

# The Unsettled Global Trading Order & Japan

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## We Are at War: Unilateralism & the Virus

The year 2019 was one of the most difficult for the global trading order. A series of unilateral trade measures adopted by the United States against China were met by reciprocal unilateral trade measures by China and escalated into a trade war. The growing unilateralism of the two major economies loosened restraints on trade protectionist measures by other countries and ignited trade wars in other parts of the world. The World Trade Organization (WTO) failed to fulfil its expected mandate to find multilateral solutions to the trade wars. Just as a small crack in a wall leads to another and destroys the whole structure, the foundation of the global trading order was shaken.

The year 2020 was hoped to mark a new start for the global trading order. At the beginning of the year, the momentum for WTO reform was growing as a number of proposals to improve and modernize it were presented by WTO members, industries and individuals. There was an expectation that the momentum would produce some tangible results at the WTO 12th Ministerial Conference (MC12) scheduled to be held in Kazakhstan in June. In addition, efforts to conclude bilateral and regional trade agreements continued to complement multilateralism as the Japan-US Trade Agreement and the US-Mexico-Canada Agreement were concluded, which were expected to be followed by the conclusion of other bilateral and regional agreements, such as the Regional Comprehensive Economic Partnership (RCEP).

However, these hopes were unexpectedly thwarted by the global pandemic of Covid-19. The MC12 has been postponed, and a new date has not yet been fixed. All WTO in-person meetings were suspended from mid-March and remain so as of this writing. In the meantime, many WTO members have resorted to unilateral export restrictions on medical supplies and food in fear of shortages of these goods in their territories. There is a growing concern that these unilateral measures undermine the reliability of global supply chains and could ultimately disrupt the global trading order.

We are at war on two fronts: unilateralism and the virus. Unfortunately, most scientists predict that Covid-19 will not disappear anytime soon and advise us to change our lifestyles to live with it until we eventually win the war against the virus. Moreover, the war cannot be won unless the international community works together. It is therefore imperative to have a solid global trading order to win the war against unilateralism.

This short article first analyzes the growth of unilateralism amid the Covid-19 pandemic and then discusses WTO reform proposals to constrain it. Finally, it considers how Japan can take a leadership role in the global trading order during and after the pandemic.

## Unilateral Export Restrictions on Medical Supplies & Food

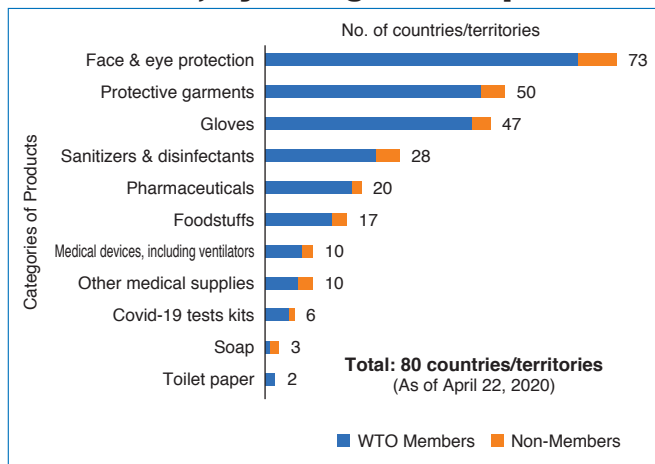
As noted in the previous section, unilateralism had already been rampant even before the pandemic started. The US had imposed additional duties on imports from China, and China had responded with retaliatory tariffs. The US had also applied additional duties on steel and aluminum for allegedly national security reasons in accordance with Section 232 of the Trade Expansion Act of 1962, which had led some WTO members, including the European Union, to have recourse to safeguard measures on steel. A trade dispute had also risen between Japan and South Korea after Japan tightened export control measures on certain products destined for Korea.

The Covid-19 pandemic has provoked another series of unilateral trade restrictive measures. Due to the increasing demand for certain medical supplies, such as masks and gowns, many countries are experiencing serious shortages of these goods, and some of them have adopted unilateral export restrictions and controls on them to meet the urgent national needs to secure essential goods in the fight against the virus. In addition, disruptions in cross-border transport caused by the pandemic have resulted in uncertainty regarding global food supply chains and led some countries to adopt unilateral export restrictions on food.

