world, and the World Health Organization (“WHO”) ultimately declared a global health emergency.⁵² Countries around the globe were in disarray, trying and struggling to best contain this overwhelming disease. Over 39 million cases have now been reported worldwide now, and the WHO estimates that more than 800 million people may have been infected by this virus.⁵³ This disease has now killed over 1.1 million people globally.⁵⁴ In the US, alone, there have been over 20 million reported cases of COVID-19 and over 300,000 deaths.⁵⁵

C. Global Trade Restrictions

As COVID-19 continued to sweep the world, and with very inconsistent information spreading, many countries began to panic.⁵⁶ COVID-19 presented the world with an unprecedented global health challenge.⁵⁷ Accordingly, many countries began to implement measures to reduce the spread of COVID-19.⁵⁸ These measures, unfortunately, shut down large portions of the world economy.⁵⁹ As the world saw an extraordinarily high demand for medical products, many na-

⁴⁸ *Stronger Open Trade Policies Enable Economic Growth for All*, THE WORLD BANK (Apr. 3, 2018), <https://www.worldbank.org/en/results/2018/04/03/stronger-open-trade-policies-enables-economic-growth-for-all> [hereinafter *Open Trade*].

⁴⁹ *Comparative Advantage*, *supra* note 47.

⁵⁰ *Pneumonia of Unknown Cause – China*, WORLD HEALTH ORG. (Jan. 5, 2020), <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unknown-cause-china/en/>.

⁵¹ Erin Schumaker, *Timeline: How Coronavirus Got Started*, ABC NEWS (Sept. 22, 2020, 10:55 AM), <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165>.

⁵² *Id.*

⁵³ Henrik Pettersson et al., *Tracking Coronavirus' Global Spread*, CNN, <https://www.cnn.com/interactive/2020/health/coronavirus-maps-and-cases/> (last updated Apr. 19, 2021); *Covid-19 Updates: One in 10 Worldwide May Have Had Virus, WHO Says*, BBC NEWS (Oct. 5, 2020), <https://www.bbc.com/news/world-54422023>.

⁵⁴ *Id.*

⁵⁵ *United States COVID-19 Cases and Deaths by State*, CENTER FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/> (last visited Jan. 6, 2021).

⁵⁶ See generally Liu et al., *supra* note 8 (discussing the onset of the pandemic).

⁵⁷ *Export Prohibitions and Restrictions*, WORLD TRADE ORG., 1 (Apr. 23, 2020), https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf.

⁵⁸ *Id.* at 6.

⁵⁹ *Id.* at 3.

tions turned towards export prohibitions and restrictions in order to alleviate shortages of supplies on a national level.⁶⁰

By the end of summer 2020, nearly 90 countries had enacted similar export restrictions.⁶¹ Since the onset on the pandemic, countries from around the world have taken close to 200 public health and public health related actions that ban or limit exports on certain products.⁶² Some analysts argue that international export restrictions surged after China implemented many of their own in early 2020.⁶³ China's domestic prioritization essentially fueled personal protective equipment ("PPE") shortages around the world and thus prompted further global restrictions.⁶⁴

The US, for example, enacted trade restrictions on many pieces of medical gear needed to fight the COVID-19 pandemic.⁶⁵ Under the Defense Production Act ("DPA"), President Trump restricted exports of respirators, surgical masks, and hospital gloves.⁶⁶ Under his direction, the US Federal Emergency Management Agency ("FEMA") limited many American exports of personal protective equipment.⁶⁷ More countries followed suit and imposed temporary export restrictions of their own in order to mitigate potential shortages of their key supplies.⁶⁸

Roughly 80 countries, including 46 WTO members, introduced export restrictions.⁶⁹ While most restrictions were considered temporary, export bans accounted for over 90% of trade restrictions that were imposed due to the pandemic.⁷⁰ The products that these restrictions covered varied country to country, but most of them included medical supplies, medical equipment, and food.⁷¹

III. Discussion

A. Medical Imports and Exports on a Global Scale

This pandemic has brought a great deal of attention to global trade – especially to medical products that are used for medical testing, treatment, and prevention.⁷²

⁶⁰ *Id.*

⁶¹ *COVID-19: Measures Affecting Trade in Goods*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm (last updated Mar. 26, 2021).

