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# The Trade Policy Response to COVID-19 and its Implications for International Business

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## ABSTRACT

**Purpose** – This paper explores trade policy measures taken in response to COVID-19 and analyzes in detail their extent and nature. We assess their compatibility with WTO Agreements: specifically, whether they were necessary and justifiable efforts to protect the security and health of populations and ask how this widespread recourse to trade barriers may impact on international business?

**Approach** – We analyse an extensive database from the International Trade Centre of trade measures taken in response to COVID-19. We differentiate by type of country, nature and coverage of measures (imports or exports, type of product). On the basis of existing jurisprudence, we analyse whether restrictive measures were likely to be judged legal under WTO rules.

**Findings** – We find that, although the majority of trade measures are probably justifiable, there were nevertheless many measures whose coverage and/or nature was such that a justification under existing WTO exceptions is, at the very least, arguable. Such widespread and intense instigation of potentially WTO incompatible measures in such a short period of time undoubtedly undermines the global trade rules on which international business has relied for decades.

**Originality** – There is little existing analysis of the legality of measures taken under the security exceptions and no substantial analyses of the measures taken in response to COVID-19. Furthermore, little scholarly attention has been paid to the impacts on international business of the increasing use of WTO ‘exceptions’ to justify trade measures to protect national industries and populations.

**Key Words:** COVID-19; WTO; Trade and security; protectionism; GVCs; trade and health

**Introduction**

## Introduction

The COVID-19 outbreak in 2020 put huge pressure on healthcare systems across the world, as they struggled with unprecedented demand for Personal Protective Equipment (PPE) and ventilators. Public outcries at the resulting exposure of essential workers to the virus pushed the issue up the political agenda in many countries. The sudden realisation that such products, as well as testing kits and pharmaceuticals, had an unrecognised importance for national security led to a series of policy interventions, including outright bans on exports. At the same time, fear of food shortages linked to the pandemic, led to restrictions on the export of key commodities, like rice and wheat, while concerns about importing the virus led some countries to ban some, or even all, imports. By early May 2020, 90 countries had installed trade restrictions in reaction to COVID-19.<sup>1</sup>

These COVID-19 related measures are likely to be contrary to WTO principles (WTO, 2020a), as well as World Bank advice to governments on how best to leverage trade policy to address COVID-19 (World Bank, 2020). They come against a backdrop of a growing debate on the extent to which trade policy interventions to protect 'national security' are compatible with international trade law. When the Trump administration imposed new tariffs on steel and aluminium in 2018 citing 'security' concerns under Section 232, they were widely criticised by trade partners and several, including the EU, launched legal action in the WTO.<sup>2</sup> In the midst of the COVID-19 pandemic, many of these same countries themselves restricted trade in PPE and pharmaceuticals, because of concerns about their citizens' security. Many observers and governments have expressed concern about this 'creep' of security 'exceptions' into trade policy (WTO, 2020b; Evenett, 2020; C.D. Howe, 2020).

While the impulse to protect the supply of vital products is certainly a natural public policy response, the potential long-term implications of such measures for trade policy and, in turn, for Multinational Enterprises (MNEs) could be significant. It is therefore critical to assess the extent and legality of COVID-19 related trade restrictions and the impact on international business. This paper seeks to contribute to this debate by answering three questions:

- What kind of trade policy measures were taken by governments in response to COVID-19?
- In view of the information available, to what extent do these measures seem to be in conformity with existing international trade rules?
- Do these interventions represent a shift in the interpretation of the rules which frame global trade and, if so, how may that impact international business?

To answer the first two questions, we leverage an extensive International Trade Centre (ITC) database of trade policy measures taken in response to COVID-19. We analyze in detail the extent and nature of these interventions and assess their potential compatibility with existing WTO Agreements. In undertaking this analysis, we also seek to shed light on the implications for international business (i.e. question 3). In particular, we are interested in the wider issue of the long-term impacts of the pandemic on the structure and reach of global value chains (GVCs). There is an extensive literature on the important role of the state, and especially trade policy, in framing the context in which GVCs have expanded across the world (see Curran et al., 2019 for a recent literature review). We will underline the potential long-term impacts of public policy interventions in response to the pandemic on this framing and highlight the risks and opportunities which this poses for companies.

