

MEDICAL SUPPLIES EXPORT CONTROLS AND BANS DURING THE EARLY COVID-19 PANDEMIC IN SOUTHEAST ASIAN COUNTRIES COMPLIANCE WITH THE WTO

Raden Mas Try Ananto Djoko Wicaksono^{1,2} and Rina Putri Rinaldi³

¹Department of Law, Faculty of Law, Gadjah Mada University and ²Department of Public Policy, School of Government and Public Policy (SGPP)

³Departement of Accounting, Faculty of Economics and Business, Gadjah Mada University
¹tryananto.wicaksono@gmail.com, ²rina.p.r@mail.ugm.ac.id

Abstract

The global markets for crucial COVID-19 products (medical supplies) are highly concentrated. Most of developing countries are highly dependent on imports for these products. However, majority of countries implemented the export controls and bans on medical supplies due to the limitation of resources they have. This research examines the Southeast Asian policy on medical supplies export controls and bans in response to the COVID-19 Pandemic and its justification for export restrictions based on Article XI paragraph (2), Article XX, and Article XXI GATT 1994. The research methods are based on qualitative methods and normative juridical research methods. This research uses secondary data from journals, books, official documents, and websites related to the Southeast Asian Government policy on export. The results show that the justification for the export ban and restriction on medical equipment can be exempted by referring to Article XX regarding general exceptions and regarding security exceptions in Article XXI (b) (iii). Most of the Southeast Asian countries tried to follow the provisions of GATT 1994 and its reflection to be a good international citizen by compliance the international law.

Keywords: Trade Policy, Southeast Asian, Medical Supplies Export, WTO

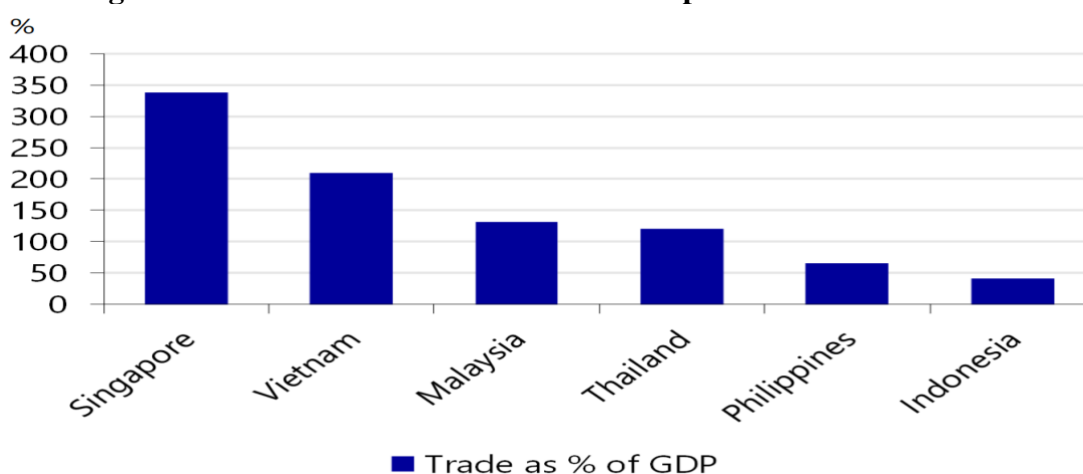
1. INTRODUCTION

The new cases of pneumonia of unknown cause detected in Wuhan City, Hubei Province of China confirmed by the World Health Organization (WHO) China Country Office (WHO, 2020) on 31 December 2019. On 5 January 2020, WHO published the first Disease Outbreak News on the new virus and declared the new virus known as Coronavirus (COVID-19) a pandemic, pointing to the over 118,000 cases of the coronavirus illness in over 110 countries and territories around the world on March 11, 2020 (Ducharme, 2020). Until 30 June 2020, the total number of coronavirus cases in Southeast Asian countries has reached 150,571 with most cases reported in Indonesia and the Philippines. Meanwhile, Thailand confirmed the total number of infections in the country to 3,171. In Vietnam, the total number of confirmed cases stood at 355, while 335 of them have recovered (Hospita, 2020). While the region's tally is still far off the hundreds of thousands compare to the U.S. and some European nations (Lee, 2020).

The world economy is reeling from the COVID-19 pandemic and most of the countries have no choice but to lock down social and economic activity. The decision that comes at the cost of a global recession, estimated to contract by at least 3 percent, with up to half the global workforce at the risk of losing their jobs and billions of people, especially in the South, pushed back into poverty and hunger (ILO, 2020; IMF, 2020; UNCTAD, 2020). According to Raphie Hayat, Researcher at RaboResearch, the economic impact of COVID-

19 on ASEAN economies will predominantly be felt through three channels: i) exports, ii) tourism and iii) domestic demand (Hayat, 2020). The data expect global the gross domestic product (GDP) to decline by almost 3% in 2020 and since tourism has ground to a halt (Erken, 2020), the result expect Singapore and Vietnam to be hit hardest in terms of exports (See Figure 1).