⁶² *Id.*

⁶³ *Export Controls and Export Bans over the Course of the Covid-19 Pandemic*, WORLD TRADE ORG., 2 (Apr. 29, 2020), https://www.wto.org/english/tratop_e/covid19_e/bdi_covid19_e.pdf [hereinafter *Export Controls*].

⁶⁴ *Id.*

⁶⁵ Brown, *supra* note 9.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ CASEY & CIMINO-ISAACS, *supra* note 10.

⁶⁹ *Export Prohibitions and Restrictions*, *supra* note 57, at 1.

⁷⁰ CASEY & CIMINO-ISAACS, *supra* note 10.

⁷¹ *Export Prohibitions and Restrictions*, *supra* note 57, at 1.

⁷² *Trade in Medical Goods in the Context of Tackling COVID-19*, WORLD TRADE ORG., 1 (Apr. 3, 2020), https://www.wto.org/english/news_e/news20_e/rese_03apr20_e.pdf [hereinafter *Trade in Medical Goods*].

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Medical products constitute roughly 5% of total global trade, and in 2019 alone, medical product imports surpassed 1 trillion dollars.⁷³

The US, Germany, and China represent that top three importers for medical products.⁷⁴ In recent years, though, the US has become the largest importer of medical products – its share of world medical products accounting for 19% of total world imports in 2019.⁷⁵ US medical imports come primarily from Ireland, Germany, Switzerland, China, and Mexico.⁷⁶ German medical imports, on the other hand, primarily come from other European countries and the US.⁷⁷ Meanwhile, China's medical imports come primarily from Germany and the US.⁷⁸ Medical exports, on the other hand, predominantly come from Germany, the US, and Switzerland.⁷⁹ However, China is the top exporter of face masks.⁸⁰ More than half the world's respirators, on the other side, are exported primarily from Singapore, the US, the Netherlands, and China combined.⁸¹

Similar to other industries, international trade has facilitated an interdependence on PPE around the world, with countries depends on global value chains and international trade for medical products.⁸² Unfortunately, as COVID-19 worsened, a growing number of states enacted export prohibitions and restrictions of these products.⁸³

B. Export Restrictions

As COVID-19 continued to spread around the world, more governments began to adopt measures in order to reduce the exports of medical supplies and equipment.⁸⁴ Some states embraced explicit export bans on medical products, while others curbed exports via more subtle measures.⁸⁵

In early April of 2020, China enacted strict export controls on various medical products; these included face masks, protective suits, thermometers, ventilators, as well as COVID-19 testing kits.⁸⁶ All exports of these products had to be accompanied with proof of registration with China's National Medical Products Administration ("NMPA").⁸⁷ In addition, China added an export prohibition

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 3.

⁷⁶ *Id.*

⁷⁷ *Trade in Medical Goods*, *supra* note 72, at 4.

⁷⁸ *Id.*

⁷⁹ *Id.* at 5.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Export Prohibitions and Restrictions*, *supra* note 57, at 3.

⁸³ *Id.*

⁸⁴ Simon J. Evenett, *Tackling Covid-19 Together, the Trade Policy Dimension*, GLOBAL TRADE ALERT, 2 (Mar. 23, 2020), <https://www.globaltradealert.org/reports/download/51>.

⁸⁵ *Id.* at 5.

⁸⁶ *Export Controls*, *supra* note 63, at 3.

⁸⁷ *Id.*

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which only allowed exports of these medical products upon authorization.⁸⁸ These additional layers of certification, inspection, and authorization acted as more export “hoops” to jump through.⁸⁹

In the US, the Federal Emergency Management Agency (“FEMA”) issued a temporary ban on certain personal protective equipment exports.⁹⁰ These restrictions were placed on respirators, respiratory filters, surgical face masks, and protective medical gloves.⁹¹ As a result of the ban, these medical products could not be exported without FEMA permits.⁹² These restrictions applied to roughly \$1.1 billion of US exports.⁹³

Even the European Union (“EU”), the so called “champion of open markets,” enacted their share of export prohibitions.⁹⁴ In the early months of the pandemic, the EU made all personal protective equipment exports subject to authorization and prohibited their exportation without license.⁹⁵ Similarly, the United Kingdom (“UK”) enacted export prohibitions on over 80 types of vital drugs in order to prevent medicinal shortages.⁹⁶ The UK also mandated licenses for any exports of personal protective equipment to countries outside the EU or European Free Trade Association.⁹⁷

