COLUMN:
COVID-19 AND TRADE

1. THE COVID-19 PANDEMIC AND RESPONSE BY EACH COUNTRY

The global spread of the COVID-19 pandemic since around March 2020 has raised concerns that the global economy will once again lean towards protectionism. More than a few countries, including developed countries, have implemented trade-restrictive measures, such as setting quotas for domestic sales, price controls, and export restrictions to ensure the prioritization of domestic distribution of medically important products such as ventilators, protective clothing, and surgical masks, as well as medicines.

Although emergency measures taken for protecting the people of a country are not necessarily immediately inconsistent with the WTO Agreements because certain exceptions and exemptions are stipulated in the WTO Agreements, exceptions and exemptions should not be abused, and unnecessary trade intervention should be restrained in order to maintain a free and open trade and investment environment.

The following is an overview of the trends in trade-related measures during the two years since the outbreak of COVID-19 (see also the 2021 Report on Compliance by Major Trading Partners with Trade Agreements, "COVID-19 and Trade" for the measures terminated prior to last year.)

2. TRADE RESTRICTIVE AND FACILITATIVE MEASURES BY EACH COUNTRY

The WTO Secretariat publishes and updates trade-related measures introduced in response to COVID-19 from time to time in WTO reports and on its website, with necessary updates.[1] According to a report by the WTO Secretariat, the total number of trade measures related to COVID-19 introduced by Members is 399 (as of November 2021) since the crisis began. 262 of the trade measures are trade facilitative (such as temporary suspension of tariffs and streamlining of customs procedures) and 137 of them are trade restrictive. While 85% of trade restrictive measures used to be export restrictions, 59% of the measures were withdrawn by October 2021, and the number of export restrictions has been reduced to 45. Additionally, 22% of trade facilitative measures have been terminated, but 205 measures are still in place. As a result, trade facilitative measures outnumber trade restrictive measures.

3. MOVES IN THE INTERNATIONAL ARENA

With the spread of the COVID-19 virus, political commitments were made at the head of state and ministerial level to address the crisis in a coordinated manner.

In the Ministerial Statement at the G20 Joint Extraordinary Trade and Investment Ministerial Meeting on March 30, 2020,[2] it was agreed that Members should "ensure that any emergency trade measures designed to tackle COVID-19, if deemed necessary, are targeted, proportionate, transparent, temporary, reflect our interest in protecting the most vulnerable, do not create unnecessary barriers to trade or disruption to global supply chains, and are consistent with WTO rules". In May of the same year, 42 Members, including Japan, issued the "Statement on COVID-19 and the Multilateral Trading System[3]".

In October 2021, the G20 Trade and Investment Ministerial Meeting and the G7 Trade Ministers' Meeting were held, and they confirmed that they would continue to make efforts to respond to COVID-

[1] https://www.wto.org/english/tratop_e/covid19_e/trade_related_support_measures_e.htm

[2] https://www.meti.go.jp/press/2020/05/20200515004/20200515004-1.pdf

[3] https://www.mofa.go.jp/mofaj/files/100051934.pdf

19 as in the previous year.

4. ACTIONS AT THE WTO

Since the COVID-19 crisis began, as many as 93 proposals have been made in the WTO arena by March 2022.[4] Among these, the main initiatives are as follows.

(1) TRADE AND HEALTH INITIATIVE

In June 2020, a group of like-minded Members proactive in WTO reform (i.e., the Ottawa Group chaired by Canada) agreed to discuss ways to facilitate the trade of medical-related products with a view to strengthening the trade system and supporting the recovery of supply chains in order to prepare for current and future crises.

In subsequent discussions, Japan has also led the discussion by proposing to strengthen the export control regulations. At the Ministerial Meeting of the Ottawa Group held in November 2020, the "Trade and Health Initiative" was compiled, including actions to be taken by each country to secure essential medical supplies, such as strengthening of the export control regulations, efforts to reduce or remove tariffs on essential goods related to COVID-19 (the scope and methods to implement tariff reduction or removal will be determined by each country at its discretion), sharing of best practices in the standard fields of trade facilitation, and improvement of transparency in trade-related measures to address the COVID-19 crisis. The initiative was submitted to the General Council in December 2020. Following outreaching engagement, as of March 2022, the number of co-sponsors of the "Trade and Health Initiative" has expanded to 61 countries including the members of the Ottawa Group.