Figure 1. Southeast Asian Countries that Depend Most on Trade



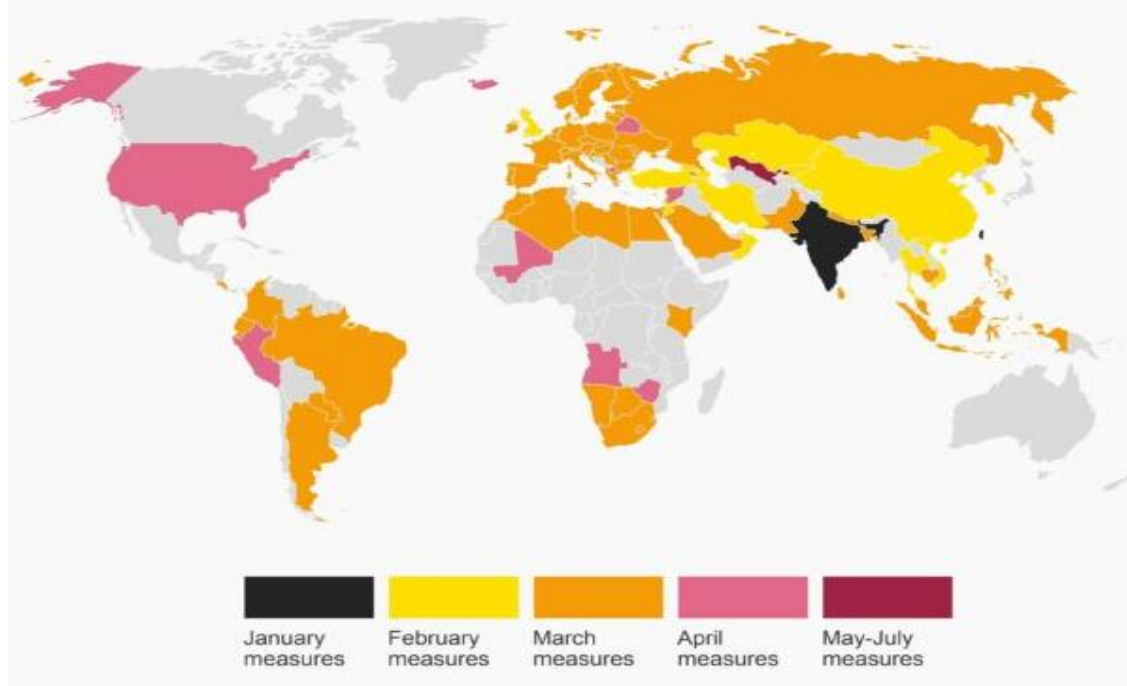
Source: Hayat, 2020

Meanwhile, The Philippines and Thailand to be hit most in terms of tourism (See Figure 2), even assuming the optimistic case, the slow recovery in tourism will hold back their economic recovery in 2021 (Erken, 2020). The impact of COVID-19 has led the global economy to shrink. According to The World Health Organization Covid-19 Disease Community Package (DCP), there are 17 products considered key to deal with the COVID-19 Pandemic. They consist of essential items for diagnosis and treatment processes such as enzymes; hygiene products such as liquid soap and hand sanitizers; personal protection equipment including gloves and medical masks; and case management products such as oxygen concentrators and respirators (Espitia, Rocha, & Ruta, 2020a). The global markets for these crucial COVID-19 products are highly concentrated. Most of developing countries are highly dependent on imports for these products. However, majority of countries implemented the export controls and bans on medical supplies due to the limitation of resources they have.

On the last updated (July 30, 2020) by Global Trade Alert, as a research institution that cooperate with European University and the World Bank, there are 90 jurisdictions (including most of southeast Asian countries) reported executed a total of 191 export controls on medical supplies and medicines since the beginning of 2020 (Global Governance Programme, 2020). In 2020, between January until August 15, at least 67 countries took at least 152 actions imposing export restrictions on medical goods, a category that includes general medical supplies (such as personal protective equipment (PPE)), medical equipment, pharmaceuticals, chemicals, sanitation products, and other medical goods. While some countries have removed some restrictions, at least 88 remain in force (Baldwin & Evenett,

2020). As a result, global PPE markets are in chaos, with reports of piracy, defective products, hoarding, and price gouging, in addition to the shortages. Many poor and vulnerable countries face uncertainty over their current and future access to imported PPE (Bown, 2020).

Figure 2. Countries Export Controls on Medical Supplies (Updated on 31 July 2020)



Source: Global Governance Programme, 2020

In general, WTO agreements are allowing the use of emergency trade restrictions related to national security or health that might otherwise contravene WTO obligations, however, that such restrictions should be targeted, temporary, and transparent. There are several examples of the related article: First, in case of prohibits export bans and restrictions, other than duties, taxes, or other charges on Article XI of the 1994 General Agreement on Tariffs and Trade (GATT). It only allows members to apply restrictions temporarily in order to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting country. Second, In the case of foodstuffs, the WTO Agreement on Agriculture requires members to give “due consideration to the effects on food security” of importing countries. In addition, general exceptions (e.g., GATT Article XI, XX) within WTO rules provide for policy flexibility for its member states, including to protect the health, provided restrictions do not “constitute a means of arbitrary or unjustifiable discrimination,” or a “disguised restriction on international trade,” among other conditions (CRS Report, 2020).