Furthermore, India placed export restrictions on vitamins, pharmaceutical raw materials, ventilators, and anti-malarial medicines.⁹⁸ Indonesia announced temporary export bans on sanitizers, face masks, and certain types of medical equipment.⁹⁹ Ukraine enacted quantitative restrictions on personal protective equipment exports such as masks, disinfectants, protective suits, and gloves.¹⁰⁰

⁸⁸ *COVID-19 Temporary Trade Measures*, INT’L TRADE CTR., <https://macmap.org/covid19> (last updated Dec. 7, 2020) [hereinafter INT’L TRADE CTR].

⁸⁹ *Id.*

⁹⁰ *Export Allocation Rule of Medical Supplies and Equipment for COVID-19*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/fact-sheet/allocation-rule-personal-protective-equipment-exports> (last updated May 23, 2021) [hereinafter FEMA].

⁹¹ *Id.*

⁹² *Export Controls*, *supra* note 63.

⁹³ CASEY & CIMINO-ISAACS, *supra* note 10.

⁹⁴ *Export Controls*, *supra* note 63.

⁹⁵ *Id.*

⁹⁶ INT’L TRADE CTR, *supra* note 88.

⁹⁷ *Id.*

⁹⁸ *Export Controls*, *supra* note 63, at 3; PTI, *WTO Asks Members to Share Information on Trade Measures Related to COVID-19*, FINANCIAL EXPRESS (Mar. 25, 2020, 4:48 PM), <https://www.financialexpress.com/economy/wto-asks-members-to-share-information-on-trade-measures-related-to-covid-19/1909190/>.

⁹⁹ Reuters Staff, *Indonesia to Ban Face Mask Exports to Ensure Domestic Supply*, REUTERS (Mar. 13, 2020, 12:04 AM), <https://www.reuters.com/article/us-health-coronavirus-indonesia-masks/indonesia-to-ban-face-mask-exports-to-ensure-domestic-supply-idUSKBN2100JB>.

¹⁰⁰ *Export Controls*, *supra* note 63, at 3.

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Serbia, too, closed its borders and enacted export restrictions on various medicinal products.¹⁰¹

Supporters claim that these prohibitive measures were necessary to prioritize domestic demands.¹⁰² Critics argue, however, that export restrictions not only harm international trade, but pose an extremely detrimental domino effect on nations that rely on international PPE. In fact, such export restrictions have already caused shortages of such products in countries looking to purchase them.¹⁰³

IV. Analysis

A. WTO Compliance

While the WTO generally does not permit export restrictions, GATT does provide exceptions to this generally accepted framework.¹⁰⁴ Article XI:2 of GATT provides the first exception.¹⁰⁵ This article allows temporary export prohibitions or restrictions “to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.”¹⁰⁶ The second exception is set forth by GATT Article XX(b), which allows for any measures that are “necessary to protect human, animal or plant life or health.”¹⁰⁷ GATT Article XXI(b) provides the last exception, which allows member states to take actions “which it considers necessary for the protection of its essential security interests” in times of international emergencies.¹⁰⁸

As to the first exception, export restrictions seem to be justified under GATT Article XI:2.¹⁰⁹ In the case of *China – Raw Materials*,¹¹⁰ a critical shortage was defined as “deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point.”¹¹¹ With the current pandemic, the WTO Appellate Body’s interpretation of Article XI:2 appears to stipulate that WTO Members do in fact have the authority to restrict necessary exports of food and medical supplies in order to

¹⁰¹ Iana Dreyer, *EU External Border and Air Freight: Next Medical Supply Chain Flash Point?*, BORDERLEX (Mar. 23, 2020), <https://borderlex.net/2020/03/24/eu-external-border-and-air-freight-next-medical-supply-chain-flash-point/>.

¹⁰² Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources for Domestic Use, 85 Fed. Reg. 20195 (Apr. 7, 2020) (to be codified at 44 C.F.R. pt. 328).

¹⁰³ Ignacio Carreño et al., *The Implications of the Covid-19 Pandemic on Trade*, 2020 EUR. J. RISK REG. 1-9, at 4.

¹⁰⁴ *Export Prohibitions and Restrictions*, *supra* note 57, at 3-4.

¹⁰⁵ *Id.* at 4.

