

Scope Interpretation of Article Xi of the GATT—In Light of the COVID-19 Pandemic

Yujie Cai¹

¹ School of International Commercial Law, University of Bristol, Bristol, United Kingdom

Correspondence: Yujie Cai, School of International Commercial Law, University of Bristol, Bristol, United Kingdom.

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Abstract

In early 2020, the COVID-19 pandemic broke out around the world. In order to combat the epidemic and ensure the operation of public health systems, more than 200 countries in the world have issued policies and carried out other related measures to interfere with the production and sales of medicines for COVID-19 treatment and to restrict the export of medical supplies such as masks, ventilators and protective suits. However, most of these measures seem to violate the general quantitative restriction rule of Article XI of the GATT, which makes people re-examine the interpretation and scope of application of this rule. As far as I'm concerned, this pandemic has made it clear that the prohibition under Article XI:1 GATT is overly broad, and the exceptions under Article XI:2(a) is overly narrow.

This essay will analysis the scope interpretation of Article XI of the GATT in two parts. Firstly, by reviewing the *Japan-Trade in Semi-Conductors case*, the first part suggests that the interpretation of Article XI:1 GATT is very broad and most of the export restriction measures during the pandemic may be clarified as “other measures” further proves that. Secondly, it will consider the view that the pandemic made it clear that the exceptions under Article XI:2(a) overly narrow since the export restriction measures imposed on medical products can hardly see to be “temporarily” and the products can also difficultly see to be “essential”.

Keywords: pandemic, export restriction, scope interpretation, GATT

1. The Prohibition Under Article Xi:1 GATT Is Overly Broad

Article XI:1 lists that quotas, import or export licences are prohibited measures on importation and exportation and use “other measures” as an important supplement to guarantee the realization of the general elimination of quantitative restrictions. However, there is no unified criterion for what measures fall under “other measures” of this article. During the pandemic, many countries have adopted various measures on trade in goods, which are not limited to quotas, import or export licences, for instance, during the epidemic, the US had intended to cease the export of respirators and used measures including executive orders, government procurement agreements, etc. (further analyzed in the following sections), these measures actually restrict the exportation of goods thus belongs to “other measures”. Therefore, Article XI:1 has been interpreted broadly.

A classic case related to this is *Japan-Trade in Semi-Conductors*. In this case, in order to perform the semi-conductor trade agreement signed with The United States, the Japanese government took measures to monitor the export of semiconductor products to the United States and other countries, preventing the export of products at lower than normal prices. As a result, the export of Japanese semiconductor products has been greatly reduced, but semiconductor prices in the international market have continued to rise. The situation is a big blow to the European electronics industry, who needs Japanese semiconductors. The EEC then claims that the measure carried out by Japan is a violation of Article XI.¹

The Japanese government argued that such measures are just a kind of non-binding, non-mandatory “administrative guidance”, and Japanese companies reduce exports not result from this government restrictions.² However, as far as Japanese reports before April 1987 has concerned, the Japanese government delayed the processing of export licenses, deliberately reduced the demand for semiconductor products in the international market, and put pressure on private companies through administrative measures. In the Panel’s view, non-coercive “administrative guidance” by the government is also a violation of Article XI if the government provides sufficient incentives and penalties to ensure the implementation of its non-coercive measures and if its intervention has played a key role in restricting the export of low-cost products.³

Consider what has actually happened during the pandemic. Intending to cease 3M’s export of respirators and let 3M’s overseas factories to supply the federal government with N95 respirators, Trump had signed an untargeted executive order proclaiming his authority under the 1950 Defence Production Act.⁴ He has also threatened to use the 1950 Defense Production Act if American companies do not voluntarily cooperate. On April 10, 2020, the Federal Emergency Management Agency (FEMA) issued Temporary Final Rules to allocate certain health and medical resources for domestic use.⁵ The above measures are obviously not coercive but it has a deterrent effect on enterprises and in order to avoid the government’s coercive measures, the rational choice for 3M is to cooperate with the government. Therefore, these measures fall under the “other measures” scope.

Thus, the term “other measures” obviously has been interpreted broadly. However, whether these measures violate GATT or not, it is necessary to consider the exception of Article XI.

2. The Exceptions Under Article XI:2(A) GATT Is Overly Narrow

Article XI:2 of the GATT 1994 provides for an exception to the “General Elimination of Quantitative Restrictions”. Under Article XI:2(a), “General Elimination of Quantitative Restrictions” does not apply to “Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.” There are four phrases that should be noted which are “temporarily applied”, “prevent or relieve”, “critical shortages” and “essential”. These phrases are highly subjective and are interpreted narrowly in practice.