In response to the pandemic, dialogue and coordination between the ASEAN Member States will remain key to effectively tackle the crisis and sustain the momentum of integration. On February 15, Vietnam, the ASEAN 2020 Chair, issued a statement on the response that ASEAN would carry out collectively to mitigate the threat of COVID-19 in the region and highlighted the importance of a coordinated response. Five days later, ASEAN

health representatives held video conferences regularly with Chinese health experts to learn from China's experience on February 20 (Hai Ly, 2020). But the most important meetings were the Special ASEAN Summit (ASEAN, 2020a), which brought together heads of states from the 10 member countries, and the ASEAN+3 Summit, which included leaders from China, Japan, and South Korea (ASEAN, 2020b).

Despite ASEAN's haste and determination, the numerous meetings and summits did not yield a cohesive and collective response to COVID-19, due to specific domestic issues among some of its member states. Examples include Cambodia's erosion of freedoms and power grabbing through the controversial state of emergency law (Touch, 2020), Indonesia's tardy response (Rodriguez, 2020), Singapore's upended containment success (Asia Pacific Foundation of Canada, 2020), Thailand's Pro-Democracy Activists protests including a new constitution, new elections, and an end to repressive laws (Vejjongsra, 2020), Malaysia's political instability due to shifting coalition politics (IISS, 2020), and the Philippines's failed to meet the challenges of COVID-19 and the responsibilities during the crisis because of limited resources, lack of good management skills, the dominance of patronage politics, corruption, and other problems (Atienza, Arugay, Franco, Go, & Panao, 2020).

So far, most of the literatures portray early indications and estimates of the likely economic implications of COVID-19 outbreak, mostly addressing isolated dimensions, such as, general macro economy including production, supply chain, and policy response (Barua, 2020; Baldwin & Weder, 2020; Baldwin & Tomiura, 2020; Cochrane, 2020; Fornaro & Wolf, 2020; Mann, 2020), borders and oil market (Arezki & Nguyen, 2020; Meninno & Wolff, 2020; Fornaro & Wolf, 2020), global GDP growth (Boone, Haugh, Pain, & Salins, 2020; McKibbin & Fernando, 2020; Fernandes, 2020; Wren-Lewis, 2020) and financial stability and risk (Beck, 2020; Cecchetti & Schoenholtz, 2020). While trade implications are enormous, scholarly research on this issue remains limited yet emerging. The purpose of this paper is to explore on Southeast Asian policy on medical supplies export controls and bans in response to the COVID-19 Pandemic and its justification for export restrictions based on Article XI paragraph (2), Article XX, and Article XXI GATT 1994.

2. RESEARCH METHOD

This study is using qualitative study and normative juridical research methods. In qualitative research, researchers interpret what they see, hear, and understand without sacrificing background, history, context, and previous understanding (Creswell, 2009). This study uses data collection techniques, both primary and secondary data. Researchers through official reports obtained primary data from the Government or official institution. Meanwhile, secondary data is obtained through a literature study, which refers to text or written sources, both visually and spoken in communication media. Secondary data were obtained from written sources, such as books, literature, academic journals, news, and online media that are relevant to this study. The process of data processing and analysis involves reviewing and interpreting the data collected, organizing, and categorizing these data, and examining their relationship with variables from predetermined theories (Creswell, 2009, p.

164). It used an analytical technique consisting of the framework introduced by Miles and Huberman (1994) which described the stages of the qualitative data analysis process consist of data reduction, data presentation, and drawing conclusions and verification (Berkowitz, 1997). Thus, the analysis technique is carried out by gathering data in the form of words and letters taken from documents and transcripts of the government report, official website, and research publications. Data analysis is conducted by extracting themes or generalizations from evidence and organizing data to present a coherent and consistent picture to prove the basic assumptions of the theoretical foundation.

Another method that uses in this article is normative or doctrinal legal research. According to Terry Hutchinson, as quoted by Peter Mahmud Marzuki, defines doctrinal legal research as research which provides a systematic exposition of the rules governing a particular legal category, analyzes the relationship between rules, explains areas of difficulty and, perhaps, predicts future development (Marzuki, 2015, h.32). Normative legal research is a library research or document study because this research is conducted or aimed only at written regulations or other legal materials.⁶ In essence, the research is examining library materials or secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. In relation to normative research, the approach used in writing law according to Peter Mahmud Marzuki as follows: (1) Case approach; (2) Statute approach; (3) Historical approach; (4) Comparative approach; and (5) Conceptual approach. The approaches used by the authors of the above approaches are the statute approach and the case approach. The statutory approach is an approach that is carried out by examining all laws and regulations relating to the legal issue being handled. The case approach is an approach that is carried out by examining cases related to the issues faced which have become court decisions that have permanent legal force (Marzuki, 2015, h.93).

