

THE SUPPLY OF COVID-19 VACCINES: AN ANALYSIS OF ARTICLE XI OF GATT 1994 OF THE WORLD TRADE ORGANIZATION (WTO)

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ABSTRACT

The world is facing an increase in the global demand for Covid-19 vaccines. Developed countries have been top manufacturers, but vaccine production has not been sufficient. The supply becomes critical when developed nations over-purchase the vaccines at the expense of equitable supply to other countries. Due to the production shortage of the vaccines, the Least Developed Countries (LDCs) and middle-income countries suffer in the queue against other developed countries, and predictions showed that the LDCs would not produce herd immunity in the country the next couple of years. To resolve the limited vaccine supply to the LDCs, it is pivotal that producing countries comply with Article XI of the General Agreement on Tariffs and Trade 1994. This rule stipulates that there should be no imposition of restrictions other than duties or taxes on any contracting party in a trade. This rule also shows that significant vaccine suppliers such as the US, China, Germany, and Russia ought to prioritise the needs of the LDCs in terms of the necessity for their front liners and vulnerable groups. Compliance with Article XI of GATT 1994 is necessary to reduce preventable deaths in LDCs by ensuring sufficient vaccines reaching the LDCs. While Article XI has been in force since 1995, the developed nations have not been observing the binding effect of Article XI in the multilateral regime of the WTO. Instead, LDCs and middle-income countries resorted to the Covax Facility and separate vaccine agreements with the developed nations to obtain vaccines. This paper concluded that while Article XI legally binds the Member States under the WTO and promotes free and fair trade, it does not make vaccine trade obligatory between nations. Alternative methods through Covax and separate agreements are necessary to address the gap of Article XI.

Key words: LDCs, GATT, vaccine, Covid-19.

INTRODUCTION

On the Worldometer statistics, there are 127 308,114 coronavirus cases and 2,789,952 deaths recorded. Statistics by July 22, 2020, showed more than 380,000 infections and 7,500 deaths caused by Covid-19 in the LDCs (Vickers & Ali, 2020). At the onset of Covid-19, testing kits and digital contact tracing have been scarce, particularly in low and middle-income countries, making it difficult to reduce the pandemic's spreadability. The LDCs in particular, are affected by three factors: their fragile healthcare systems (Vickers & Ali, 2020), total dependency on the importation of medical supplies and equipment for the treatment of Covid-19 (Bown, 2020; Evenett, 2020), and financial incapability in purchasing expensive medical supplies. These factors made it impossible to prepare frontline health responders each month with 1.59 million goggles, 89 million masks, 30 million gowns, 76 million gloves, and 2.9 million liters of hand sanitizers (WHO, 2020).

When Pfizer and Moderna produced vaccines that passed the efficacy percentages of 95% and 94.1%, respectively, in clinical trial phases (Branswell, 2020), many see a ray of hope through a cracked door. Developed nations have produced the fastest possible vaccine imaginable in modern history (Bloomberg, 2020). Later in 2020, vaccine rollouts began to counter Covid-19. Quick vaccine rollout has been essential as it took only 12 days for the world to jump from 1 million to 2 million in April and just 24 days to reach 4 million Covid-19 cases in May 2020.

However, an unprecedented event occurred where developed countries reserved dosages of vaccines more than required, causing inequitable access of vaccines to other nations (Baker, 2020). Although 200 million doses of Covid-19 vaccines have been distributed in over 50 countries (Our World in Data, 2021), there has been a critical shortage and unequal access to the vaccines that the pandemic might continue for months and years (Farrar, 2021). Subsequently, the shipment of more than 31 million Covax facilities has helped the struggling nations (Gavi, 2021). The Covax supply is crucial as a study in 2020 by Johns Hopkins Bloomberg School of Public Health in the US estimated that one in four people might be unvaccinated until 2022. The fact is that the developed nations of less than 15% of the global population have reserved 51% of the dose supply, leaving 85% of the global population of lower and middle-income countries to wait for vaccine supply for at least another two years (Thin, 2021). Such vaccine nationalism, or "a phenomenon where rich countries are vaccinating, and poor countries have to wait," was an unbecoming event in the course of combating Covid-19 rapidly and thoroughly (Riaz, 2021).