The remainder of this paper is structured as follows. We firstly highlight the very particular trade policy context into which the COVID-19 crisis falls, where the existing international legal framework has

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<sup>1</sup> <https://www.macmap.org/covid19>

<sup>2</sup> [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds548\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds548_e.htm)

already been contested. We then draw on literature on international trade law, the international political economy of trade, GVCs and international business to highlight the interactions between trade policy and the structure of production in the global economy. We underline, in particular, how the expansion (and contraction) of global trade has often been predicated on shifts in the trade policy context. We will then analyse the measures which governments have taken in response to COVID-19, focusing particularly on the legality of new trade restrictions. We then leverage this work to draw some conclusions on the long-term impacts of COVID-related trade measures on the institutional context faced by international businesses and on their reliance on GVCs. In conclusion, we will highlight the shortcomings of our research, as well as the key future research questions which arise from our work.

### **COVID-19 interventions in context**

It is important to note that the current public health crisis follows several years of growing anti-globalization sentiments and increasing protectionism, together with the decline of multilateralism enshrined in WTO principles. This has already created major strategic challenges for MNEs (Curran and Eckhardt, 2020). The economic impact of the pandemic and the widespread PPE shortages which many countries experienced, further undermined the long-held belief that the optimisation of international sourcing should be a standard part of MNEs' operating strategy. Criticism of globalisation, and GVCs which underpin it, is nothing new. Researchers and activists have long noted the negative externalities of the spread of production to distant locations with widely differing and sometimes dysfunctional governance structures (Curran and Eckhardt, 2020; Rodrik, 2018). What is new is that the pandemic has forced governments and MNEs to actively consider the risks created by another negative externality of globalisation – reduced self-sufficiency – which has sometimes interfered with their capacity to protect their populations (Strange, 2020). Observers and policy makers quickly began to refer to the need to diversify supplier bases and move away from holding near-zero inventories, increasing resilience, but also costs (Hogan, 2020; Javorcik, 2020). Although others have questioned the wisdom of government intervention in the sourcing decisions of private companies (ECIPE, 2020) and warned of the negative effects of any retrenchment on developing countries (Borderlex, 2020) and small open economies like Canada and Ireland (C.D. Howe, 2020), COVID-19 has changed the terms of the globalisation debate.

This shift comes only a little over a decade after major disruption of trade and investment following the Global Financial Crisis (GFC). Indications so far are that the effect of COVID-19 on global flows will be even more extensive both in trade (WTO, 2020c; CEC, 2020) and investment (UNCTAD, 2020). There are several reasons for this. Firstly, COVID-19 is both a demand and a supply shock whereas the trade collapse after the GFC was mainly driven by a shock in demand (Baldwin and Tomiura, 2020). As a result, global trade in both goods and services will be affected (WTO, 2020c). The crisis will generate spillover effects throughout supply chains, and highly trade-dependent countries are likely to be the most negatively affected (Fernandes, 2020; WTO, 2020d). Indeed, there is evidence that companies and sectors most heavily integrated into GVCs are particularly sensitive to trade shocks (Ferrantino and Taglioni, 2014; WTO, 2020c).

Secondly, protectionist measures in response to COVID-19 are more widespread than those related to the GFC. Initially at least, the latter led to rather limited trade policy interventions, mainly affecting financial sectors, although protectionism has tended to steadily increase since the GFC (UNCTAD, 2020). In addition, recent COVID-19 restrictions have taken a different form: direct bans on trade rather than measures that increase trade costs and often targeting exports as well as imports. These interventions risk increasing the fragility of the world trading system at a time when it is already under threat from increased recourse to 'exceptional' trade policy measures and US refusal to engage (Bown and Keynes, 2020). The intensifying US-China trade disputes have further weakened the confidence in

the world trading system. Finally, business uncertainty is extremely high, not only in relation to demand and supply, but also government willingness to intervene in economies, undermining investor confidence. This makes investment decisions even more challenging than in the post-GFC context (UNCTAD, 2020).

All of these factors are likely to foster concern in MNEs about their reliance on GVCs going forward and reassess their own vulnerabilities and the robustness of their supply chains in this context (Strange, 2020). It is critical for such strategic planning to have a clear understanding of the rules of the game they will face post-COVID, including whether and how international obligations stemming from existing trade agreements restrain governments' trade policy responses to national health and security concerns. This paper seeks to inform this key question.