Strengthen export control discipline	• **Review current export control** on covid 19-related essentials. **Control future measures**. • Unavoidable export control to be reported to the WTO (to be explained they are reasonable, minimum, and in a limited scope). • **Measures to be within 3 months in principle**. Report with reasons to the WTO to extend.
Reduce / remove staff	• **Make maximum efforts to temporarily reduce/remove tariffs** on covid 19-related essentials.
Facilitate trade	• **Share best practices in standard fields** under the covid-19 crisis and strengthen consistency of restrictions.
Improve transparency	• **Promptly respond to request** from other countries **for information** on measures for the crisis.

Table: Overview of "Trade and Health Initiative"

(2) PROPOSAL TO WAIVE CERTAIN OBLIGATIONS UNDER THE TRIPS AGREEMENT

In October 2020, India and South Africa[5] proposed to the TRIPS Council that the General Council should decide on waiving certain obligations under the TRIPS Agreement (obligations to protect copyrights, designs, patents, and undisclosed information and obligations related to enforcement thereof) for the time being for the purposes of prevention, containment and treatment of COVID-19 with a view to providing timely access to COVID-related medical supplies (including medicines, vaccines, diagnostic kits, masks, and ventilators) ("Waiver Proposal"). Since the regular meeting in October of the same year, a series of formal and informal TRIPS Council meetings have been held, and discussions have taken place. When the discussions began, the developing countries and developed countries were

[4] https://www.wto.org/english/tratop_e/covid19_e/proposals_e.htm

[5] As of February 2022, in addition to India and South Africa, co-sponsors include Pakistan, Bolivia, Venezuela, Mongolia, Maldives, Fiji, Vanuatu, Indonesia, Jordan, Malaysia, Argentina, the LDC Group, and the African Group.

taking opposing positions. However, in May 2021, the United States expressed support for the waiver of certain obligations regarding vaccines under the Waiver Proposal. In June of the same year, the European Union submitted a new proposal to clarify the requirements for compulsory licensing under Article 31 of the TRIPS Agreement ("EU Proposal") as a counterproposal to the Waiver Proposal. Since then, the TRIPS Council has been discussing both the Waiver Proposal and the EU Proposal. With respect to the Waiver Proposal, in contrast to the co-sponsors and the countries in support of the proposal (including Sri Lanka), the European Union, the United Kingdom, Switzerland, and others have stressed the importance of intellectual property protection and are taking a cautious approach. These Member states and regions have asserted, for example, that (i) technology transfer of trade secrets or know-how from companies that developed the vaccines is indispensable for producing vaccines etc., and even if the obligation to protect intellectual property is waived, it would be difficult for each country to produce vaccines etc., independently, and it would instead be counterproductive to the smooth transfer of technology among companies, and (ii) protection of intellectual property that encourages research and development is important to prepare for future pandemics. With regard to the EU Proposal, the co-sponsors and the countries in support of the proposal asserted that, for example, (i) provisions on compulsory licensing have already been clarified in the TRIPS Agreement and the EU Proposal does not bring any additional value, and (ii) there are requirements for the use of compulsory licensing and it is impossible to respond swiftly. Despite discussions at a series of formal and informal TRIPS Council meetings, the gap among the countries has not been filled, no consensus has been reached, and discussions are still ongoing.

5. National measures and WTO rules on COVID-19

(1) Introduction

Since the global spread of COVID-19, countries around the world have taken various measures, such as export control of medical products and provision of support to affected industries. Such measures will be justified under the WTO rules as efforts to overcome a critical situation, depending on the extent of their purposes and means. However, excessive measures taken under the cover of a critical situation that distort the basis of competition and market functions that form the basis of the multilateral free trade system should be avoided. The following is an overview of the relationship between the measures taken by each country in response to the COVID-19 pandemic and the WTO rules.

(2) Quantitative restrictions

In response to the spread of COVID-19, quantitative restrictions have been imposed on medical supplies and other items in some cases. For example, in March 2020, the EU introduced the export authorization system that requires prior authorization of the relevant EU Member where the exporter was established (abolished in May 2020)[6] for personal protective equipment, such as masks, protective clothing, and gloves. In January 2021, the EU announced an export authorization system that requires prior authorization of the relevant EU Members where COVID-19 vaccines are manufactured (abolished in December 2021).[7]

In terms of export control regulations, including the export authorization system, Article XI, Paragraph 1 of the GATT provides for general prohibitions of quantitative restrictions, which are generally

[6] The initial 6-week period was extended by 30 days as of April 2020. (Commission Implementing Regulation (EU) 2020/402 and Commission Implementing Regulation (EU) 2020/568)