Before the vaccine rollouts, the world was facing trade restrictions on food and essential medical equipment (WTO, 2020). A breach of the GATT rule occurred when India and the other 55 countries refused to export products to their importers (Saunders, 2020). As a result, Laos and a few other LDCs requested these nations to eliminate those restrictions because LDCs were adversely affected by the shortage of medical goods. The WTO published this request, and soon after, the developed countries decided to withdraw the restrictions.

The paper analyses Article XI's impact in safeguarding fair export and import goods between the Member States and argues that compliance with Article XI is the best solution for vaccine distribution. Nevertheless, Article XI does not obligate trade of essential goods to occur. This study finds that other forms of international cooperation on vaccine supply are necessary to address Article XI's gap.

RESEARCH QUESTIONS

This research addresses the following questions :

1. How does Article XI of GATT address export and import restrictions between the developed nations and the rest of the nations?
2. Why do Member States of the WTO impose trade restrictions despite the binding effect of Article XI?
3. What are the ways forward to improve vaccine access to both low and middle-income countries in the event of persistent non-compliance of Article XI demonstrated by the developed nations?

In understanding the concept of global restoration of health, the following section first explains the history of the WTO and trade rules that guide contracting States in export and import dealings. WTO's basic principles are essential; otherwise, international trade would be in haywire (Cutler, 2021). Unnecessary imposition of trade restriction is detrimental to Covid-19 supply, as is the case of the US-China trade war where tariffs increased the price of products and limited access to numerous goods (Bershefsky, 2021). Nevertheless, this research does not relate the vaccine supply issue to the geopolitical factor or the tariff restriction seen in the US-China trade war. Instead, it examined the prohibition of quantitative restriction under Article XI GATT and why global vaccine supply is inequitable despite Article XI GATT's application upon all Member States of the World Trade Organization (WTO).

RESEARCH SIGNIFICANCE

This research examined the impact of Article XI of GATT in tackling the equitable supply of Covid-19 vaccines worldwide. Recent statistics show that the supply runs out on front liners and vulnerable categories in both middle and low-income countries. Vaccine nationalism should not supersede vaccine diplomacy, and currently, the world is witnessing both phenomena coinciding. If vaccine nationalism persists, it affects the timeline of combating the pandemic. The slower and the more unequal the vaccine distribution is, the longer it takes to end the pandemic. Most nations' economic recovery depends much on labour force and trade sustainability contributed by the middle and low-income countries, and therefore the latter cannot recover holistically without 60-70% of herd immunity established in their communities.

RESEARCH METHODOLOGY

The study is doctrinal or library-based research with references from the World Trade Organization database, particularly the General Agreement on Tariffs and Trade 1994. Both primary and secondary sources consist of mainly newspaper articles and virtual forums and conferences. The study tested the application of Article XI on equitable access to vaccine and explored its legally binding effect, yet does not compel the Member States to trade with one another in the Covid-19 vaccine supply.

TRADE RULES OF GATT AND THE WORLD TRADE ORGANIZATION (WTO)

Global restoration repeats in the Covid-19 pandemic; it has not been something new. The global restoration was a response to the destruction caused by the Second World War that led to world recovery. Trade restored the war destruction, a solution to world prosperity. Trade rules resulted from the Second World War prevented the world from going through the "dark hour" again (Nottage, 2020).

The establishment of common principles began when the then UK Prime Minister Winston Churchill and the USA President Franklin Roosevelt met for the signing ceremony of The Atlantic Charter 1941. National policies of both the UK and the US were harmonized "for a better future for the world" (The Atlantic Charter, 1941). Clauses 4 and 5 of the Atlantic Charter aimed for global economic collaboration and access by all states to world trade. Churchill and Roosevelt recognized the relationship between the international economy and peace and security in the Charter (Nottage, 2020).

By October 30, 1947, a more consensus effort began when 23 countries entered into the General Agreement on Tariffs and Trade (GATT). It was the Atlantic Charter that precipitated GATT. Today, GATT has evolved into WTO, a multilateral economic agreement involving 164 Member States. Consequently, WTO, the successor of GATT, replaces GATT to cater to the trade complexity and acts as a forum provider for negotiation on multilateral trade agreements, basic rules for global trade, and a body of dispute settlement.