### **An interdisciplinary literature review**

The questions which we pose in this paper are relevant to several different strands of existing academic enquiry. In this review of the literature we will highlight how these different research streams have explored the interaction between trade policy, its wider framing context, GVCs and international business. Although our empirical analysis mainly focuses on the concrete trade policy measures which have been mobilised in response to COVID-19, we believe that our findings speak to a literature which is far broader than international trade law. Most obviously, international business can only remain 'international' in a context of relatively open and predictable trade policies. If many countries adopt policies which at best undermine and at worst openly challenge existing norms, it would represent a major shift in the institutional basis of international business operations, with unpredictable results.

#### *International Trade Law, Security and Health*

The first body of scholarship we engage with is the literature on international trade law. This literature has looked extensively at the question of which trade policy measures are legitimate in order to protect citizens. In negotiating the General Agreement on Tariffs and Trade (GATT), signed in 1947, it was anticipated that states may wish to intervene in trade to protect their populations both during times of war or in reaction to other threats. The result was Article XXI: the 'Security' Exceptions and Article XX: the General Exceptions, which provide specific instances in which WTO members can be exempted from GATT rules. For many years the General Exceptions were more widely utilized, and several comprehensive analyses have been undertaken by legal scholars (Barrett Lydgate, 2012; Bartels, 2015; Charnovitz 1997; Quick, 2013). One exception is particularly relevant to the protection of public health: paragraph XX (b). Pursuant to this paragraph, WTO members may adopt WTO incompatible policy measures if they are 'necessary' to protect human health.

A variety of different trade restrictions have been judged to largely conform to GATT/WTO rules, including bans on imports of asbestos (Howse and Tuerk, 2001) and retreaded tyres (McGrady, 2009), as well as restrictions on the use of cigarette trademarks (Curran and Eckhardt, 2017). However, panels judging on Article XX defenses have clearly underlined the need for countries to demonstrate, both that such measures are 'necessary' to achieve the defined objective and non-discriminatory in their application. As is clear from several previous cases (*Korea-Beef*; *Brazil- Retreaded Tyres*; *Thailand – Cigarettes*; *EU-Seal Products*), the "necessity" requirement in Article XX demands an enquiry into whether the policy objective could have been achieved through a less WTO-inconsistent measure (WTO, 2000; 2007; 2011; 2014). An overly broad measure, therefore, stands to be challenged under this requirement, even if it helps address the national problem identified.

Likewise, examination of the nature of discrimination stemming from the measure in question is an important issue in an Article XX analysis. Two elements are examined in this regard. The first is whether

the measure discriminates between “countries where the same conditions prevail.” If the measure targets only a particular country or countries, when other non-targeted countries arguably pose a similar problem, it will likely fail to meet this requirement, which is interpreted to mean that discrimination is only permitted if it stems rationally from fulfilling the objectives of the measure (WTO, 2014). The second element concerns whether the discrimination is ‘arbitrary or unjustifiable’. Even if a measure is directed at fulfilling the declared objective, it may still be problematic if the discrimination stemming from it is judged to be thus. As established in *US-Shrimp* and *Brazil-Retreaded Tyres*, judgement depends on the examination of the reasons and rationale for the discrimination provided by the state imposing the measure (WTO, 1998; WTO, 2007).

Article XXI – the national security exception - has been described as a ‘pandora’s box’ (Boklan and Bahri, 2020) and an “all-embracing” exception to GATT rules, in that, in theory, each WTO member can self-define its ‘essential security interests’ (Bhala 1997). Nevertheless, countries have historically been cautious about using the article. Over the years it has occasionally been cited to justify trade restrictions or sanctions, with the US the most active user. However even they have only invoked it in limited circumstances: in 1985 against Nicaragua, as part of the War on Drugs and, in 1996 against Fidel Castro’s Cuba and Qaddafi’s Libya (Bhala, 1997). These actions were condemned by their major trading partners (Dattu and Boscariol, 1997), although, during the Falklands war, the European Community, Canada and Australia justified their suspension of imports from Argentina under Article XXI (Browne, 1997). In one of the most unlikely cases, Sweden tried (unsuccessfully) to invoke the Article in 1975, arguing that import quotas on shoes were necessary for national security reasons (Lee, 2018).

In recent years, however, we have seen a sudden increase in the number of disputed cases in the WTO involving national security (Lee, 2018; Pinchis-Paulsen, 2020; Yoo & Ahn, 2016). In addition to the above-mentioned US steel/aluminum case, there have been recent disputes between Russia and Ukraine; Japan and South Korea; India and Pakistan; as well as Qatar and several of its neighbors (Pinchis-Paulsen, 2020). Restrictions instigated in response to the COVID-19 crisis need to be seen in this context of increasing willingness to link trade policy to questions of security and attendant concerns about the extent to which such action is legal under WTO Agreements.