¹⁰⁶ *WTO Analytical Index, GATT 1994 – Article XI*, WORLD TRADE ORG., 1, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art11_oth.pdf (last visited Jan. 6, 2021).

¹⁰⁷ WORLD TRADE ORG. *Article XX General Exceptions*, *supra* note 7.

¹⁰⁸ *Article XXI Security Exceptions*, WORLD TRADE ORG., 1 (last visited April 18, 2021).

¹⁰⁹ *Export Prohibitions and Restrictions*, *supra* note 57, at 4.

¹¹⁰ See Appellate Body Report, *China–Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/AB/R (adopted Jan. 30, 2012).

¹¹¹ *Id.* ¶ 324.

prevent critical shortages.¹¹² In fact, as demand for medical products and equipment soared, many nation members turned toward export prohibitions and restrictions in order to mitigate supply shortages of products they deemed necessary.¹¹³

Regarding the second exception articulated in Article XX(b), export restrictions put into place to protect human, animal, or plant life or health appear to be in accord with WTO obligations and rules, so long as they are not applied in a discriminatory manner or are disguised restrictions on international trade.¹¹⁴ In short, indiscriminate export restrictions on medical products are indeed in accordance with WTO law.

The last exception in GATT Article XXI(b) regarding national security, however, does not come across as a justifiable exception for export trade restrictions.¹¹⁵ While the pandemic undoubtedly plays into a member state's national security interests, the WTO typically does not equate health emergencies as those justifiable in international relations.¹¹⁶ Accordingly, national security concerns do not justify any of these export restrictions.

It must be said, while export restrictions may be in accordance with WTO law and obligations, in no way does that imply such restrictions are ultimately useful tools in fighting the COVID-19 pandemic.

B. Impact on Global Trade

While perhaps compliant with WTO obligations, the WTO nevertheless argues these prohibitive export restrictions hurt global value chains.¹¹⁷ The concept of global value chains refers to international production sharing—a process in which production activities are broken down and carried out by different countries.¹¹⁸ From a product's conception to its end use, the design, production, and distribution stages may all be divided among multiple firms across many geographic spaces.¹¹⁹

Due to the fact production processes for many items around the world are so integrated into global value chains, export restrictions essentially fuel shortages.¹²⁰ No country in the world can produce all the products it needs for medical care; nor can a single country produce all the necessary intermediate

¹¹² Joost Pauwelyn, *Export Restrictions in Times of Pandemic: Options and Limits Under International Trade Agreements*, SSRN, 6, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3579965 (last updated May 8, 2020).

¹¹³ *Export Prohibitions and Restrictions*, *supra* note 57, at 3.

¹¹⁴ *Id.* at 4.

¹¹⁵ Carreño et al., *supra* note 103, at 6-7.

¹¹⁶ *Id.*

¹¹⁷ *Export Controls*, *supra* note 63, at 1.

¹¹⁸ Adnan Seric & Yee Siong Tong, *What Are Global Value Chains and Why Do They Matter?*, INDUSTRIAL ANALYTICS PLATFORM (Aug. 2019), <https://iap.unido.org/articles/what-are-global-value-chains-and-why-do-they-matter>.

¹¹⁹ *Id.*

¹²⁰ *Export Controls*, *supra* note 63, at 1.

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products.¹²¹ While countries enacted export prohibitions in an effort to mitigate critical shortages, these restrictions did just the opposite.¹²² If a myriad of countries are prohibiting the exportation of medical goods, then no country will have all the medical products needed to fight the pandemic.¹²³

For example, while the EU manufactures a large amount of medical devices and medicines, it is still very dependent on a myriad of imports that are necessary for medical care, such as pharmaceutical raw materials, generic drugs, and protective equipment.¹²⁴ In 2019, the EU imported roughly 17.6 billion US dollars worth of personal protective equipment.¹²⁵ Correspondingly, when other countries impose export prohibitions and restrictions, despite its medical manufacturing capabilities the EU ends up worse off.¹²⁶

The COVID-19 pandemic has highlighted the world's need for global value chains. Responding effectively and efficiently to the COVID-19 pandemic undoubtedly requires an increase in global medical supply production, and well-functioning global value chains are needed to do just that.¹²⁷ As world production increases and becomes available, international trade will be of the utmost importance when it comes to moving needed supplies from where it is abundant to where it is lacking.¹²⁸ This is especially important during global pandemics where a disease peaks in different locations at different times.¹²⁹ Global efficiency is highly dependent on these international global value supply chains.¹³⁰

