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Article

Responding to COVID 19: India's trade restrictions and the World Trade Organization

Varad Choudhary, Rudraksh Lakra and Ayan Gupta

Abstract

The COVID-19 Pandemic ("COVID-19") has caused massive disruption in the global supply chains, forcing countries to undertake extreme measures to ensure survival and to mitigate an unprecedented social and economic crisis. Owing to the impact caused by a shortages in essential supplies, many countries have imposed severe export restrictions on medical supplies like Personal Protective Equipment (PPE), surgical masks, testing SWABS, sanitary gloves, and clothing ("Essential Medical Supplies"). These measures have brought about a slew of problems. However, they also bring with them a golden opportunity for India to work towards dethroning China from its global dominance. This article deconstructs the trade restrictions imposed by India, and their effectiveness. It also discusses how India can guard itself against potential litigation before the World Trade Organization.

The COVID-19 pandemic has brought about a new wave of trade protectionism with states imposing export restrictions on Personal Protection Equipment, testing kits, and important medicines [Essential Medical Supplies].¹ There is also the looming issue of protectionism with respect to vaccines as and when they are developed and ready to ship. India has also resorted to such restrictions, especially in the initial stage of the pandemic.²

The Pandemic has also brought about a departure in the status quo of world trade. As China, the quintessential "World's Factory" shut down, so did international trade. Supply

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chains fell apart, and given how easily the disease spreads, production by and large also stopped.³ This brought about a slew of problems for the world, including India. China's botched handling of the epidemic, its attempt to hide the disease's spread, and its refusal to share vital information about the virus has also led to an increasing distrust towards her.⁴ Amidst all this, India's standoff with China in the Galwan Valley in Ladakh has only added to the multiple challenges facing the Indian Government, which was already battling an economic slowdown.⁵

The current situation in global trade provides an opportunity for India to take necessary steps to establish its presence more forcefully in the international stage. The growing distrust of China and the problems caused as a result of non-diversified supply chains have forced manufacturers to lookout for newer investment destinations.⁶ Further, the economic reliance of the world on China no longer serves any comfort to nations.⁷ The vacuum that the fall of Beijing brings is an opportunity that India can easily make the most out of.

However, to do that, India will need to do quite a bit of groundwork. It will first have to ensure its own safety and ensure it has enough essential medical supplies for itself during, what can be called, one of independent India's biggest public health crisis. India will also need to ensure that it complies with the World Trade Organization [WTO] regime, which in general, prohibits trade protectionism. Finally, it will need to project confidence to the world, that it is ready for the challenges coming its way, as it takes on China.

This paper primarily examines India's approach to trade protectionism and how it has helped bring stability to a nation. Secondly, it analyzes the appropriate legal justifications available for India's protectionist policy under the WTO. Finally, it explores the opportunity COVID - 19 provides India --for substantially reducing China's dominance in international trade-- by shifting focus and investment into building strong domestic supply chains.

India's Approach to Trade Protectionism

India has not been shy in introducing export restriction measures when it comes to PPE, especially protective masks and gowns, and hand sanitizers.⁸ The Government at one point *prohibited* the export of PPE barring non-medical gear masks and equipment such as cotton masks.⁹ Additional restrictions on the export of *bottled* sanitizers have also been placed.¹⁰ While India's internal production is stabilizing slowly, the Government resorted to protectionism as the number of cases increased in India, though these measures are now being slowly relaxed.¹¹ So far, India's approach has been flexible; it has issued 25 notifications over the last five months, adjusting and recalibrating its trade policy in response to various

dynamic factors.¹² For instance, having achieved adequate domestic supply, India promptly relaxed export restrictions.¹³ Absolute prohibition has strictly been restricted to measures necessary for the management of the pandemic or where there is an acute shortage.¹⁴ Recently, the Government announced that the prohibition of the export of PPE gear will not be extended to surgical drapes and wraps, isolation aprons, and X-Ray gowns, i.e., gear that may not directly or necessarily be used for COVID-19 management.¹⁵