Some clarification was provided from the first-ever WTO dispute examining the national security exception - a dispute between Ukraine and Russia in 2019 (*Russia - Traffic in Transit*). As regards whether a measure was “taken in time of emergency in international relations”, the WTO panel in this case opined that the action should be taken *during* the emergency (WTO, 2019). The panel’s discussion indicates that genuine COVID-19 countermeasures taken during the crisis are likely to meet this threshold. The panel also held that the national security exception is also premised upon the principle of good faith, which demands that states should not abuse the provision in order to circumvent existing treaty obligations (*Op cit*). Thus, the key criteria in judging COVID-19 related trade measures under Article XXI would likely be whether the measure in question is adopted in good faith during an emergency.

Despite concerns about the expansion of the security ‘exception’ into trade policy (Evenett, 2020; C.D. Howe, 2020), there has been little systematic legal analysis of security related trade measures (Lee, 2018; Pinchis-Paulsen, 2020; Yoo & Ahn, 2016) and no detailed research on the recent measures in response to COVID-19 (Pauwelyn, 2020). Such analysis is vital to understanding the extent to which trade restrictions during a public health (or other) emergency can be justified under existing WTO rules, both under Article XXI (Security Exceptions) and Article XX (General Exceptions). For business, such understanding is necessary to assess the predictability of the international trading system which

underpins their investment and sourcing choices going forward. This is the key issue which we seek to illuminate in this paper.

### *The International Political Economy of the Global Trading System*

The concerns about compatibility with WTO rules, as discussed above, are of course only pertinent if the WTO continues to function as an institution for regulating disagreements on these rules between members. Yet the WTO has recently been undermined by the US's refusal to nominate new Appellate Body members at the Dispute Settlement Body (DSB), which forced the Body to suspend its operation in December 2019 (Bown and Keynes, 2020). To shed light on these dynamics, it is helpful to look at another key area of literature, which is pertinent to the questions we address: international political economy (IPE). With some rare exceptions (Witt, 2019), IPE is rather rarely exploited within the international business literature.

The relationship between trade openness, international institutions and security concerns has long been at the heart of debates in IPE. For instance, according to hegemonic stability theory (Kindleberger, 1973; Krasner, 1976), if there is a dominant power, the global economic system is most likely to be open and stable, while in the absence of a hegemon, instability and protectionism dominate. This literature holds that, as a result of free-rider problems, a single global hegemon needs to provide the public good of international stability and economic openness. Following WWII, this was indeed the role that the US played, as the driving force behind the creation of the multilateral trading system, with the GATT at its core. This system, although far from perfect and very politicised, was characterized by rules aimed at restricting arbitrary forms of discrimination and liberalizing global trade (Ikenberry 2019). In the course of the 1980s, the European Community (later the EU) was ready to provide joint leadership in the multilateral trade arena: during the Uruguay Round negotiations, the EU and US combined forces to create a global institution (the WTO) with a judicialized dispute settlement system as one of its key pillars (Eckhardt and Elsig 2015).

Today the US is openly undermining the WTO and its dispute settlement system. Many observers even doubt whether the system will survive the current tensions, leading to the collapse of the rules-based WTO system and a return to a much more politicized GATT-style system (Bown and Keyes, 2020; Pauwelyn, 2019). They also fear that the COVID-19 crisis and the trade policy responses will make this outcome even more inevitable (Baldwin and Evenett, 2020; Bown, 2020). The implications of the weakening (and even potential disappearance) of the rules-based global trading system and the stability it provides for international business, have barely been discussed.

There is also a clear security dimension to hegemonic stability theory, because the hegemon provides the public good of international stability as long as the distribution of gains does not compromise its national security. In the same vein, it has been argued that security motivations have been an important driver behind the negotiation of free trade agreements (FTAs), especially for the US. Beginning with its agreement with Israel in 1985, FTAs gained momentum as part of the post-9/11 US security agenda, with the US signing several agreements with countries that were of strategic or geo-political importance. In the words of Robert Zoellick, the US trade representative at the time, such FTAs had to be earned via "*cooperation...on foreign and security issues*" (Capling and Ravenhill, 2012: 292). Although, under Obama, the security rhetoric was less explicit, his administration openly linked the signing of trade agreements to foreign policy objectives, most obviously in relation to the TPP (*op cit*). Although some have argued that the EU is more of a "normative trade power" than the US (Poletti and Sicurelli, 2018), there is also evidence that EU's trade policy is driven by geo-economic and geo-political considerations (Zimmerman, 2007).