According to the WTO Secretariat, 80 countries and separate customs territories, including 72 WTO members, have introduced export restrictions as a result of the Covid-19 pandemic (Export Prohibitions and Restrictions: Information Note, April 23, 2020, [https://www.wto.org/english/tratop\\_e/covid19\\_e/export\\_prohibitions\\_report\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf) [*hereinafter* Information Note]). See *Chart*). As of April 30, 2020, 103 notifications have been submitted to the WTO regarding measures, including but not limited to export restrictions, in relation to Covid-19. These measures are mostly related to medical supplies (Joint Statement of April 20, 2020 by the heads of the WTO and the World Health Organization (WHO), [https://www.wto.org/english/news\\_e/news20\\_e/igo\\_14apr20\\_e.htm](https://www.wto.org/english/news_e/news20_e/igo_14apr20_e.htm)) while some are applied to trade in food (Joint Statement of March 31, 2020 by the heads of the WTO, the United Nations Food and

CHART

## Number of countries and separate customs territories introducing export prohibitions & restrictions as a result of Covid-19, by categories of products



Source: WTO Secretariat

Agriculture Organization and the WHO, [https://www.wto.org/english/news\\_e/news20\\_e/igo\\_26mar20\\_e.htm](https://www.wto.org/english/news_e/news20_e/igo_26mar20_e.htm).

For example, in the US, the president issued a memorandum directing the secretary of Homeland Security to allocate certain medical supplies, such as masks and gloves, for domestic use, and the Federal Emergency Management Agency (FEMA) has issued a temporary rule to ban the export of designated medical supplies unless explicit approval is given by FEMA. Similarly, the EU has adopted a regulation requiring authorization for exports outside the EU of designated personal protective equipment.

The export restrictions and controls not only significantly restrict cross-border flows of vital goods but could also trigger trade restrictive measures by other countries and eventually erode confidence in the multilateral trading system. The next section discusses whether these export restrictions are consistent with WTO law.

### Unilateral Export Restrictions & WTO Law

In principle, export restrictions are prohibited under the WTO agreements. Specifically, Article XI: 1 of the General Agreement on Tariffs and Trade (GATT) provides that “no prohibitions or restrictions other than duties, taxes or other charges ... shall be instituted or maintained by any” WTO member “on the importation ... or on the exportation of any product.” The export restrictions taken in response to the Covid-19 pandemic are *prima facie* inconsistent with Article XI: 1 of GATT.

However, there are a few exceptions to this rule, which could

justify the export restrictions taken in response to the pandemic. For example, Article XI: 2(a) of GATT provides that the obligation of Article XI: 1 of GATT does not apply to “export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting” WTO member. The jurisprudence of WTO dispute settlement suggests that medical supplies are likely to be regarded as “essential” products and that certain medical supplies are evidently seeing critical shortages under the present circumstances. Thus, temporary export restrictions and controls on medical supplies, such as those taken by the US and the EU, are highly likely to be justified by this exception even if they are found *prima facie* to be inconsistent with Article XI: 1 of GATT.

In addition, some WTO members consider that their export restrictions on medical supplies are also justified by Article XX(b) of GATT along with by Article XI: 2(a) of GATT. Article XX(b) provides that measures otherwise inconsistent with Article XI: 1 of GATT may be justified if the measures are “necessary to protect human, animal or plant life or health” and are not applied in a manner resulting in “arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade.”

However, the justifiability of export restrictions on medical supplies under Article XX(b) is not without question. First, while certain *medical supplies* are evidently “necessary” to protect human life and health, it is less evident that *export restrictions* on such products are “necessary” for that purpose. To put it differently, the necessity of medical supplies does not necessarily endorse the necessity of applying export restrictions on these goods. Second, according to WTO dispute settlement jurisprudence, measures are not “necessary” in the sense of Article XX(b) if less trade restrictive alternative measures are available to protect human life and health. While no alternative to export restrictions may be available for the moment to meet the skyrocketing domestic demand for medical supplies, less trade restrictive alternatives, such as government aid to increase production capacity, could become available in the long run. Thus, the necessity of applying *permanent* export restrictions to medical supplies is questionable.

While it is crucial to allow WTO members to take necessary measures to fight the virus, the importance of minimizing the harmful impact of these measures on the multilateral trading system should not be underestimated. In this regard, it is worth noting a statement on Covid-19 and the multilateral trading system, submitted by 42 WTO members, including Japan, Canada and Switzerland, but not the US, EU or China, to the General Council as a document for a General Council virtual meeting held on May 15 for the purpose of information sharing on the trade impact of the pandemic (WT/GC/212, May 5, 2020). In the statement, the 42 members stress that “trade restrictive emergency measures aimed at protecting health, if deemed necessary, shall be *targeted*,

*proportionate, transparent and temporary, not create unnecessary barriers to trade or disruption to global supply chains, and be consistent with WTO rules” (emphasis added).*

The question is whether the WTO is adequately equipped with monitoring and enforcement mechanisms to ensure that trade restrictive emergency measures are adopted in accordance with its rules and exceptions, and remain targeted, proportionate, transparent and temporary. The question highlights some of the systemic issues that have already been raised in the WTO reform talks. The next two sections review institutional reform of the WTO that is required to win the war against unilateralism.