India has calibrated its trade policy regarding essential medical supplies, in sync with the legal obligations under the GATT. It has applied the restrictions uniformly towards all nations that also faced similar conditions and challenges. Moreover, as the row with the United States over Hydroxychloroquine demonstrates, India's decisions of imposing restrictions have been well balanced with its political ties with the international community.¹⁶ Despite the host of problems that the pandemic has brought about within the Country, India has assisted 123 other afflicted nations with vital medical supplies.¹⁷ It has refrained from adopting an extreme protectionist policy and by participating in conversations within the international community, it has advanced its diplomatic position.¹⁸

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India's approach has been dynamic, carefully calibrated, and is deserving of praise, especially for its success in meeting both domestic as well as foreign demand for essential medical supplies. These factors are crucial for maintaining its stronghold in the global market and India should not lose out on such opportunities considering how the demand for PPE and similar equipment is rising as other nations, especially the European states, begin to open up.¹⁹ India is already in motion to tackle this by easing restrictions on various products to make its domestic producers competitive at the global stage. On 28th July India placed monthly export quota of 4 crore units per month for 2/3 ply surgical masks and 20 lakh units per month for medical goggle.²⁰

Legal Justifications for Export Restrictions

India's protectionist measures are quite critical in ensuring that the Public Health emergency remains manageable. This is visible in the emphasis supplied by the Government on the measures itself. These measures, as this paper explores later, are also a key for India to establish its presence in the International Market. However, to reap these benefits, India will need to ensure that its measures do not face a legal challenge in the future, and remain compliant with the WTO's regulatory regime, which usually prohibits protectionism.

The export restrictions with respect to Essential Medical Supplies, do appear to *prima facie* challenge the WTO's General Agreement on Trade and Tariffs ("GATT") Article XI (1), which prohibits both indirect and direct quantitative restrictions.²¹ However, there are certain admitted exceptions to this prohibition, namely Article XX(b), Article XX (j), and Article XI(2)(a), that India can rely on. This section will explore all 3 of these exceptions in detail to understand India's legal position vis-à-vis the GATT.

A. GATT, Article XX (b)

Article XX of the GATT²², the "general exception" provision will allow India to introduce measures that would be inconsistent with the WTO regime if they meet the two-tier-test under the article. India would have to demonstrate that *first*, its restriction on essential goods falls within and meets the requirement of any one of the exceptions enumerated in subparagraph (a)-(j) of Article XX; and *second*, India's restrictions satisfy the requirement of the chapeau.²³ While Article XX provides for multiple conditions under which an exception can be claimed, the most relevant exception in the current circumstances is Article XX(b), it allows member states to enforce measures if they are "necessary to protect human, animal or plant life or health."²⁴ Article XX(b) further requires a two-prong test. *First*, that the measure was undertaken to achieve an objective required to protect human, animal or plant life; and *Second*, that the specific measure was necessary to achieve the stated objective.²⁵

India's Covid-19 related export restriction on essential medical supplies, especially PPE, would pass the first test, as these measures are critical to protecting human life, especially doctors and field workers in the frontline.²⁶ As for the test of "necessity," the measure must satisfy a certain "weighing and balancing test" and the "least restrictive test." The "weighing and balancing test" has been expanded to refer to (a) the evaluation of the measure's "extent of the contribution to the achievement of a measure's objective, (b) its trade restrictiveness" and (c) "which are to be weighed and balanced in the light of the importance of the interests or values at stake."²⁷

In *Brazil – Retreaded Tyres Report*²⁸ the Appellate Body (AB), observed that the protection of human life, against diseases, was vital and essential to the "highest degree."²⁹ India can argue it has placed trade restrictions to protect the lives of patients and medical workers against COVID-19, which is a 'vital' interest and thus there is a greater chance of the measure being found necessary.³⁰ The element of the "extent of contribution" requires a "genuine relationship of ends and means of the objective pursued."³¹ The element of the "extent of contribution" is likely to be met as India has employed trade restriction to combat the critical shortage of essential medical supplies³² and the restrictions can be argued to

have produced a material impact, in assisting it in meeting the domestic demand, and safeguard its vital interest.³³