Linking trade policy to questions of national security, and the stability of the global trading system, are now being seen in a new light, both as a result of the evolution of US trade policy under the Trump administration and global responses to COVID-19 (Birrell Ivory, 2020; UNCTAD, 2020). Where Bush and Obama used free trade to further US security interests abroad, Trump is doing the exact opposite: using protectionism to defend national security. Accordingly, the administration considers that trade policy must be both in the national interest and coherent with security strategy (BDI, 2020). As part of this policy, as highlighted in the introduction, new tariffs on steel and aluminium have been imposed on imports, citing 'security' concerns and other products are threatened. This move has been highly controversial and contested and links the above debates within International Trade Law and IPE to existing scholarship in IB.

### *The Interactions between Trade Policy and Global Value Chains*

One of the aims of this paper is to assess the implications of the COVID-19 related trade restrictions and the threat to the WTO for international business. To this end we draw on the literature on GVCs. Until relatively recently, the central focus of most of this literature was on governance patterns and power relations *within* GVCs (Gereffi et al., 2005; Ponte, 2019). Research often treated institutions and states as the external 'context' within which firms' actions take place (Eckhardt and Poletti, 2018). However, in recent years we have seen a growing interest in, and recognition of, the pivotal role that states, and especially their trade policies, play in the structure and reach of GVCs (Curran 2015; Frederick et al. 2015; Horner 2017; Smith, 2015). Most of this literature starts from the assumption that trade policy measures typically lower trade barriers (at least for some partners) and, as such, much attention has been paid to how trade liberalization facilitates GVCs or favors more regional value chains (Frederick et al., 2015; Smith, 2015). However, as Curran et al. (2019: 875) observe, to assume that tariffs and other protectionist measures are no longer relevant '*risks obscuring important parts of the picture...[particularly] in the context of the current anti-trade political rhetoric.*' Concretely, we have witnessed several years of increasing trade protectionism, which has raised major strategic challenges for companies (Curran and Eckhardt, 2020). A key question is how these shifts impact on GVCs.

The COVID-19 crisis came just over a decade after another major shock to the global economy which had major impacts on GVCs and trade flows: the GFC of 2008-9. Analyses of the impacts of the attendant sudden slowdown of economic activity may provide some lessons for that following COVID-19. Curran and Zignago (2011) found major impacts on trade, with sectors where the fragmentation of production was highly developed witnessing stronger effects from the crisis. Similarly, Ferrantino and Taglioni (2014) found that trade in complex products organized in GVCs was more sensitive to the global downturn than other trade. Others found, however, that overall GVCs have proven to be resilient in the aftermath of the GFC, noting consolidation of GVCs (Cattaneo et al. 2010) but also shifts in their structure with a growing salience of South-South trade post-GFC (Horner and Nadvi, 2018).

Another key relevant research stream which, although primarily within international economics, overlaps to some extent with that on GVCs, is the literature on the impact of protectionism on trade. The COVID-19 measures came at a time when the world trading system was already under intense pressure. In recent years, developed countries have experienced a broad backlash against globalization in general and free trade in particular (Kobrin, 2017; Rodrik, 2018). For a variety of reasons, especially since the GFC, public opinion has become more skeptical of trade (Curran and Eckhardt, 2020; Mansfield and Mutz, 2013; Rodrik, 2018). Worryingly for international business, this backlash has led to major policy reversals which complicate the capacity of MNEs to operate across borders: the vote for Brexit in the UK, the US withdrawal from trade agreements such as TPP, its recent trade war with China and undermining of the WTO.



These policy changes have potentially major impacts on business strategy. While Brexit has been subject to extensive study (e.g. Gasiorek et al., 2019), the EU-UK trade relationship hasn't actually changed yet. In contrast, the US-China trade war has already had major impacts, which underline the vulnerability of international business structures to policy change. Amiti et al. (2019) look at trends in US trade and import prices at detailed level and find that the new tariffs resulted in falls in import values of 25-30% and increases in prices of between 10-30%, as well as substantial reductions in variety in most affected sectors. These are averages and in some products tariffs were so prohibitive that trade fell to zero. They estimate that \$165bn of trade was lost or redirected to avoid the tariffs. Similarly, Fajgelbaum et al. (2019) found falls in US trade volumes in affected sectors of 23% in imports and 25% in exports, while Handley et al. (2020) calculate that the decline in US exports was equivalent to a 2% tariff for a typical product and 4% for a product with high exposure.