### WTO Reform: Transparency & Monitoring

Transparency and monitoring is a fundamental feature of the multilateral trading system under the WTO agreements. A number of obligations and mechanisms to ensure transparency and enable monitoring are already embedded in the WTO.

In particular, in the WTO Trade Policy Review Mechanism, trade policies and practices of all members are subject to periodic review to improve adherence by all members to WTO rules and facilitate the functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of members. Moreover, the WTO Secretariat regularly produces “trade monitoring reports” in order to enhance transparency of trade policy developments.

In addition, the Decision on Notification Procedures for Quantitative Restrictions, adopted by the Council for Trade in Goods on June 22, 2012, requires members to “complete notifications of all quantitative restrictions in force by Sept. 30, 2012 and at two yearly intervals thereafter” and to “notify changes to those quantitative restrictions as soon as possible, but not later than six months from their entry into force” (G/L/59/Rev.1, July 3, 2012). Notifications shall be compiled by the Secretariat in a publicly accessible database.

These general notification requirements are complemented by more specific notification requirements provided for in individual WTO agreements ([https://www.wto.org/english/tratop\\_e/covid19\\_e/transparency\\_report\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/transparency_report_e.pdf)). For example, Article 12.1(b) of the Agreement on Agriculture requires WTO members to “give notice in writing ... to the Committee on Agriculture comprising such information as the nature and the duration of such measure” before instituting an export prohibition or restriction.

Despite these requirements, WTO members often fail to notify the WTO of sufficient information on their trade measures. As reported by the WTO Secretariat, many of the measures taken in response to Covid-19 have not been properly notified (Information Note, April 23). The lack of proper notifications prevents proper monitoring of trade policies and measures.

In WTO reform talks, several members, including Japan, the US and the EU, have proposed procedures to facilitate compliance with the notification requirements (JOB/GC/204/Rev.3, JOB/GTG/14/Rev.3, March 5, 2020). Most notably, the proposal provides that egregious failure to comply with the notification requirements could result in certain disadvantages, such as the imposition of a charge to a recalcitrant member. The rigorous approach of the proposal reflects the frustration among the sponsoring members, which is understandable given the importance of notifications in the WTO monitoring mechanisms. However, this sort of sanction is uncommon in the WTO and is likely to struggle to gain broad support from the membership.

### WTO Reform: Dispute Settlement

Enforcement is an indispensable element to ensure the effectiveness of a legal system. The WTO dispute settlement system is a principal enforcement mechanism of the WTO and was the reason for the success of the multilateral trading system for the last 25 years. In particular, a quasi-judicial review by panels, *ad hoc* reviewers, and the Appellate Body (AB), a standing appeal body, contributed to not only the resolution of hundreds of WTO disputes but also the enhanced security and predictability of WTO law.

However, the WTO dispute settlement system had plunged into crisis even before the Covid-19 pandemic erupted. The crisis reached a pinnacle in December 2019 when the AB became incapacitated due to the US blocking of appointments of new members. With six out of the seven member positions vacant, the AB is currently unable to meet the quorum of three. The US justifies the blocking by saying the AB has overreached its mandate under the Dispute Settlement Understanding (DSU) and insists that it will not lift its block until an answer is given to the question of “why” the AB disregards rules under the DSU. The incapacitation of the AB could halt the functioning of the quasi-judicial process of WTO dispute settlement as a whole.

Reforming the AB and persuading the US to lift its block is the principal subject of the WTO reform talks. Moreover, growing unilateralism amid the pandemic underlines the need to bring WTO dispute settlement back on track. For this purpose, two options are currently on the table, but neither of them appears promising.

First, an informal consultation process on matters related to the functioning of the AB was launched under the auspices of the General Council in December 2018, and Ambassador David Walker, a facilitator of the process, put forward a draft General Council decision based on the “points of convergence” among consulted WTO members. The draft decision presents the so-called “Walker Principles” which the AB should comply with. Although the draft was not adopted at the General Council meeting of December 2019 as expected, there is hope that the Walker Principles show a direction

for AB reform and become a key to break the deadlock. However, this hope may be overly optimistic given the fact that the informal process did not involve the participation of the US and that the draft does not address the “why” question the US has posed.