The second element of the “weighing and balancing test” is trade restrictiveness, which refers to the “restrictive effect of a measure on international commerce,” to be recorded in “light of the specific obligation of the covered agreements that the respective measure infringes.³⁴ Further, as clarified by the AB in *Brazil – Retreaded Tyres* report “trade restriction to the highest degree” may also be justified if the measures employed are apt to make a material contribution to the objective.³⁵ Given that India’s export restriction on essential medical supplies has produced a material impact, in combating the critical shortage of essential medical supplies and shoring up domestic supplies³⁶ even trade restriction to the highest degree may be justified.

Once the *weighing and balancing test* is fulfilled, the measure is considered *prima facie* necessary, post which the tribunal assesses if the measure was the *least restrictive* available alternative that the member could have adopted, which would have provided it the same extent of protection.³⁷

In India’s case, the restrictions do pass the test of less restrictive and necessary measures. For instance, the export prohibition on PPE is only limited to *medical non-surgical* PPE gear used specifically for combatting COVID-19 in hospitals.³⁸ The prohibition on masks is not absolute but has instead been flexible. As the production of PPE stabilized, exports to the tune of 5 million units were allowed and a total prohibition on it was temporarily halted.³⁹ Moreover, it is important to note that India has not stopped the export of cotton

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masks but only medical non-surgical ones. Similarly, the export of only ready-to-sell bottled sanitizer was prohibited while sanitizer in bulk could be exported.⁴⁰ These examples show that India has remained very specific with the restrictions imposed and has not resorted to utilizing blanket protectionism. Thus, it can *prima facie* be concluded that the restrictions pass the test of least restrictive, necessary measures.

However, merely satisfying the test under Article XX(b) would not justify such measures by the member-states, they will also have to satisfy the requirements under the chapeau of Article XX, namely, that the enforcement of any measure should not be ‘arbitrary’ or lead to ‘unjustifiable discrimination’ between countries. Discrimination should be between countries where the *same* conditions prevail.⁴¹ As of now, India has not made any distinction and where prohibited or regulated, export restrictions apply uniformly

across all countries.⁴² Thus, it cannot be concluded that the restrictions are arbitrary or discriminatory.=

B. GATT Article, XX (j)

GATT Article XX (j) would allow India to introduce measures inconsistent with the WTO Regime provided that such measures are *essential* to the acquisition or distribution of products in *general or local short supply*.⁴³ For a measure to be justified under Article XX (j), it would require the measure to be consistent with the requirement of Article XX (j) and the chapeau of Article XX.⁴⁴ Therefore, to justify its export restrictions under Article XX (j) India must show that, *first*, the design of the measure introduced was capable of acquiring or distributing products in 'general or local short supply,⁴⁵ *second*, the measure was essential to achieve the acquisition or distribution of such products, third, the product in question was actually in 'general or local short supply.⁴⁶

The *first* element under the Article XX (j), requires the panel to analyze if the design of the measures introduced, (including its content, structure, and expected operation), was capable of addressing 'the issue of acquisition or distribution of products in general or local short supply.⁴⁷ The term capable only requires the respondent party to demonstrate the relationship between the measure and issue of 'the acquisition or distribution of products in general or local short supply.⁴⁸ Most of India's export trade restrictions meet the first element of Article XX (j), given that there is an inverse relationship between the export restriction on essential medical supplies and their critical shortage, and are appropriate in combating short supply of essential medical supplies. The *second* element of Article XX (j) requires the measure to be essential to achieve 'the acquisition or distribution of products in general or local short supply.' The term essential refers to or is better defined as '*absolutely indispensable or necessary*.⁴⁹

Moreover, a measure would be essential if it met the weighing and balancing and the least restrictive test, as is the case of Article XX(b).⁵⁰ A large part of the analysis regarding the how India's measure would meet the weighing and balancing test, noted above under Article XX(b), is applicable and is useful for justifying even export restrictions under Article XX(j), as the objective of trade restriction under both articles is to ensure supply of critical medical supplies. Moreover, India's export restriction will outweigh trade restrictiveness as the restrictions have been placed to combat the short supply of critical medical goods, and have enabled the state to retain a larger share of critical medical goods produced domestically.⁵¹