Export restrictions, however, risk hindering the required supply response that the world needs—especially when it comes to much needed medical equipment.¹³¹ These export restrictions have created a ripple effect through the world economy.¹³² Even Economists argue initial export restrictions may lead to retaliatory measures by other countries, which may also be comparable export restrictions.¹³³ This, in turn, disrupts international supply chains, cuts countries off from essential supplies, and ultimately further dampens the global economy.¹³⁴

While countries may be imposing limits on trade exports in order to curb vital medical shortages and thus, safeguard the lives of its own citizens, doing so is disadvantageous as no country alone can successfully produce all the medical

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 3.

¹²⁵ *Id.* at 4.

¹²⁶ *Id.*

¹²⁷ *Export Prohibitions and Restrictions*, *supra* note 57.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Bengt Söderlund, *The Impact of Travel Restrictions on Trade During the COVID-19 Pandemic*, Vox EU (Nov. 4, 2020), <https://voxeu.org/article/impact-travel-restrictions-trade-during-covid-19>.

¹³¹ *Export Prohibitions and Restrictions*, *supra* note 57.

¹³² *Export Controls*, *supra* note 63, at 1.

¹³³ *Id.* at 4.

¹³⁴ *Id.*

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equipment needed. In reality, these measures do the opposite. They disrupt supply chains and decrease total production, which in turn leads to essential product shortages in areas that need them the most.¹³⁵ Other nations consequently counter these restrictions with ones of their own, which only exacerbates the global crisis at hand.¹³⁶

C. Impact on the United States

The US is no exception to the detrimental effect of protectionism and export restrictions. In fact, President Trump's restrictive curb on medical gear exports put Americans and other countries at higher risk. The reason is simple: the US relies extensively on the importation of PPE.¹³⁷ The US imported \$4.7 billion of other PPE, which included face shields, protective garments, hand sanitizer, protective goggles, and headwear.¹³⁸ Ventilators, X-ray equipment, thermometers, and other such PPE made up another \$12.6 billion of US imports.¹³⁹

Aside from finished medical products, inputs needed to manufacture medical gear are just as much impacted by export restrictions. For example, US companies use Canadian pulp to produce protective garments.¹⁴⁰ Put plainly, export restrictions on medical gear conversely put US medical imports at risk as well.

As a plethora of countries followed suit in implementing medical export restrictions of their own, critics point out the impact of these restrictions will harm not only those who are enacting the restriction, but also smaller countries who depend and rely on foreign medical goods.¹⁴¹

D. Impact on Developing Nations

For many patients who contract severe cases of COVID-19, access to medical products, ventilators in particular, is a matter of life and death.¹⁴² Global export bans on medical ventilators deprives numerous developing nations of these products; many global value chains provide the parts for ventilator producers.¹⁴³ Ac-

¹³⁵ *IMF and WTO Heads Call for Lifting Trade Restrictions on Medical Supplies and Food*, WORLD TRADE ORG. (Apr. 24, 2020), https://www.wto.org/english/news_e/news20_e/igo_15apr20_e.htm [hereinafter *Lifting Trade Restrictions*].

¹³⁶ *Id.*

¹³⁷ Brown, *supra* note 9.

¹³⁸ *FAQs on Shortages of Surgical Masks and Gowns During the COVID-19 Pandemic*, FOOD AND DRUG ADMIN., <https://www.fda.gov/medical-devices/personal-protective-equipment-infection-control/faqs-shortages-surgical-masks-and-gowns-during-covid-19-pandemic> (last visited Jan. 6, 2021).

¹³⁹ Brown, *supra* note 9; Sarah Kliff et al., *There Aren't Enough Ventilators to Cope with the Coronavirus*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/business/coronavirus-ventilator-shortage.html> (last updated Mar. 26, 2020).

¹⁴⁰ Chris Bush, *Nanaimo's Harmac Mill Works to Fill Doubled Pulp Order for Medical Masks and Gowns*, VANCOUVER ISLAND FREE DAILY (Mar. 24, 2020), <https://www.vancouverislandfreedaily.com/business/nanaimos-harmac-mill-works-to-fill-doubled-pulp-order-for-medical-masks-and-gowns/>.

