

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 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.

Approximately three years have passed since the spread of the disease, and many countries have lifted these trade-restrictive measures. On the other hand, it is believed that there are cases where regulations that were introduced as emergency measures with the assumption to be applied on a temporary basis have not been reviewed in a timely manner, and are still in place. In addition, depending on the COVID-19 situation and political trends, measures such as export restrictions may be introduced temporarily if there is a sudden increase in the demand for certain goods such as rapid antigen test kits; therefore, it is necessary to continue to closely monitor whether such measures are being unnecessarily implemented or continued.

2. TRADE RESTRICTIVE AND FACILITATIVE MEASURES BY EACH COUNTRY

In order to ensure transparency, the WTO Director-General asked all Members to provide information about trade-related measures introduced in response to COVID-19, which information was published in the “Trade Monitoring Report on Trade-Related Developments”. In addition, the WTO Secretariat collects information on measures taken by each country, and publishes and updates this information on its website from time to time.

According to a report by the WTO Secretariat, 118 Members allegedly took trade-restrictive measures and trade-facilitating measures since the crisis began. As of October 2022, 34 or more Members are said to take export restrictive measures on medicines and food. On the other hand, there have been some trade-facilitating moves such as temporary suspension of tariffs, acceleration of regulatory approvals, and streamlining of customs procedures.

3. MOVES IN THE INTERNATIONAL ARENA INCLUDING THE WTO

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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, 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, 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”. In addition to the guidelines on emergency trade measures, the G20 Joint Extraordinary Trade and Investment Ministerial Meeting expressed its continued commitment to WTO reform, including a permanent resolution to the Appellate Body issues.

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(1) “TRADE AND HEALTH INITIATIVE” AT WTO’S 12TH MINISTERIAL CONFERENCE (MC12)

A group of like-minded Members led by Canada proactive in WTO reform (i.e., the Ottawa Group), held a Ministerial Meeting of the Ottawa Group in November 2020, and presented to the General Council in December 2020 the “Trade and Health Initiative”, which included 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 removal or reduction 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. Even after the presentation, the number of supporting Members increased to 61 before the WTO’s 12th Ministerial Conference (MC12).

At the 12th Ministerial Conference (MC12) held from 12 to 17 June 2022, an independent statement entitled “WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics” was issued under the agreement of all Members. The Members agreed on the TRIPS Agreement (see below for details), and confirmed the importance of due restraint when implementing export control on medical supplies on an urgent basis.

Details	Strengthen export control regulations	<ul style="list-style-type: none"> • <u>Review current export control</u> on COVID-19-related essentials. <u>Control future measures.</u> • Unavoidable export control to be reported to the WTO (to be explained they are reasonable, minimum, and in a limited scope). • <u>Measures to be within 3 months in principle.</u> Report with reasons to the WTO to extend.
	Reduce / remove tariffs	<ul style="list-style-type: none"> • <u>Make maximum efforts to temporarily reduce/remove tariffs</u> on COVID-19-related essentials.
	Facilitate trade	<ul style="list-style-type: none"> • <u>Share best practices in standard fields</u> under the COVID-19 crisis and strengthen consistency of restrictions.
	Improve transparency	<ul style="list-style-type: none"> • <u>Promptly respond to request</u> from other countries <u>for information</u> on measures for the crisis.

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

In October 2020, India and South Africa 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). After a series of discussions at the TRIPS Council, the above-mentioned independent statement issued at MC12 finally incorporated the clarification and simplification of the procedures for compulsory licensing under the TRIPS Agreement for patents required to produce and supply COVID-19 vaccines.

Subsequently, the TRIPS Council held a series of discussions based on the provisions in the Ministerial Decision to decide within six months from the date of the decision whether or not to extend the scope of the decision to COVID-19 diagnostics and therapeutics (paragraph 8 of the Ministerial Decision). However, no agreement was reached among the Members by the deadline, and it was agreed at the General Council meeting on December 20, 2022 that the discussions would continue.

4. 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)¹ for personal protective equipment (“PPE”), such as masks, protective clothing, and gloves. In January 2021, the EU introduced an export authorization system that requires prior authorization of the relevant EU Members where COVID-19 vaccines are manufactured (abolished in December 2021).²

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 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 XI 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.³ Some quantitative restrictive measures to combat COVID-19, particularly those related to medical supplies, may meet the strict requirements of Article XI, Paragraph 2(a), at least until the situation improves. Some of these measures may also be deemed to satisfy the requirements of Article XX(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

¹ 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)

² The original deadline of six weeks was extended by 31 days effective November 29, 2021. (Commission Implementing Regulation (EU) 2021/1728)

³ 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”.

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,⁴ but no increase in tariffs that would infringe on the WTO rules has been confirmed. However, considering that 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 necessary to continue to watch the situation of each country closely, as there will possibly 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 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.

The Agreement on Subsidies and Countervailing Measures (“ASCM”) has no provision to justify certain 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. 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

⁴ See Part I for countries that have reduced tariffs on goods related to COVID-19.

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). However, measures taken for the purpose of responding to serious infectious disease outbreaks may 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.

In addition, national treatment obligations and fair and equitable treatment obligations for foreign companies after investment are generally guaranteed in investment agreements.

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))”.

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 may possibly violate the national treatment principle and other obligations.

Amid the continued spread of COVID-19 in 2020, demand for masks and other personal protective equipment (PPE), vaccines and other medicines and medical equipment, expanded sharply in 2020. In the United States, for example, government procurement budgets of \$2.7 trillion have been reported and procurement of \$2.2 trillion was contracted by the end of January 2021 to combat COVID-19. The United Kingdom spent £15 billion on the procurement of PPE, and £2.7 billion on the procurement of COVID-19 vaccines in the year 2020.

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 WTO 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. The proposal was challenged by several GPA parties in January 2021 and was referred to arbitration in March, but the U.S. subsequently withdrew its notification in April 2021. 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.

In addition, the WTO Committee on Government Procurement exchanged information on the policies adopted by countries to respond to COVID-19. In particular, from the viewpoint of supporting small and medium enterprises' business continuity, various efforts have been made in each country to shorten the payment procedure period and extend the construction period for construction projects. It is also important to establish a framework for government procurement in response to COVID-19 through such exchange of information in the future.