Second, as a temporary solution to keep the WTO dispute settlement system functioning despite the incapacitation of the AB, the EU has proposed using arbitration procedures under Article 25 of the DSU as an alternative to the AB review. The EU’s initiative, now called the “multi-party interim appeal” (MPIA) arbitration arrangement, has been joined by 18 other WTO members and may be followed by more. Under this arrangement, disputes among the parties to the MPIA will be dealt with by arbitration until the AB resumes functioning. Although these efforts could enable the preservation of the two-level review process, it cannot be disregarded that the MPIA is only a short-term band-aid and does not solve the concerns about the AB permanently. Even worse, it could deepen the divergence of views between the US and other WTO members regarding how the AB should function.

### Japan’s Role in the Unsettled Global Trading Order

Japan is in a unique position to show leadership in the unsettled global trading order. First, Japan proclaims itself as a champion of free trade. This self-proclamation is evidenced by the fact that it has not taken trade restrictive measures in response to Covid-19 but, instead, adopted trade facilitation measures, such as prioritization of customs clearance for certain medical goods ([www.customs.go.jp/english/news/covid-19/index.htm](http://www.customs.go.jp/english/news/covid-19/index.htm)). Second, Japan successfully maintains a solid relationship with its major trading partners. The recent conclusion of trade agreements with the US and the EU along with the continued negotiations of the RCEP with Asian and Oceanian partners, including China, can be a guiding light for the rest of the world.

Japan’s role is particularly important in the following areas.

First, Japan should help reinvigorate WTO reform talks. The momentum for WTO reform, which was interrupted by the Covid-19 pandemic, needs to be regained. In particular, the pandemic and its consequences on trade have underlined the need to reform the WTO monitoring and enforcement mechanisms. Out-of-the-box thinking is required to achieve a breakthrough in these reforms. For example, transparency may be enhanced by not only WTO members’ notifications but also more active involvement of non-governmental entities, particularly businesses. Moreover, bilateral consultations on specific trade concerns, which have proven useful under some WTO agreements, should be used more widely to facilitate monitoring. In the WTO dispute settlement reform, the current format of the two-level review process should not be taken for granted, and the role of the AB should be recalibrated.

Second, Japan should lead the rule-making process to modernize

trade rules. While it is critical to conclude the ongoing negotiations on fisheries subsidies and advance talks on new issues, such as e-commerce and investment facilitation, there is also an imminent need and opportunity to make a special arrangement to facilitate cross-border flows of medical supplies. The arrangement would require the permanent elimination of tariffs on medical supplies as well as prioritized customs clearance for these goods during pandemics. It would also encourage cooperation among relevant regulatory authorities to control the quality of medical supplies. Subsidies on medical supplies should be categorized as “non-actionable” so that legitimate government measures, such as government aid to increase production capacity of masks, would not be challenged in WTO dispute settlement. The arrangement could be adopted as a plurilateral agreement among like-minded WTO members.

Third, and finally, Japan should deepen and expand the network of regional trade agreements. The pandemic has highlighted the risk of the Japanese economy’s over-dependence on China and the need to diversify its supply chains. The expansion of the Trans-Pacific Partnership (TPP) Agreement along with the awaited conclusion of the RCEP could facilitate such diversification in the Asia-Pacific region. Moreover, the Japan-US Trade Agreement should be developed into a more comprehensive economic partnership agreement to cover broader issues, such as investment and trade in services. A bilateral trade agreement, expected to be negotiated with the United Kingdom, should maintain the same level of ambition as the TPP and the Japan-EU Economic Partnership Agreement. The inclusion of a special provision on medical supplies may be discussed in these bilateral and regional negotiations.

### Conclusion

The global trading order, which has been shaken by unilateralism for the last few years, is being further ravaged by the Covid-19 pandemic. According to the WTO, world trade is expected to fall by between 13% and 32% in 2020 due to the pandemic.

It should be recalled that GATT, the predecessor of the WTO, was created to prevent beggar-thy-neighbor policies from disrupting world trade. International cooperation is essential to reinforce the global trading order and win the war against unilateralism and the virus.

There is a possibility that the postponed MC12 will be rescheduled in June 2021. The trade community must not miss this opportunity to show solidarity.

**JS**

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