The main idea is that the international community creates an open, cooperative, and rules-based world trading system for the sake of prosperity for every member state of the WTO. This prevents protectionism and rivalry between the Member States because, in the 1930s, rivalry did lead to the collapse of world trade and rising trade tensions (Koopman et al., 2020). In promoting free trade, the 23 countries gathered and negotiated at the GATT rounds on three broad principles: reciprocity, non-discrimination, and a code for trade rules. The Bretton Woods Institutions (of the World Bank and International Monetary Fund) based their aspirations for peace and remove trade discrimination based on imperial preferences (Nottage, 2020).

Although GATT was not a perfect set of trade rules, it was the most viable trade rule today (Santana, 2020). Between 1948 and 1994, international commerce rapidly grew through the implementation of GATT. Reduction and elimination of tariffs have improved global trade for goods and services between trading nations. Moreover, GATT rules address the elimination of quota or quantitative restrictions. Quotas, import or export licenses, or other measures shall not be instituted or maintained by any can be made to affect import or export between territories. The WTO succeeded GATT in 1995, where the amendment of GATT 1947 took place, and the WTO members agreed that GATT 1994 applied as a legal instrument within the WTO.

Today, the WTO is a trade organization that liberalises trade among its 164 Member States (WTO, 2016). It is a platform that provides a trade rules system, a forum for negotiation, and settles trade disputes between Member States (WTO, 2021). Being an intergovernmental institution, the WTO is rule-bound under its trade treaties negotiated and agreed upon by its Member States (Labonte & Baker, 2021).

On March 23, 2021 recently, the Director-General of the WTO, Ngozi Okonjo-Iweala, expressed her disappointment over export restrictions on vaccines when the EU export authorisation scheme set barriers (Farge & Nebehay, 2021). Under this scheme, producers need to obtain authorisation before exporting the vaccines. Despite the move made by India and South Africa, lowering the export barrier and using the existing capacity to increase input is a must, as adherence to the WTO provisions is the simplest mode of ensuring equitable access to vaccines (Farge & Nebehay, 2021).

Catered to the more complex trade post-1980s, the WTO Agreement was eventually entered into force on January 1, 1995. Annex 1A of the WTO Agreement contains the GATT 1994. It incorporates six Understandings on Articles of the GATT 1947, tariffs and accession Protocols, and GATT decisions between 1948 and 1994 continue to have legal effect as part of GATT 1994- now a part of the WTO Agreement.

Within the agreements signed under the WTO, the system maintains the application of two cardinal principles, namely the *most favoured nation* and the *national treatment* principles. Unless otherwise agreed, member countries should treat each other equally and without discrimination in export and import matters and treat each other equally within the national market. In the spirit of non-discrimination between countries in the supply of goods, no discrimination should be made against another country when imposing duties, taxes, or other charges.

ARTICLE XI of GATT 1994: GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS

According to Article XI: “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

This provision prohibits protectionism amongst Member States whereby there shall be no form of prohibitions or restrictions made against any import or export of any product traded among WTO Members. This prohibition applies to medical supplies between countries, such as medicines, PPE, ventilators, masks, and vaccines necessary to curb the pandemic of Covid-19.

However, Article XI:2 does provide exceptions to the general rule. Among the Members, restriction of trade is possible if there is a: a) situation in a State where there is a need to prevent or relieve critical shortages of foodstuffs or essential products to the contracting party; b) situation where there are standards/regulations on the commodities in question; or c) situation on any agricultural/fisheries product necessary to the enforcement of governmental measures which operate.

For discussion purposes regarding the issue of LDCs and medical supplies and vaccines needed for combating Covid-19, this study focuses on exceptions found in Article XI:2(a) on “critical shortages” of essential products in the following section.

SEVERE SHORTAGES IN THE TRADE OF MEDICAL GOODS IN DEALING WITH COVID-19: DEVELOPED NATIONS BREACHED ARTICLE XI?