3. ANALYSIS AND DISCUSSION

Since ASEAN officially launched its Economic Community (the AEC) in 2015, with its four pillars: a single market and production base, a competitive region, equitable economic development, and integration into the global economy (Acuity, 2018), has progressed the most. The creation of the ASEAN Trade in Goods Agreement in 2010 and the fact that most Intra ASEAN trade is already at zero tariffs is proof of single market progress (ASEAN, 2015). Meanwhile integration into the global economy was realized through free trade agreements (FTAs) signed and implemented with six of its East Asian partners: Australia and New Zealand (AANZFTA), China (ACFTA), India (AIFTA), Republic of Korea (AKFTA), and Japan (AJCEP). All the agreements are marking an important economic and political commitment to the region's shared and connected future in a common market. Economic cooperation in many areas has increased the number of intra-ASEAN trade from US\$0.76 trillion in 2000 to US\$2.3 trillion in 2016 as shown in Figure 3. (ASEAN, 2017)

Figure 3. Intra-ASEAN's Total Trades



Source: (ASEAN, 2017, p. 16)

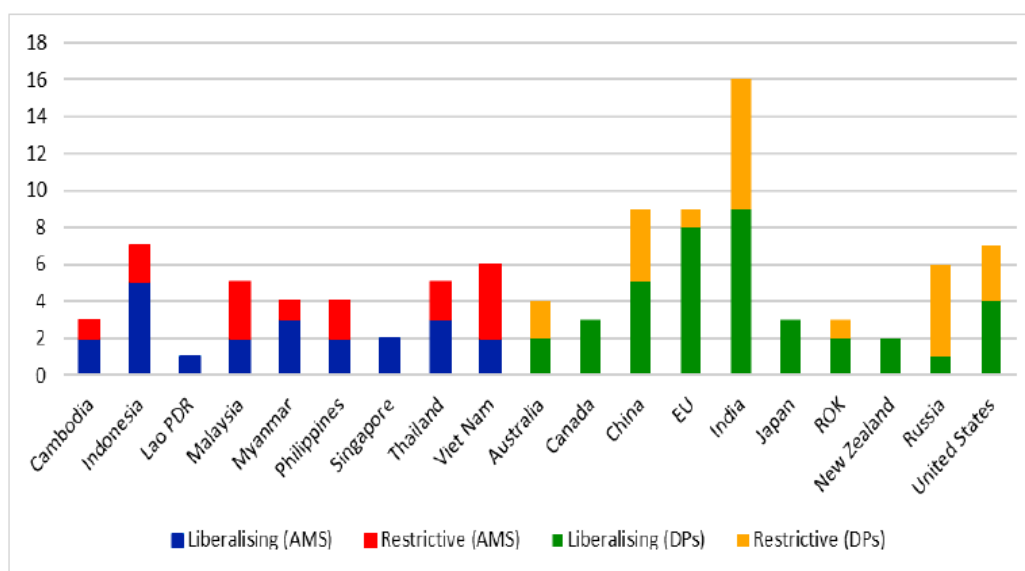
Today the economy of ASEAN has been faced with unprecedented uncertainties stemming from the COVID-19 pandemic. Preliminary ASEAN statistics also indicate that total merchandise trade in 2019 declined modestly by 1.8 percent year-on-year (yoy) to US\$2.77 trillion while foreign direct investment (FDI) inflows in the same period increased by 4.7 percent yoy to US\$160.7 billion. In addition, continued trade tensions between major trading partners (U.S. and China) and concerns over the outbreak (ASEAN Annual Report, 2020, p. 17). To response the early situation of COVID-19 pandemic, the ASEAN Economic Ministers agreed to issue a joint statement on strengthening the ASEAN's Economic Resilience in response to the outbreak of COVID-19 at the 26th ASEAN Economic Ministers' Retreat in the central city of Da Nang on March 11, 2020. In the joint statement, they expressed concern over the outbreak of the COVID-19, which has adversely affected the lives of people as well as economies across the globe. They underscored the importance of ASEAN solidarity and the spirit of a cohesive and responsive ASEAN community in facing the outbreak through joint efforts to avoid further adverse impacts (Vietnam Times, 2020).

Most countries are highly dependent on international trade; therefore, depressed demand and breaks in supply chain connectivity are likely to particularly affect those economies that are most integrated into global value chains such as Singapore, Vietnam, and Malaysia. China as the country ASEAN's biggest external trade partner and investor, accounting for 17.1% of ASEAN's total trade and 6.5% of its total FDI inflows in 2018, and it is tightly woven into its supply chains (ASEC, 2020). International trade is expected to plummet by between 13% and 32% in 2020 (WTO, 2020), which will likely have a broad and deep impact on the ASEAN region (ASEC, 2020). On 10 March 2020, following its 26th retreat and gathered in Da Nang, the ASEAN Economic Ministers (AEM) issued a statement calling for collective action to mitigate the impact of the virus, with a particular focus on leveraging technology and digital trade, as well as trade facilitation platforms to foster supply chain connectivity and sustainability (ASEAN, 2020c). A month later, in April 2020, ASEAN Leaders convened the Special ASEAN Summit on Coronavirus Disease 2019 (COVID-19). During the Summit, Leaders issued a declaration calling for the implementation of measures to boost confidence and improve regional economic stability, including through policy stimulus, by assisting those individuals and businesses suffering from the impact of COVID-19, particularly MSMEs and vulnerable groups (ASEAN, 2020d).