In *China-Measures Related to the Exportation of Various Raw Materials*, China considers that “critical shortage” is a shortage in quantity that rises to the level of decisive status, or to the level of uncertainty or equal risk. China also thinks that the verbs “prevent” and “relieve” mean that the extent of the shortage is uncertain or poses a serious threat. “Therefore, the foreseeable depletion of natural resources should be classified as a “critical shortage” and China’s conservation measure to prevent or alleviate this shortage should be permitted by Article XI:2(a). The panel, however, holds the view that if the shortage is permanent rather than temporary, it will not be possible to “prevent” it through temporary export restrictions.⁷ In this sense, the raw materials which is natural resources, will definitely run out thus the shortage is permanent, China cannot be exempted from liability by applying Article XI:2(a).

Consider the export restriction measures during the pandemic, if a WTO member claims that the quantitative restriction measures taken by another member on the export of its medical products violate the obligations of Article XI of the GATT, and the party tries to cite Article XI:2(a) to prove the legality of its measure, I think there are two aspects need to be considered.

First, the “temporarily” of its measure. In the dictionary, “temporary” means “only for a certain time” and “for a limited period of time”. However, how long does “a certain time” refers to? In *China-Measures Related to the Exportation of Various Raw Materials*, China cites Australia’s restriction on Melano sheep from 1929 to 2010, which lasted more than 80 years to guarantee China’s application of article XI:2(a).⁸ The panel considered that a measure that could be exhausted for 16 years should be considered a permanent shortage rather than a “critical shortage” under article XI:2(a) thus China’s measures in this case cannot be classified as “temporarily”.⁹ Similarly, the COVID-19 pandemic has not yet ended, and it is hard to predict when the shortage of related medical products will be alleviated or ended. Therefore, the “temporarily” of the export restriction on medical products is highly controversial and it is difficult to meet the qualification of Article XI:2(a).

Second, the “essential” of the medical products. In this case, the respondent will face two problems. For one thing, are all medical products and medicines related to the pandemic “essential”. For instance, face masks are “essential”, how about the materials used to make them? Are these raw material also “essential”? For another thing, the respondent has to prove that there are no reasonably alternative measures exist. Measures such as temporarily reducing import taxes on medical products, expanding the production of medical products, and developing corona-virus vaccines may be used as alternatives to the quantitative restriction measures on medical products. First, in terms of expanding health products production and developing vaccines, they are hard to be considered as reasonably alternative measures because it takes plenty of time to carry out. For instance, it usually takes 8 to 10 years for a vaccine to go from development to market. Likewise, expanding the production of

medical products is also not a matter that can be solved overnight which requires the expansion of labor force, the improvement of production efficiency and so on. However, unless extreme circumstances such as a global shortage of medical products or disruption of international freight and logistics occur, it is generally reasonable to expect that imports be expanded in the short term through measures that do not violate WTO rules, such as reducing import taxes on medical products that have been mentioned above. Therefore, most of the quantitative restrictions imposed on the export of medical products could hardly be considered “essential”.

3. Conclusion

To conclude, this essay has shown that the prohibition under Article XI:1 GATT is overly broad and the exceptions under Article XI:2(a) is overly narrow which are further proved by the pandemic. On the one hand, the interpretation of “other measures” in Article XI:1 GATT can be extended to any non-coercive government action that creates sufficient incentives or impediments to private action thus the export restriction measures during the COVID-19 pandemic can all be included in this category. On the other hand, phrases like “temporarily” and “essential” in Article XI:2(a) are highly subjective thus it’s hard to prove that the measures used during the pandemic meet the exceptions under Article XI:2(a).

References

WTO Case-Law

Reports of the Panel, *Japan-Trade in Semi-Conductors* (L/6309-35S/116) May 1998.

Reports of the Panel, *China-Measures Related to the Exportation of Various Raw Materials* (WT/DS394/R WT/DS395/R WT/DS398/R) 5 July 2011.

Website

<http://www.wto.org>.

Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19, available at <https://www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/>, 2020-7-20.

Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources for Domestic Use, available at <https://www.federalregister.gov/documents/2020/04/10/2020-07659/prioritization-and-allocation-of-certain-scarce-or-threatened-health-and-medical-resources-for-domestic-use>

Agreement

General Agreement on Tariffs and Trade 1994 (GATT).

¹ Reports of the Panel, *Japan-Trade in Semi-Conductors* (L/6309-35S/116) May 1998, paras 78.

² *Ibid* at paras 50-51.

³ *Ibid* at paras 106-109.

⁴ Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19, available at <https://www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/>, 2020-7-20.

⁵ Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources for Domestic Use, available at <https://www.federal-register.gov/documents/2020/04/10/2020-07659/prioritization-and-allocation-of-certain-scarce-or-threatened-health-and-medical-resources-for-domestic-use>.

⁶ China’s second written submission, para 89.

⁷ Reports of the Panel, *China-Measures Related to the Exportation of Various Raw Materials* (WT/DS394/R WT/DS395/R WT/DS398/R) 5 July 2011, para 7.297.

⁸ *Ibid* at para 7.252.

⁹ *Ibid* at para 7.350.

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