In depth sectoral analysis of the impact of new trade barriers can also be informative. Flaaen et al. (2020) explore US trade in washing machines, which were subject to various anti-dumping (AD) actions even before the introduction of the latest round of tariffs. Their work bears witness to the flexibility of business responses to new trade costs: when US imposed AD duties on washing machines from Korea and Mexico, firms shifted sourcing to China. When China was targeted, they shifted to Vietnam and Thailand and, finally, when all producers were targeted, firms moved production back to the US. Total imports were little affected by the duties until all producers were covered and prices even went down when production shifted to China. Curran (2015) found similar trade diversionary impacts from US AD duties on solar panels. These findings are coherent with the IB concept of the 'Global Factory,' where managers are orchestrators of dynamic production networks, constantly responding to external shocks (Buckley, 2009). Thus, the literature on protectionism underlies that it can have major impacts on trade and investment, while certain sectors are more vulnerable than others, not least because of variations in the geography, structure and flexibility of their value chains (Handley et al., 2020; Bellora and Fontagné, 2019).

#### *International Business Strategy, Institutional Change and Protectionism*

There are several streams of the international business literature which can shed light on company strategy in the current context. The discipline has long been interested in the interaction between institutions – both home and host – and MNEs (see Aguilera and Grogard, 2019 for a recent review). However, the discipline has often struggled to take more than a 'thin' view of institutions and a tendency towards quantitative approaches may obscure qualitative changes in the institutional context (Aguilera and Grogard, 2019). COVID-19 has resulted in a major expansion of the states' role on the economy (UNCTAD, 2020). In the context of this paper, trade policy is one of the most visible institutional levers which governments have at their disposal to impact on MNE decision making. The extensive trade policy interventions following COVID-19 will certainly increase scrutiny of the interactions between state institutions and MNEs and will likely require a 'thicker' view of how institutions matter.

Another key question for MNEs is how to react to the rising tide of trade protectionism, which threatens to undermine many of their business models. This question has attracted surprisingly little attention in the international business literature. The recent work which has appeared has mainly focused on the broader concept of 'de-globalisation', rather than trade protectionism (Butzbach et al., 2020; Kobrin, 2017; Meyer, 2017; Moyo, 2019; Witt, 2019). This is surprising, as greater understanding of the implications of rising trade barriers for business strategy seems to us to be vital, if MNEs are to adapt their market and non-market strategies (NMS) to the new context (Baron, 1995). Although there is some limited work on MNEs in the trade policy arena, as Curran and Eckhardt (2020) point out, much of it focuses on how firms seek protection, rather than how they resist such pressures. In seeking to

shed light on the recent protectionist surge around COVID-19, we hope to contribute to greater understanding of the growing disruption in the global trading system and the strategic responses it requires of international business.

## **Methodology**

In order to inform the question of the legality of trade responses to COVID-19, we undertake an empirical analysis of the measures taken by governments. We base our analysis on the COVID-related measures which were reported in the ITC's database on the 10<sup>th</sup> May 2020.<sup>3</sup> By this date, most of the countries which instituted such measures during the crisis, had done so. The ITC constituted the database from the WTO's database,<sup>4</sup> but also from government websites and press reports. They detail the type of measure, the products covered, the impact (restricting or liberalising) and the timeline of the measures. Although we briefly report on liberalising measures, we do not analyse them in detail as, in principle, such measures would be no threat to the WTO as, unless they are discriminatory, they are largely WTO compatible. We classified the interventions by nature (restrictions, bans, changes in non-tariff barriers), coverage (medical supplies, food, other) and whether they applied to exports or imports. Finally, we classified the 90 countries which instituted measures by World Bank category - High Income (HI), Upper Middle Income (UMI), Lower Middle Income (LMI) and Low-income countries (LIC). Least developed countries (most of which are also LICs) were also classified, as they have specific flexibilities under the WTO Agreements<sup>5</sup>. This was both for ease of presentation and because these different types of countries tend to have different roles within the key GVCs related to the pandemic, with most key medical devices produced in HI countries, while UMI (mainly China and Malaysia) are key sources for PPE (Gereffi, 2020).