3.1. Medical Supplies Export Controls and Bans in Southeast Asia

COVID-19 not only has an impact on a country's economic growth, but trade and investment are also predicted to be burdened by this pandemic. The WTO projects that global trade in 2020 will fall by 13% to 32% in each region and cover all sectors. As a result, various countries began to experience a crisis so that they imposed trade restrictions, including export restrictions. Products such as vital medicines, medical supplies, and food are the focus of export restrictions. This restriction is carried out to meet domestic needs (ASEC, 2020). Not much different from various countries in the world, data from the World Trade Organization (WTO) and the International Trade Center (ITC) states that ASEAN countries are imposing export restrictions and relaxing imports of goods and services concerning Covid-19. ITC data states that there were 295 acts related to trafficking carried out by 139 countries and regions. 156 actions are restrictive and 139 liberalizations, the steps taken in this action are focused on exports and imports (Alberti, 2020). ASEAN Member States (AMS) and ASEAN Dialogue Partners (ASEAN DPs) in general have issued 62 liberalization measures such as reducing tariffs or import duties and trade facilitation and have taken 38 actions related to export restrictions (see Figure 4).

Figure 4. Numbers of trade and trade-related measures issued by AMS and ASEAN DPs during COVID-19



Source: ASEC, 2020

Measures to restrict exports of medical supplies and food have received special attention from the International Monetary Fund (IMF) and the WTO. Through the Managing Director of the IMF and the Director-General of the WTO, the government is not advised to impose restrictions on the export of medical supply and food. Massively, restrictions will disrupt the supply chain, suppress production, and the product may not

be in the hands of people who need it (ASEC, 2020) This restriction will hurt the exporting countries of their trading partners. The restriction is intended to reduce prices and provide the availability of domestic products, but this will only be temporary. Since the medical supply is a valuable and rare item when the item is available, the public is likely to make large purchases, hoard, and speculative actions which will cause scarcity to occur and product prices to increase (Hopewell & Joshua, 2020). Countries that carry out restrictions think that the shortage of supply will be covered by national production by each country. Hopewell and Joshua (2020) argue that it is unrealistic and impossible to do. The medical supply chain is global in nature, the complexity of the product with its various supporting components is not easily produced through the state's complete self-sufficiency. Cooperation between countries and producers is needed so that these products are ready for use and meet market needs.

The WTO stated that the long-term effect of export restrictions would result in prolonged health and economic crisis and exacerbate the situation. The more serious impact will be felt by developing countries with high poverty levels and which are still vulnerable. Experience in the global crisis shows that restrictions on food exports are multiplying rapidly in various countries and are causing greater uncertainty and price increases (WTO, 2020). Evans, a neo-liberal economist, argues that elimination of the role of the state in the economy is the key to successful reform, others argue that an 'embedded autonomy' of the state is necessary for successful reforms (Evans, 1992). For neo-liberals, state intervention creates market distortion and rent-seeking behavior leading to costly and unproductive investment. Since the intentions and capabilities of states are constantly changing in an anarchic international system, cooperation on a relative gain basis is highly unlikely and cheating is common (Grieco, 1988; Grieco, 1990; Mattar, 1994).

In general, medical products are categorized into four groups, namely: (1) medicines (including both dosified and bulk medicines); (2) medical supplies (consumable for hospital and laboratory use such as alcohol, syringes, gauze, reagents, etc.); (3) medical equipment and technology; and (4) personal protective equipment (e.g., hand soap and sanitizer, face mask, and protective spectacles) (WTO, 2020b). In 2018, the total value of global exports of personal protective equipment (PPE) products was US\$47.5 billion with most of such exports consisted of gloves, masks, and gowns. Global export of gloves was recorded at \$15.6 billion or 76 percent of which was supplied by China, Malaysia, Thailand, Vietnam, and Belgium. Global export of masks (i.e., textile masks and gas masks) with totaled \$13.6 billion or almost 63 percent of which was supplied by China, Germany, the United States, Vietnam, and Mexico (Suvannaphakdy, 2020). The total value of ASEAN exports of PPE products was \$8.5 billion or 18 percent of global exports in 2018. Many 80 percent of such exports were in gloves and gowns (13 percent). The largest exporter of PPE products was Malaysia (\$4.6 billion), followed by Vietnam (\$1.7 billion) and Thailand (\$1.4 billion) (Suvannaphakdy, 2020). During the current COVID-19 period, however, sourcing health supplies including PPE products from overseas have become increasingly challenging

for ASEAN countries. Thus, Governments around Southeast Asia have been implementing trade-related measures in response to the COVID-19 pandemic including trade restrictive. (See Table 2).

Table 2. Southeast Asian Regulations on Medical Supplies Export Controls and Bans in Response to COVID-19

Countries	Regulation	Description of Goods	Policy Instrument	Implementation Date
Brunei Darussalam	Royal Customs and Excise Department, Ministry of Finance on Temporary Exception for Personal Hygiene ¹	Personal hygiene products	Tariff reduction	1 April 2020
Cambodia	Government's Resolution No. 20/NQ-CP ²	Masks	Export Ban	20 March 2020
Indonesia	Regulation of Minister of Trade Number 34 of 2020 on Second Amendment to Regulation of Minister of Trade Number 23 of 2020 (Regulation 34/2020)	Masks	License to operate	5 March 2020
		Masks	Export Ban	12 March 2020
		Temporary Export Ban for Antiseptic, Mask Raw Material, Personal Protective Equipment, and Masks	Export Ban	18 March 2020
Laos	PM Decision No.31 on Policies and Measures to Mitigate the Impact of COVID-19 on Lao Economy (2 April 2020) ³	Masks, Soaps, other Medical Equipment	Tariff Reduction for Import	2 April 2020
Malaysia	Custom Act on Prohibition of Export No.2 2020 ⁴	Masks (of types: one-ply (ear loop), two-ply (ear loop), three-ply (ear loop))	Export Ban	18 March 2020
Myanmar	-	Medical Supply Products	Tariff reduction	27 April 2020