The *third* element requires the tribunal to determine if the product in question is in “general or local short supply.” To determine whether a product is in ‘general or local short supply,’ the panel will examine the supply and demand of a specific good in a particular geographical area or market. An analysis of the availability of products would include a variety of factor including, (a) the level of domestic production, (b) the extent of stable and accessible supply of products, (c) the reliability of local or transnational supply chains, (d) “the purchasing power of foreign and domestic consumers, and (e) the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad.”⁵²

This element would likely be met, over 90 states have placed export restrictions on essential medical supplies relating to Covid-19, severely debilitating the “transnational supply chains,” and these export restrictions have been placed due to inadequate level of domestic production (local supply chain).⁵³

The final hurdle India’s export restrictions face is that measures under Article XX(j) are meant to be temporary and are to be “discontinued as soon as the conditions giving rise to [the measure] have ceased to exist.”⁵⁴ Consequently, India’s export restrictions will be lawful to the extent domestic manufacturing capacity becomes sufficient, not only to meet domestic demand in a particular area or market but also to meet the international supply of the goods in question, post which the export restrictions must be removed or relaxed. India has already shown a willingness to comply/keep in mind this requirement, as the above-mentioned instance relaxation of the export prohibition of PPE Masks as and when domestic production stabilized.⁵⁵

C. GATT Article, XI(2)(a)

GATT Article XI (2)(a) would allow India to introduce and temporarily apply export restrictions on foodstuffs or other *essential products* to insure against a “critical shortage,” of such products.⁵⁶ The AB in China-Raw Materials⁵⁷ noted such measures should strictly be applied for a limited period only to “arrange a passing need,” of goods to which are ‘absolutely indispensable’ for a member state, to prevent or relieve “critical shortages.”⁵⁸

The AB defined “critical shortages” as deficiencies in the quantity that are crucial, that amount to “a situation of decisive importance”/a turning point/crisis and noted that Article XI(2)(a), can only be invoked with to alleviate or reduce an existing critical shortage or to prevent an “imminent critical shortage. ”

It is undisputed that the nature of the COVID-19 pandemic has made essential medical supplies to be the resource of survival for nations. Both public and private health

systems across countries depend on such essential medical supplies and the medical staff employed in these healthcare sectors cannot function without such supplies. An effective response to the pandemic in terms of treatment of the sick mandates that the medical staff remains safe. Beyond just medical staff, these essential medical supplies are also being used by staff across various sectors as well as the general public. Countries worldwide are working with the presumption that their essential staff (across all sectors) remains safe, as a result, temporary export restrictions imposed for essential medical supplies does qualify as a "situation of decisive importance," given the extraordinary circumstances.⁵⁹ Pertinently, any export restrictions imposed by India, on essential medical supplies, would be justified under Article XI(2)(a) if they already face a "critical shortage" of essential medical supplies or if such shortage is imminent. No other reasonable justification would satisfy the invocation of Article XI(2)(a).

The reliance on GATT XX(b) and XX (j), are suitable for India, given that their scope is more comprehensive than article XI(2)(a), as their application is not restricted only to relieve "critical shortages" or to prevent "imminent critical shortage." This means that India could even justify measures which are not explicitly made to meet a critical shortage, but rather to store essential medical supplies to meet the domestic supply and the international supply for these medical supplies [Article XX(j)] and to provide the highest level of protection, to medical workers and patients [Article XX(d)]. Therefore, Article XX allows for greater flexibility for India to place trade restrictions on essential medical supplies in order to strengthen its healthcare infrastructure's limitations. While XX (j) also has restrictions in terms of discontinuation of the measure upon the conditions warranting its imposition ceasing, it is relatively uncertain as to when or rather whether the demand for essential medical supplies will see a fall. Considering that countries are steadily resuming operations the demand for such essential medical supplies will undoubtedly increase.