Compliance is necessary to ensure no discrimination against LDCs and middle-income countries occurred regarding quantity restrictions on vaccines. If Article XI is binding and prohibits such restrictions, wealthier nations would not have the privilege to restrict vaccines to other parts of the world. Failure to observe the rule allows a complainant nation to refer the matter to the WTO dispute settlement body.

Historically speaking, under Article XI:2(a), the US proposed the Charter in 1946 the phrase “conditions of distress” (Analytical Index, 1993). According to the Analytical Index, the US representative stated that this phrase did not mean “economic distress but referred to shortages of crops, in cases such as famine.” As for the term “critical,” the terms of paragraph 2(a) according to the Report of the Havana Conference Sub-Committee on Quantitative Restrictions “... are adequate to allow a country to impose temporary export restrictions to meet a considerable rise in domestic prices of foodstuffs due to a rise in prices in other countries”. In the Analytical Index, the Report of the Review Working Party on “Quantitative Restrictions” also recorded that:

“...to the extent that the rise in prices was associated with acute shortages of the products in question, as it normally would be, [temporary export restrictions applied to meet a considerable rise in domestic prices of food-stuffs due to a rise in prices in other countries], whether affecting foodstuffs or other products, was covered by that sub-paragraph [2(a)]”.

In terms of findings, the case of *China-Measures Related to the Exportation of Various Raw Materials* (WT/DS398, 2013) showed that the Appellate Body at the WTO upheld the decision of the Panel where China was not supposed to impose a restriction that is not proven to be “temporary” to prevent “critical shortage” within the meaning of Article XI:2(a). This case involved Mexico as a complainant upon China, the respondent, to be violating, among others, Article XI when China imposed quantitative restrictions on the export of bauxite, coke, fluorspar, silicon carbide, and zinc. China has been the leading producer of raw materials. Hence, any export restraint was rendered detrimental for non-Chinese consumers on these raw materials (Panel Report, 2011).

In the context of the Covid-19, the developed nations breached this rule. Consequently, the WTO needed to issue a joint call on April 24, 2020 to ensure that these governments refrained from imposing export and other trade restrictions on medical supplies and food, including diagnostic kits, critical medicines, and artificial equipment for respiratory such as ventilators and personal protective equipment (PPE). Bhala (2021) asserts that the current situation involving vaccines is unconventional because, traditionally, developed nations are more inclined to free trade, whereas poorer nations tend to be protective of local industries. In the context of the Covid-19 vaccines, the fact remains that the developed nations are producers and primary purchasers of the vaccine. Unless otherwise justified by the “acute shortage” of vaccines faced domestically, as with India’s recent case and its immunisation campaign India’s Serum Institute (Roy & Agharwal, 2021), the developed nations have been over-purchasing vaccines at the expense of other nations. Over-purchasing of vaccines will make herd immunity impossible globally within the next couple of years, and alternative arrangements are taking place to speed up timely vaccination worldwide.

Alternative routes to Article XI prohibition are essential for global equitable access to vaccines, and the following section elaborates on these routes. Without alternative methods to vaccine access, “no economy can fully recover until we have global equitable access to vaccines...the path we are on leads to less growth, more deaths, and a longer economic recovery.” (Kalemlı-Ozcan, 2021).

ALTERNATIVE EFFORTS OF COUNTERING THE IMPACT OF QUANTITATIVE RESTRICTIONS ON VACCINES

Vaccination for the Covid-19 is crucial not only for global health but also for the global economy. Persistent export restrictions of vaccines lead to the rippling of the economy (CRS Reports, 2020). At the global level, the scarcity of vaccines in LDCs will not solve the pandemic. Vaccination aims to prevent morbidity and mortality and ultimately to achieve herd immunity and prevent continuous transmission (Health Department of Republic of South Africa, 2020).

Despite the prohibition set by Article XI, the lack of compliance led to three efforts to ease equitable access to the vaccines. The first effort is equitable distribution through the establishment of the Covax Facility. Covax Facility has been targeted for just over one billion doses for eligible countries by the end of 2021, and it has become essential because there is a real risk that people globally will go unprotected and that the infection continues to spread. Covax ensures sufficient and equitable procurement of vaccines to cross the barrier of access and affordability of vaccines worldwide (Gavi, 2020). The Covax Pillar relies on the principle of equitable access (Health Department of Republic of South Africa, 2020). Apart from assisting vaccine safety through portfolios for clinical trials, Gavi, Vaccine Alliance established Covax facility to ensure funding availability, and funded countries will receive sufficient doses up to 20 percent of their population.