¹⁴¹ Brown, *supra* note 9.

¹⁴² Evenett, *supra* note 84, at 6.

¹⁴³ *Id.*

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ordingly, export restrictions on these items stalls production of ventilators which, in turn, denies foreign buyers and citizens of these much-needed items.¹⁴⁴

In analyzing trade data, the United Nations (“UN”) revealed that in 2018, only 25 states exported more than \$10 million of medical ventilators.¹⁴⁵ Of those, only one was a Latin American country, and none were from Africa, the Middle East, or South Asia.¹⁴⁶ Thus, when top ventilator exporters curb or restrict ventilator shipments, a large portion of the world’s population are then denied access to these much needed products—especially during a pandemic.¹⁴⁷

Many countries in Latin America and the Caribbean are highly dependent on US medical equipment.¹⁴⁸ Jamaica, for example, imports a majority of their respirators, gloves, and masks from the US.¹⁴⁹ Many developing nations do not even have the ability to increase their local production of medical gear. Therefore, depriving these countries of even one of these products could seriously hamper the effectiveness of their medical response to COVID-19.¹⁵⁰

In addition, the EU’s export restrictions on certain medical products could very well have compromised the healthcare systems in developing nations in Eastern Europe and sub-Saharan Africa—many of which rely heavily on the EU for medical supplies.¹⁵¹ For example, Cape Verde, a small island nation in the Atlantic, imports over 90% of its medical gloves and face shields from the EU.¹⁵² EU restrictions could consequently limit medical supplies and in turn, the quality of care available to those on the island. Even where one medical product is lacking or unable to be sourced, effective medical care could very well be jeopardized.¹⁵³

Industrial countries have long pushed developing countries to open up their markets to foreign imports.¹⁵⁴ This has created a system in which developing countries come to heavily rely on foreign imports, especially on medical equipment.¹⁵⁵ Thus, for many developing countries, restrictive export policies threaten to eliminate their access to global markets for medical product imports right when they need it most.¹⁵⁶

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Brown, *supra* note 9.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Chad Brown, *EU Limits on Medical Exports Leave Many Poor Countries Vulnerable to COVID-19*, THE PETERSON INST. FOR INT’L ECON. (Mar. 25, 2020), <https://www.piie.com/research/piie-charts/eu-limits-medical-exports-leave-many-poor-countries-vulnerable-covid-19> [hereinafter *EU Limits*].

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Chad Brown, *EU Limits on Medical Gear Exports Put Poor Countries and Europeans at Risk*, THE PETERSON INST. FOR INT’L ECON. (Mar. 19, 2020), <https://www.piie.com/blogs/trade-and-investment-policy-watch/eu-limits-medical-gear-exports-put-poor-countries-and> [hereinafter *COVID Repercussions*].

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

V. Proposal

A. The Case for Free Trade – Even During a Pandemic

Integration into the global economy has long been tied to economic growth, development, and poverty reduction.¹⁵⁷ Studies have even shown that open global trade policies are needed for continuous economic growth.¹⁵⁸ In fact, in terms of increasing living standards, no country has achieved great success in the last few decades without being open to global trade.¹⁵⁹ It has even enabled many developing countries to establish their own competitive advantages, especially in the realm of product manufacturing.¹⁶⁰

Essentially, the free trade framework encourages countries around the world to specialize in what they are able to produce with the least amount of resources.¹⁶¹ This, in turn, promotes economic growth on a global scale and lowers the price of goods and services around the world.¹⁶² After all, no country alone can produce all of the goods it needs at a reasonable price.¹⁶³ This is particularly applicable to medical products.

The success that coincides with free trade does not disappear with the onset of a global emergency. Given the COVID-19 pandemic, liberalized trade is essential to save lives. There is a well-defined need to keep trade flowing in order to ensure the supply of essential medical products is properly produced and distributed throughout the world. This, however, will require cooperation between all nations. Keeping trade open and flowing requires the market to keep supplying essential goods and requires countries to avoid export restrictions.¹⁶⁴ Easing trade tensions and restrictions is particularly crucial.