Philippines	-	Firms told to allocate 80% of production to the domestic market	Export Limit	25 March 2020
Singapore	Health Sciences Authority regulation on Import of Hand Sanitizers, Mask, thermometers and Protective Gear - 2020	Hand sanitizers, masks, thermometers, protective gear	Non-automatic import-licensing procedures	31 January 2020
		Medical, hygiene, pharmaceutical and agricultural products	Tariff reduction	16 April 2020
Thailand	WTO document G/MA/QR/N/THA/2/Add.3, 2 April 2020 ⁵	Masks	Export License	6 February 2020
		Masks	Export Limit	21 February 2020
		Extension on Export Ban on Masks	Export Ban	25 March 2020
Vietnam	-	Masks	Export Limit	11 March 2020

Source: ¹Trading Across Borders Brunei, 2020; ²Customs News, 2020; ³Lao Prime Minister, 2020; ⁴Warta Kerajaan Malaysia, 2020; ⁵WTO, 2020c; International Trade Centre (ITC), 2020; EUI, GTA and World Bank, 2020

Export bans and restrictions are generally prohibited by the WTO. This can be seen in Article XI paragraph (1) the General Agreement on Tariffs and Trade (hereinafter, GATT) 1994, which states:

“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 the exportation or sale for export of any product destined for the territory of any other contracting party.”

This indicates that WTO member countries are prohibited from introducing or maintaining any form of exports restrictions or restrictions other than duties, taxes, or other fees. Exceptions to this rule are only allowed in specific circumstances under:

- 1) Article XI: 2 of the GATT expressly allow, “Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party”.

- 2) Article XX (b) of the GATT allows measures “necessary to protect human, animal or plant life or health”.
- 3) Article XXI (b)(iii) on “Security exceptions” states that nothing in the GATT must be construed to prevent any WTO Member “from taking any action which it considers necessary for the protection of its essential security interests” in times of “emergency in international relations”.

Therefore, it is still possible for WTO member countries to impose a quantitative restriction if they meet the exclusion criteria specified in Article XI paragraph (2) letter an of GATT 1994, namely:

"The provisions of paragraph 1 of this Article shall not extend to the following: (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party."

This provision stipulates that WTO member countries can implement temporary export bans or restrictions to prevent or reduce shortages of foodstuffs or other important products in the exporting country. Apart from the exception to this paragraph (2) on Article XI, the provisions regarding export restrictions can also be exempted by referring to other GATT provisions such as Article XII, Article XX, and Article XXI. However, if it is related to the COVID-19 pandemic, the most relevant exceptions are those contained in Article XI paragraph (2) and Article XX of the GATT 1994. Furthermore, related to prohibitions and restrictions on foodstuffs during the Covid-19 pandemic can be linked on the grounds of "food security" in Article XXI GATT 1994 (Lapa, 2020). Furthermore, when WTO member countries impose export restrictions, this does not automatically apply but there is a notification mechanism that must be made in advance by WTO member countries where this has been agreed in the "Decision on Notification Procedures for Quantitative Restrictions" in 2012.

3.2. Justification of Export Prohibition and Restriction Based on Article XI

WTO member countries can take an action on export restrictions (bans) and limitation in response to the COVID-19 pandemic. Article XI paragraph (1) GATT that regulates general elimination of quantitative restrictions states that a country is prohibited from implementing a non-tariff policy (such as quantitative restrictions or non-tariff barriers). It is regulated that barriers or restrictions can only be made in the form of import duties, taxes, or other charges and not based on quotas, import, or export licenses. The export prohibition and restriction exemplified above, such as what happened in Southeast Asian on medical equipment is clearly a quantitative restriction that is explicitly covered by the term "quota" in Article XI paragraph (1) because banned exports or impose quotas on various variations of goods, especially medical equipment.

The provisions regarding the prohibition or limitation contained in Article XI paragraph (1) may be exempted from paragraph (2). During the Covid-19 pandemic, the provisions in Article XI paragraph (2) letter a, is the most relevant provisions because it allows WTO member countries to impose temporary export restrictions to reduce shortages of food and other products important to exporting countries. The provisions of Article XI paragraph (2) letter a: “Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party”.

The Appellate Body (AB) decision on the case of raw materials in China has provided clear instructions on the scope of the exception to Article IX paragraph (2) and how to apply it. AB believes that the commodity in question must be "absolutely indispensable or necessary" for the exporting country and that the shortage must be "critical". This means that shortages must cause a "crisis" in the exporting country, which is described as a "turning point, a very important or decisive stage, difficult times, dangers or tensions in politics, trade, etc. Thus, when it is linked to the COVID-19 pandemic period, then this condition is included in the category of deficiency of a very important quantity; the quantity of the commodity determines a situation, a situation that has reached a very important or decisive stage, or a turning point (WTO, 2020). From the AB decision above a limitation or prohibition on exports must be carried out as soon as possible when a critical situation occurs in the exporting country.