[7] As an alternative mechanism, a new monitoring system to manage vaccine export data for each company was introduced in January 2022.

prohibited in light of the fact that they are more likely to distort free trade than tariff control. However, measures that fall under the exemption provisions of Article XII Paragraph 2(a) of the GATT, "export prohibitions or restrictions temporarily applied to prevent or relieve a critical shortage of foodstuffs or other products essential to the exporting contracting party", and the exception and justification provision of Article XX(b), "measures necessary to protect human, animal or plant life or health", are not inconsistent. Article XI, Paragraph 2(a) of the GATT sets out requirements such as that (i) the product is essential, (ii) the shortage is "critical", and (iii) the measures are temporary, and Article XX(b) of the GATT sets out requirements such as that the restrictive measure is (i) for the purpose of protecting human life and health, and (ii) necessary for that purpose.[8] Some quantitative restrictive measures to combat COVID-19, particularly those related to medical supplies, may meet the strict requirements of Article 11, Paragraph 2(a), at least until the situation improves. Some of these measures may also be deemed to satisfy the requirements of Article 20(b) in view of the importance of objectives such as the protection of the lives and health of the Members' citizens, and the fact that countries are in short supply of goods necessary for the protection of lives and health due to the pandemic. Therefore, unless the measure is clearly excessive, the applicability of an exemption or justification will not be clearly denied. However, as "gray area" measures are likely to increase, it is necessary to pay close attention to ensure that inconsistent measures will not be taken under the cover of the legitimacy of their objectives and that measures will not be continued unnecessarily.

(3) CUSTOMS DUTY

While prohibiting quantitative restrictions in principle and allowing the imposition of tariffs, the WTO rules aim to reduce tariff barriers by having Members promise maximum tariff rates on a product-by-product basis through tariff negotiations and gradually reduce the maximum tariff rates (bound tariff rates). Article II of the GATT obliges the Members to apply a tariff rate that does not exceed the bound tariff rates.

In the current COVID-19 crisis, there are moves at the moment to temporarily reduce tariffs on medical supplies needed for treatment in the case under consideration in this column,[9] but no increase in tariffs in the opposite direction that would infringe on the WTO rules has been confirmed. On the other hand, tariffs are a typical trade barrier, and many countries raised tariffs to protect their domestic industries during the economic crisis that followed the bankruptcy of Lehman Brothers in 2008 (see "'Protectionist' measures in the current economic crisis and actions by the Ministry of Economy, Trade and Industry" in the 2009 Report on Compliance by Major Trading Partners with Trade Agreements). It is thus necessary to watch closely whether there will be a growing movement to implement tariff hikes aimed at protecting domestic industries, in the same way as after the global financial crisis in 2008, if the current crisis becomes more of an economic crisis.

(4) SUBSIDY MEASURES

In order to deal with the impact of COVID-19 on the domestic economy and businesses, countries have introduced and examined a number of support measures, including support for industries and

[8] In addition, as Article XX(j) of the GATT (measures essential to the acquisition or distribution of products in general or local short supply) is also discussed, the said item is characterized by the requirement of balance among Members (that measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such product). In addition, as stated in section 3 above, as a political commitment in the international arena, it has been expressed that emergency measures against the COVID-19 pandemic in general, including export control, need to be "targeted, proportionate, transparent, and temporary".

[9] Among the trade facilitation measures regarding goods related to COVID-19 (262 measures), 59% of them are tariff reduction or removal measures. Details of national and regional measures are described in Part I.

businesses damaged by restrictions on the movements of people and contraction of economic activities, mainly support for SMEs and micro-businesses maintaining employment and avoiding bankruptcy, economic stimulus measures, and business relief measures through government investment and nationalization.

In light of the fact that the Agreement on Subsidies and Countervailing Measures ("ASCM") has no provision to exclude measures for protecting life and health, even emergency measures to respond to COVID-19 may be deemed to be in violation of the ASCM if they adversely affect other countries in the design of the support measure. Therefore, it is necessary to pay close attention to these emergency measures, such as for example, measures that exceed the necessary level to respond to the crisis, and measures that will continue to be taken after the COVID-19 pandemic has been brought under control.

In addition, in view of the fact that the massive subsidies implemented in each country after the global financial crisis of 2008 are thought to be a remote cause of the current problem of excess production capacity, it is necessary to closely monitor the developments so that each country's measures do not become excessively market-distorting and develop into the problem of excess production capacity.

(5) Investment restriction measures

With regard to the recent spread of COVID-19, there have been discussions in various countries on strengthening investment screening in order to protect important industries, including ensuring health, and to guard against the risk of foreign companies acquiring important industries during economic downturns such as stock market declines.