Tackling a Wounded Dragon

China has sharpened its manufacturing prowess over 4 decades to become the 'world's factory'. It did so while simultaneously developing a complex labyrinth of internal supply chains and interoperability that has made relocation considerably difficult but not impossible. As manufacturers examine their supply chains for a post-COVID 19 world, the imperative for greater supply chain resilience versus the attractiveness of China as a manufacturing location and tech-forward consumer market is the principal challenge that they will need to navigate⁶⁰ There is considerable hope since China is slowly but surely losing its influence.⁶¹ The disruption of supply chains around the globe, coupled with supply and demand-side crisis during the pandemic has led to the recognition of the institutional flaws

of globalization with serious questions being posed regarding the overreliance on China.⁶² The “world’s factory” halted abruptly during the pandemic, severely affecting the trade of both essential goods and non-essential goods. The effect of the colloquial saying “*when China sneezes the rest of the world gets a cold*” has been felt in full effect.

There is a growing consensus for a need to make the world’s trade supply chains more resilient by adding buffers and redundancies within the system.⁶³ This would in the long run mean the reduction of China’s power in the global trade system. To counter the overreliance on China, nations and investors will attempt to store more and maintain larger buffer stocks to absorb short-term shocks. Such steps are going to raise production worldwide, and in the long-run lead to diversification to other nations in terms of capacity and the ability to deliver⁶⁴ This newfound rejection of China’s hegemony in global manufacturing, a growing shift away from total globalization,⁶⁵ and China’s own attempt to move from a labor-intensive economy to one based on automation, robotics, and aerospace⁶⁶ creates a large manufacturing vacuum for others to fill.

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The Pandemic offers myriad opportunities to India to secure a substantial portion of global trade from China’s share, given the growing distrust of China, its rising labour cost and its ongoing shift to a consumption economy.⁶⁷ The opportunity that the growing need for a diverse supply chain offers perfectly fits with what India has to offer. However, a sustained challenge to China’s hegemony will require uniform responses to rising trade demands from foreign countries and due compliance with the WTO regime, which as the above discussion shows, has been done so far. India will also have to tackle the competition from Mexico and Southeast Asian nations trying to make the most out of this opportunity. Any hindrances to smooth functioning of supply chains in India’s manufacturing should be immediately addressed

A positive step in reassuring manufacturers can be understood from the *Atma Nirbhar Bharat Abhiyan* (ANBA)⁶⁸, or self-reliance movement, announced on May 12, 2020, by the Prime Minister of India to strengthen and modernize the agriculture and manufacturing supply base. As part of the ANBA, the Government of India has promised to provide micro, small and medium enterprises collateral-free loans up to Rs.3,000 billion (US \$ 40.54 billion). The micro, small and medium enterprises sector in India is the second-largest in the world and robust investment in this sphere can spearhead India’s push for global manufacturing dominance. India must not lose out on consolidating the shift of manufacturing from China.

It bodes well for her that as many as 22 domestic and international firms, including Apple's contract manufacturers as well as Samsung, Lava, Dixon, etc. – shifting from China--have already lined up with proposals for mobile phone production in India,⁶⁹ worth Rs 1100 billion (US \$15.06 billion) over the next five years. Further, a not so insignificant 80% of fashion brands are reportedly planning to reduce sourcing from China.⁷⁰

While the Indian government is keen to rapidly develop infrastructure to aid India's growth story,⁷¹ what is even more necessary is a uniform and attentive approach in India's dealings with the international community in order to attract global investments. The ongoing US-China trade war is a prime opportunity for India. However, thus far India has not been as successful in attracting manufacturing investments as nations like Malaysia, Thailand, Vietnam and Indonesia, who, despite having a limited trade capacity as compared to India were still able to benefit owing to a friendlier trade and investment framework.⁷² Feeble and unstable policies will act as a deterrent to potential investors and corporations who are looking towards stable supply chains and investor-friendly market regimes. India's trade policy for essential medical supplies, if managed correctly, would allow it to challenge Chinese hegemony, first by allowing it to attract investors and growing its share in global trade and second, by strengthening its position diplomatically, to erode China's influence, especially in South East Asia.