Thus, the WTO member states should demonstrate the essential goods that are prohibited or restricted in their exports are really needed to fight the COVID-19 pandemic, if not, the export restrictions cannot be justified. However, the justification should not conflict with other WTO special agreements (Aatreya, 2020). For example, in the case of import licensing regimes by Indonesia, AB states that the exception is Article IX paragraph (2) letter c GATT 1994 does not apply based on Article 12 paragraph (1) Agreement on Agriculture (AoA) or in other words the provisions in GATT cannot be used to justify actions which constitute a violation of AoA (in the case of import licensing regimes in Indonesia against Article 4 paragraph (2) which independently does not allow QR which is enforced by Indonesia and is applied together with Article XI paragraph (1) GATT 1994). Therefore, the prohibitions and restrictions imposed during the COVID-19 pandemic must also pay attention to the existing WTO special agreements (WTO, 2017).

Table 3. WTO Cases Related to Export Prohibition and Restriction Justification on Article XI GATT 1994

Case	Appellate Body Decision
DS366: Colombia — Indicative Prices and Restrictions on Ports of Entry ¹	The Panel states that if there is an action in the form of prohibition or restriction on imports, either directly or indirectly, it will be subject to Article IX paragraph (1).

DS394: China — Measures Related to the Exportation of Various Raw Materials ²	Case of raw materials in China that there are clear instructions on the scope of the exception to Article IX paragraph (2) and how to apply it. It is stated that the commodity in question must be "absolutely indispensable or necessary" for the exporting country and that the shortage must be "critical". This means that shortages must cause a "crisis" in the exporting country, which is described as a "turning point, a very important or decisive stage; difficult times, dangers or tensions in politics, trade.
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Source: ¹WTO, 2007; ²WTO, 2020

3.3. Justification of Export Prohibition and Restriction Based on Article XX

If a prohibition or restriction that violates Article XI paragraph (1) cannot be “justified” in Article XI paragraph (2), then the general exclusion contained in Article XX GATT 1994 could be potential. The analysis in Article XX consists of two levels which require that action (in this case a prohibition or restriction) must meet one of the exceptions set out in letters “a” to “j” and the requirements set out in the opening words of Article XX (*chapeau*) specified:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures”

This Chapeau states that measures taken by WTO member countries to protect certain interests are not allowed if the action is classified as indiscriminate or unjustifiable discrimination, or if the action is a cover to restrict international trade. Furthermore, the prohibitions or restrictions imposed during the Covid-19 pandemic will be very relevant if using letter b of Article XX which allows WTO member countries to take actions "necessary to protect human, animal or plant life or health". As an initial consideration, this ban is intended to protect lives in the face of the COVID-19 pandemic, but whether the ban is "necessary" should be discussed further.

Table 4. WTO Cases Related to Export Prohibition and Restriction Justification on Article XX GATT 1994

Case	Appellate Body Decision
DS332: Brazil — Measures Affecting Imports of Retreaded Tyres ¹	AB stated that to determine whether an action is deemed "necessary" under Article XX letter (b) necessary to protect human, animal, or plant life or health; such a holistic operation or a comprehensive study is needed to consider whether limiting or prohibiting action taken by a country

	will be commensurate with the results obtained by the country if it imposes restrictions or existing restrictions.
DS135: European Communities — Measures Affecting Asbestos and Products Containing Asbestos ²	AB argues that the more important matters or values at stake, the likelihood that such actions will be justified under Article XX will also increase.

Source: ¹WTO, 2009; ²WTO, 1998

In case of COVID-19 that has been classified as a pandemic by WHO (WHO, 2020a), the interests of the lives of WTO member countries are indeed at stake and it is clear this is a very important measure. This suggests that the export ban and restrictions described in the background have a high chance of being justified under Article XX. Furthermore, when talking about the measure "whether the action taken is commensurate with the results to be obtained", then AB's opinion in the EC-Asbestos case can be used as a reference, that is, if there is any an "alternative action" that can be taken by a WTO member country to face difficulties in its country, such alternative action will undermine a country's reason to justify its actions under Article XX. However, WTO member states remain free to determine the level of protection they wish to maintain, and the existence of alternative measures will affect the justification of Article XX only if the alternative measures achieve the same level of protection as the measure set by the state. During a pandemic like this, the country will set the maximum possible level of protection so that the ban or restriction on medical exports, especially those carried out by WTO member countries, can be justified, especially if the COVID-19 pandemic is very disturbing.