Although the WTO Agreements do not yet have general rules on investment, the GATS already regulates the provision of services through foreign investment in trade in services. In other words, if investment restriction measures have an impact on trade in services and the Member taking such measures has committed to a certain degree of liberalization of such services under the GATS, it may violate the prohibition of market access restrictions (Article 16 of the GATS) or the prohibition of national treatment violation (Article 17 of the GATS) to the extent that the commitment is violated. Measures that fall under the general exceptions set out in Article 14 of the GATS (such as measures necessary to maintain public order under subparagraph (a) or to protect human life or health under subparagraph (b)) may be justified under the WTO Agreements, and there may be an argument that measures taken for the purpose of responding to serious infectious disease outbreaks fall under these exceptions.

Consistency with these international rules needs to be closely watched.

(6) Intellectual property

The purpose of the intellectual property system is to promote intellectual creative activities by providing incentives for such activities through the grant of certain exclusive rights, such as patent rights, to persons who developed and created an invention or other intellectual property, and encourage the efficient use of resources for research and development of new technologies and knowledge, and thereby provide a foundation for economic development and innovation based on intellectual property. The TRIPS Agreement stipulates rules to promote and protect such creative activities, including exceptions to patentable subject matters (Article 27, Paragraphs 2 and 3), exceptions to rights conferred (Article 30), and security exceptions (Article 73), taking into account public order and interests of third parties.

The TRIPS Agreement also provides that, under prescribed conditions, a Member may grant a license to a person other than the patent holder, if necessary (Article 31, Article 31 bis: the so-called "compulsory licensing"), and also provides that some of those conditions may be waived in the case of a national

emergency. In addition, the Doha Declaration adopted at the Ministerial Conference in 2001 affirmed that "the Agreement can and should be interpreted and implemented in a manner supportive of a WTO member's right to protect public health and, in particular, to promote access to medicines (Paragraph 4)", "each member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted (Paragraph 5(b))", and "each member has the right to determine what constitutes a national emergency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency (Paragraph 5(c))".

At present, intellectual property is not considered to be an obstacle to the availability of medicines to combat COVID-19, and no specific move has been confirmed to unfairly limit intellectual property. However, it is still necessary to pay attention to whether countries will take measures to unfairly impose limitations on intellectual property beyond the scope permitted by the TRIPS Agreement under the pretext of an emergency situation.

(7) Procurement by governmental agencies

Procurement by governmental agencies is exempted from the national treatment obligation under the GATT rules (Article III, Paragraph 8 (a) of the GATT). However, in view of the impact of government procurement on international trade, national treatment and most-favored-nation treatment are regulated by the government procurement rules voluntarily signed up to by WTO Members (48 countries and regions), which provide for fair and transparent procurement procedures.

However, in government procurement, preferential policies for domestic products are often adopted for security purposes or to protect specific industries, and such domestic and foreign discriminatory government procurement is considered to violate the national treatment principle and other obligations.

Amid the continued spread of COVID-19, demand for masks and other personal protective equipment, vaccines and other medicines and medical equipment, expanded sharply in 2020. In the United States, for example, government procurement budgets of $4.6 trillion have been reported and procurement of $4.1 trillion has been contracted by the end of December 2021 to combat COVID-19.[10] The United Kingdom spent £9.6 billion on the procurement of personal protective equipment, the procurement of COVID-19 vaccines and securing hospital beds in 2021.[11] It is anticipated that the scale of procurement of vaccines and other medicines and medical supplies in each country will be maintained at a high level in 2022, two years after the outbreak of COVID-19.

While COVID-19 has increased the demand for the government procurement of medicines and medical equipment, there have also been moves to reduce the fair and open government procurement market in order to prioritize the procurement of locally produced medicines and medical equipment. In November 2020, the U.S. Government notified the Committee on Government Procurement of a revised proposal to exclude from the scope of the Agreement on Government Procurement the essential medicines and health care products identified by the U.S. Food and Drug Administration (FDA), as well as 227 drugs and 96 medical devices identified as important ingredients thereof. Although the notification above was withdrawn in April 2021 due to the change of the U.S.'s government, it is necessary to pay attention to the industrial development and protection policies of each country in the name of measures against COVID-19 in the future.

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[10] https://www.usaspending.gov/disaster/covid-19

[11] https://www.gov.uk/government/publications/autumn-budget-and-spending-review-2021-documents/autumn-budget-and-spending-review-2021-html