For example, Malaysia has agreed with the first 20% of Pfizer and 10% from Covax to be part of the initial national vaccination plan (PMO Malaysia, 2020). In terms of funding, although self-financing countries would assist the funded countries, Gavi has prepared the Gavi Covax Advance Market Commitment (AMC), a separate funding mechanism under this Covax Facility that supports access to Covid-19 vaccines to increase the participation of all countries irrespective of their ability to pay (Gavi, 2020). The Serum Institute of India, for example, has been one of the signatories to supply vaccines developed by AstraZeneca PLC and the University of Oxford to 64 developing nations through Covax (Shah et al., 2021). However, timeliness is critical because a national timetable for distributing vaccines is essential to bring the pandemic to a close (Farrar, 2021). It is unimaginable if Covax could not assist the deprived nations on time and that the breach of Article XI by vaccine-producing countries persisted.

The second effort is that a waiver proposal has been made on 2 October 2020 by South Africa and India to the WTO requesting for member countries to suspend the protection of intellectual property rights as it removes barriers for timely access to affordable medical supplies that are necessary for the prevention, containment, and treatment of the Covid-19 (Ghosh, 2020). At the Doha Ministerial 2001, Paragraph 4 of the Declaration on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) stated TRIPS to be as follows:

“...does not and should not prevent members from taking measures to protect public health...that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public health and, in particular, to promote access to medicines for all”.

TRIPS could relax the rules on patents by authorising the use of the patents for countries that produce vaccines for LDCs or countries with insufficient or zero manufacturing capacities in the pharmaceutical sector. TRIPS aims to facilitate innovation, knowledge, and creativity based on global minimum standards and protect IP rights (Reinsch & Caporal, 2020). Government

intervention could bypass a patent through compulsory licensing, but such effort has yet to occur under the WTO under Articles 30 and 31 of TRIPS.

The third effort is through bilateral arrangements between countries and pharmaceutical companies. Under Article XXIV of GATT, like-minded Member States could form a partnership under a bilateral or plurilateral free trade agreement, as long as it complies with the core principles of the most favoured nation and national treatment principles under the WTO. However, the World Health Organization (WHO) warned that these efforts are fragmenting the market for Covax in ensuring rapid yet equitable access for the vaccines (IANS, 2021). The WHO Director-General emphasised that nearly all 50 countries where vaccines have been taking place are wealthy nations, and 75 percent of doses distributed in only ten countries. Equitable distributions are complicated without global solidarity, and worse, excessive purchase of vaccines through these bilateral arrangements far diverted from the aspirations of both WHO and Covax.

CONCLUSION

The year 2020 is a year like no other. Tremendous challenges have been affecting the supply of medical goods and vaccines. However, developed nations have been non-compliant with Article XI. Instead, vaccine nationalism occurred where developed nations over-purchased the vaccines. Simultaneously, the idea of trade agreement was never to compel trading partners to trade; Article XI's scope may have covered free and fair trade, but the Member States may refuse to supply essential goods, including vaccines. Article XI applies to agreed parties, and hence without formal agreement on vaccines, the impact will not be the same as seen in the case of *China-Measures Related to the Exportation of Various Raw Materials*. The case illustrated China and Mexico as trade partners that have agreed to trade raw materials.

In contrast with today's situation, vaccine-producing countries have demonstrated a "critical shortage" of vaccines for their citizens, rather than agreeing to supply vaccines to other nations. As a result, 85% of the nations worldwide had to rely on other cooperative methods. Covax Facility, bilateral arrangements, and application for waiver on IP rights are three "way forward" methods that require negotiations between the WTO Member States. Developed nations are actual "barrier-creators" by reserving more than required vaccines for their citizens. Article XI neither prevents vaccine nationalism nor does it promote vaccine diplomacy in the most evident sense.

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