In this context, India's management of its PPE production is of extreme significance. India has gone from relying on imported PPE to now producing 450,000 kits a day. The PPE industry has grown by fifty-six times, in 60 days making India, the world's second-largest PPE producer.⁷³ The speed is a testament to the readiness of the country's internal supply chain and production management capabilities.

However, this feat should not just be seen in the context of the present problem. As the demand for PPE rises by the day, it brings new opportunities for India. Overtime with Government support, more liberal policies and an active role of domestic manufacturers, India can become a key player in the PPE market which is expected to be worth \$92.5 billion by 2025.⁷⁴ India has already taken key steps in this regard by allowing export to the tune of 5 million units. However, the key to exploiting this potential lies in ensuring that the current support that has been offered by the Government to producers, continues.

Further, India needs to establish a strong supply chain of essential medical provisions and equipment, like it did with PPE in 60 days⁷⁵ and create a bona fide and steady relationship with buyers. This would enable the domestic supply chain to expand, diversify or shift upwards in the value chain, post-pandemic. Essentially, India needs to move beyond reactionary policies and actions, and utilize its potential to project confidence and

readiness to welcome investors and the international community. The time is ripe to re-evaluate current bilateral and multilateral trade agreements and envision new ones that facilitate supplies of critical components and materials. This involves considerable sharing of knowledge at an international level that can be achieved through research partnerships, and building strategic alliances with countries with whom India already has a track record of collaborative research.

Further, India's trade policy regarding essential medical supplies can be utilized to advance its commercial diplomacy. Humanitarian assistance and joint actions during a crisis can positively shape memories in a partner state.⁷⁶ For instance, India's decision to relax restrictions on the export of essential medical supplies immediately showed positive results with USA Secretary of State Mike Pompeo praising India for "helping USA in a collective effort against the pandemic." This should be seen as an ideal model to follow.⁷⁷ India's has done well so far, it has offered assistance, of essential medical goods, including hydroxychloroquine (HCQ) and paracetamol tablets, to at least 123 countries.⁷⁸

Institutionalizing the crisis would entail setting up plans for joint action, coordinating containment periods for international travel, and extending medical and public health assistance both via material assistance and sharing of knowledge and best practices. However, more importantly, it requires India to decide to expand its influence in Southeast Asia, primarily via BIMSTEC and ASEAN. Unlike the SAARC region, where India has largely led the organization's effort for COVID-19 response, India does not have the same influence in Southeast Asia.⁷⁹ With suspicion and distrust of China growing, India can build a place for itself within Southeast Asian nations with a regional approach. This newfound friendship can be later utilized, not just to balance China's current power potential, but also to allay investor concerns over concentrated supply chains by setting them up jointly.

Conclusion

The pandemic has caused massive disruptions in the global supply chain, but India has risen to the challenge of the shortage of essential medical supplies resoundingly well. This has been done within the legal framework of the World Trade Organization and the rules prescribed under the GATT framework. India has the potential to fill the vacuum left by China if it effectively exploits its coastline of over 7,500 km serviced by 200 odd ports of various sizes, well connected by the second largest road network and fourth-largest rail network in the world. India has the potential to offer to the world conducive logistics, infrastructure, and connectivity. India is also endowed with rich natural resources such as coal, iron ore, copper, zinc, offering immense potential for mining and related activities. A significant workforce and a relatively younger demographics are a perfect stage for India

to dethrone China and emerge as a leading producing and a consumer market for global companies. India will also need to ensure that its approach to trade protectionism remains well thought out and that its own domestic needs are satisfied. Further, it must do so keeping in mind the legal regime laid down by the General Agreement of Trade and Tariffs ("GATT") and ensure that its protectionist measures do not go beyond the boundaries laid down by the WTO regime. Finally, it must project confidence and ability to the international community, especially the manufacturers, and show that it is ready for the challenge of providing the stability that the world needs in a post-pandemic scenario. India must rely on trust and transparency rather than stealth and secrecy in its dealings. India must not come off as another China.

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