The analysis based on Article XX letter b and Article XI paragraph (2) letter a can be distinguished for two reasons. First, Member States' policy to prohibition or restriction in Article XX letter b covers a broader scope and is not limited to "temporary" measures, as in Article XI paragraph (2). Second, Article XI paragraph (2) letter applies only if there is a difficulty that is already "critical" for goods deemed "essential" at that time for the exporting country. Therefore, prohibitions or restrictions during the COVID-19 pandemic can be justified based on Article XX letter b, even if the exporting country does not face "critical" difficulties (Aatreya, 2020). Furthermore, if a state action has fulfilled the provisions in one of points a to j (in this case letter b) then the next analysis is to assess the state's actions based on chapeau Article XX. As previously discussed, Article XX chapeau states that actions taken by WTO member countries to protect certain interests are not allowed if the action is classified as indiscriminate or unjustifiable discrimination, or if the action is a front for restricting international trade. The function of this chapeau is to avoid abuse, but in fact it, thwarts many attempts to justify protective measures (Joseph, 2011). Lorand Bartels further stated that there is absolutely no difference between the conditions of action specified in

the chapeau and the conditions of action referred to in point “a” so that these two conditions should be applied together and not exclude one another (Lorand , 2015).

3.4. Justification of Export Prohibition and Restriction Based on Article XXI

Article XXI regulates security exceptions that allow member states to justify actions that are not in accordance with the principles of international trade for reasons of state security. Article XXI provides that:

Nothing in this Agreement shall be construed

- a) To require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- b) To prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - i. Relating to fissionable materials or the materials from which they are derived.
 - ii. Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.
 - iii. Taken in time of war or other emergency in international relations; or
- c) To prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security

The security exception embraces five broad categories: (1) national security information; (2) nuclear material; (3) military goods and services; (4) war and international emergencies; and (5) U.N. Charter obligations. To justify the prohibition and restrictions on the export during the COVID-19 pandemic, Article XXI (b) (iii) requires war or other emergencies in international relations. A global pandemic like COVID-19 cannot possibly be classified as a war, therefore, it could be proven as an "emergency in international relations". The reason of COVID-19 pandemic can be categorized as an emergency in international relations is based on the following facts:

1. Several countries such as the United States or Russia Federation have included the pandemic in their national security strategy. For example, Russia states that a pandemic is a threat to its national security in the field of public health (Lapa, 2020).
2. The Secretary-General told the Security Council on July 2, 2020, that the COVID-19 pandemic is “profoundly affecting” peace and security across the globe. He emphasized the need for collective security from United Nation Security Council (UNSC) (United Nations, 2020).
3. The UNSC unanimously passed Resolution 2532 and it considers “the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security” (preambular para. 11) (Pobjie, 2020).

Furthermore, regarding the time element in Article XXI (b) (iii), the state will clearly act during an emergency. When proposing security exemptions, WTO Members must: (1) define 'essential security interests' in good faith and (2) adopt measures to protect essential security interests in good faith, i.e., the actions taken must correlate

with the interests to be protected. This requirement is aimed at preventing the abuse of the security exemption provisions but at the same time, it is also aimed at respecting the decisions of WTO member countries to protect the sovereignty of their countries. The obligation of good faith is applied not only to the definition of essential security interests but also to implement measures to prohibit or restrict exports by the state. In other words, WTO Members are obliged to demonstrate that their actions are justified in protecting the interests of the state (Anania, 2014). Article XXI refers to steps deemed "necessary by the State" rather than actions that are objectively "necessary" under Article XX. Regarding this element, WTO member states should not experience significant difficulties because as stated above is a right of a country to determine the "necessary" elements.

4. CONCLUSION

The export prohibition and restriction of various products, especially medical supplies during the COVID-19 pandemic, is indeed a violation of Article XI paragraph (1) of GATT 1994, but this provision can be exempted by paying attention to the provisions in paragraph (2). In addition, the justification for the export ban and restriction on medical equipment can also be exempted by referring to Article XX regarding general exceptions. Such action can also be justified if the state refers to the provisions regarding security exceptions in Article XXI (b) (iii). Basically, state actions in the form of export controls and restrictions on medical supplies can be justified if these actions can be proven as an excuse to fight the COVID-19 pandemic. WTO Members exporting such products may also invoke the general exception of Article XX (b) of the GATT. Article XX (b) of the GATT allows measures necessary to protect human life or health, provided that these measures if they are strictly limited to the requirements of emergency response.

Although the decision of countries to impose export restrictions is justified, this action must also be balanced with international cooperation, thus supply shocks do not occur and create the risk of shortages of stocks for countries that depend on global supply chains and exacerbate the COVID-19 pandemic. Most of the Southeast Asian countries tried to follow the provisions of a particular treaty or rule of customary international law, in this case, WTO rules. Since most of the Southeast Asian countries were ratified, it is an expression of commitment, acting in accordance with the legal obligations established in GATT. While most of the Southeast Asian countries can be rightly criticized on some issues, their self-perception remains one of a country committed to a rules-based international order; in short, to be a good international citizen.

Overall, to tackle the COVID-19 crisis, key medical supplies, and other crucial products that related with the crisis, should freely flow from producers to where they are needed. Export restrictions and import protection are collectively inefficient, especially for least developing countries, as they see the number of COVID-19 cases rise, trade protectionism will cost lives. Trade policy cooperation should first aim at preserving open markets in this difficult time. Export restrictions on medical supplies in times of pandemic are not only related to trade regulations but also concerned with global health governance. Therefore, the cooperation between ASEAN members states with WTO and WHO is required. To solve the problem of shortages in medical products caused by a global pandemic requires improving trade regulations. The author proposed to establish a multilateral common market of medical products.

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