A number of nations issued statements urging that states keep trade lines open. For instance, Australia, Brunei Darussalam, Canada, Chile, the Republic of the Union of Myanmar, New Zealand, and Singapore issued a joint statement outlining their commitment to maintaining open and connected supply chains.¹⁶⁵ These countries recognized the importance of removing restrictions on essential goods, especially on medical supplies, in order to support the viability of global supply

¹⁵⁷ IMF Staff, *Global Trade Liberalization and the Developing Countries*, INT'L MONETARY FUND (Nov. 2001), <https://www.imf.org/external/np/exr/ib/2001/110801.htm> [hereinafter *Trade Liberalization*].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Comparative Advantage*, *supra* note 47.

¹⁶² *Open Trade*, *supra* note 48.

¹⁶³ *Comparative Advantage*, *supra* note 47.

¹⁶⁴ *COVID-19 and International Trade: Issues and Actions*, ORG. FOR ECON. CO-OPERATION AND DEV. (June 12, 2020), <https://www.oecd.org/coronavirus/policy-responses/covid-19-and-international-trade-issues-and-actions-494da2fa/> [hereinafter *OECD*].

¹⁶⁵ *Joint Ministerial Statement by Australia, Brunei Darussalam, Canada, Chile, the Republic of the Union of Myanmar, New Zealand and Singapore Affirming Commitment to Ensuring Supply Chain Connectivity Amidst the COVID-19 Situation*, GOV'T OF CANADA (Mar. 25, 2020), <https://www.international.gc.ca/gac-amc/news-nouvelles/2020-03-25-joint-ministerial-statement-declaration-ministerielle-commune.aspx?lang=eng>.

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chains.¹⁶⁶ Despite the uncertainty associated with the pandemic, countries need to unite to keep trade flowing. Protectionism has consistently proven to be a costly failure, and a global pandemic is not the time for a shift toward isolationist measures.¹⁶⁷

As COVID-19 rages on, nations would do well to first increase global trade transparency.¹⁶⁸ Global transparency is crucial in structuring sound national policies while simultaneously keeping international trade flowing.¹⁶⁹ That said, countries would do best to honor their commitments to the WTO by properly reporting all COVID-19 related trade measures taken.¹⁷⁰

In addition, nations should opt for global cooperation in making sure global supply chains are not disrupted—particularly as it regards the many medical products needed to fight off disease.¹⁷¹ Opening trade of essential medical supplies means removing trade barriers, including tariffs and export prohibitions.¹⁷² It means expediting any necessary certification procedures and enhancing trade facilitation to maintain the flow of goods between countries.¹⁷³

States need to properly plan beyond the immediate. There is a serious need to increase the overall supply of essential medicinal products globally, and nations should urgently work together to boost capacity and production, rather than implementing any kind of restrictions. In essence, this means prioritizing free trade. Nations are undoubtedly concerned with wanting to protect their own citizens, but the effect these restrictions have on other countries, and in turn, the global containment efforts, can be extremely detrimental.¹⁷⁴

Transparency, global cooperation, and liberalized trade are essential to build an effective global supply of medical gear needed to fight the COVID-19 pandemic. Export restrictions on essential goods, such as medical equipment, should be removed and free trade embraced. Nations need to work together in order to increase medical supplies, not restrict it.

VI. Conclusion

Export restrictions can have ripple effects throughout the global economy. While they may be deemed justifiable under WTO obligations, COVID-19 should not be used as a basis to impose limits on trade exports—even if countries consider it a priority to safeguard the lives of its own citizens. In the short term, export restrictions may result in increased domestic availability of medical prod-

¹⁶⁶ *Id.*

¹⁶⁷ Scott Lincicome, *The Case for Free Trade*, NATIONAL REV. (May 2, 2019, 1:24 PM), <https://www.nationalreview.com/magazine/2019/05/20/the-case-for-free-trade/>.

¹⁶⁸ OECD, *supra* note 164.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

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ucts. On the contrary, however, export restrictions ultimately reduce total global supply; limiting the availability of medical products on both a domestic, as well as international, level. In addition, developing countries are severely affected by restrictive measures placed on PPE. As many have limited manufacturing capacities, they rely on industrial nations for many medical products. In the aggregate, export restrictions are counterproductive.¹⁷⁵ What makes sense in a single emergency can be disastrous during a global crisis.¹⁷⁶ These ideas considered, free trade should be embraced and remain preferential for the global good. After all, a global pandemic requires a global response.

¹⁷⁵ *Lifting Trade Restrictions*, *supra* note 135.

¹⁷⁶ *Id.*