In order to better analyse the legal basis for these measures, we extracted all the official notifications provided to the WTO by the end of May. We noted quite some path dependency in such notifications, as members clearly built on others' prior notifications in creating their own. Thus, for those which had not notified the WTO, we attributed the most likely justification building on those of members who notified similar measures. It is worth noting that several countries in our database were not WTO members, however all were at least 'observers' and therefore, in theory, seeking to conform to the rules in order to facilitate accession. We classified the measures by justification and by likelihood that the latter would be considered WTO compatible. Green measures were judged to be directly related to COVID-19 and appeared justifiable, in terms of protecting the population. Yellow measures were considered more problematic, for a variety of reasons discussed below. Clearly there is an element of educated judgement in our classifications. There is no way of knowing what a WTO panel (and the Appellate Body) might judge in a hypothetical dispute settlement proceeding, in the absence of more details of the measures at issue and their actual impact on markets. However, we are confident that our judgements are reasonable and objective under the circumstances and, importantly, that there are legitimate questions about the legality of many measures.

## **Key Findings on COVID-19 Trade Measures and Their Impact**

The detailed analysis on which the findings we report here are based is too extensive to include in this short paper and can be found Table A1 and A2 in the on-line annex. Here we will simply highlight the

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<sup>3</sup> The ITC maintained an updated database of measures throughout the pandemic available at the address: <https://macmap.org/fr/covid19>

<sup>4</sup> [https://www.wto.org/english/tratop\\_e/covid19\\_e/covid\\_measures\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/covid_measures_e.pdf)

<sup>5</sup> LDCs have longer transition periods for implementing WTO agreements and can be given more generous market access than other countries, including other developing countries, under the 'Enabling Clause'.

key findings from our work. On the question of the overall nature and coverage of the trade restrictive measures, our findings are reported in Table 1. As we can see, there are some slight differences in the nature of the measures taken by different types of countries. HI countries overwhelmingly restricted (or banned) exports of medical products (PPE, medicines). Restrictions on food and other products, as well as imports, were more common in UMI and LMI countries. Overall, the most common restrictions were on exports of medical products. LDCs were not very active in restricting medical trade and indeed pleaded for an end to such measures (WTO, 2020c). This is unsurprising, as they tend to overwhelmingly be import-dependent in the sector, especially in medicines.

<b>Table 1 - Restrictions on trade following COVID by nature and country type</b>						
	Medical	Food	Other	Exports	Imports	Bans
HI	27	1	1	28	1	21
UMI	38	14	8	49	12	38
LMI	16	9	1	23	3	20
LDC	5	3	1	8	1	8
LIC	5	4	1	10	1	7
RG	2	1	0	3	0	2
Total	93	32	12	121	18	96

Source – Own calculations on the basis of ITC data

An overview of the liberalising measures is provided in Table 2. HI countries undertook slightly fewer liberalising measures than restrictive. As these countries tend to have lower average tariff rates on medical goods, that is not surprising (WTO, 2020a). UMIs, LMIs and LDCs were very active in reducing tariffs on imports, especially for PPE and medicines. It is not without irony that many of these liberalising measures took place at the same time as producing countries imposed restrictions on exports that made it almost impossible to source such products on the global market. In several cases countries restricted exports of medical products, while simultaneously liberalising their import. There was some limited action to reduce non-tariff barriers (NTBs), like onerous certification procedures and eliminate previously imposed anti-dumping duties (ADDs) on imports, especially of medical goods.

<b>Table 2 - Liberalisation of trade following COVID by nature and country type</b>						
	Tariff Redn./ Elimination	NTB redn.	Removal of ADDs or similar	Medical	Food	All products
HI	17	3	1	17	3	4
UMI	38	4	4	39	4	0
LMI	14	3	0	16	3	0
LIC	2	0	0	1	0	1
LDC	14	1	0	12	3	0
RG	3	0	0	2	1	0
Total	88	11	5	87	14	5

Source – Own calculations on the basis of ITC data

In relation to our second question on WTO compatibility, the liberalizing measures in Table 2 would not constitute violation of WTO Agreements, unless they were discriminatory, which never appeared to be the case. On the other hand, restricting measures in Table 1 would, almost by definition, constitute violation of the relevant provisions of the covered agreements. For instance, trade bans or restrictions are incompatible with Article XI:1 of the GATT, which prohibits quantitative restrictions on trade.

Import restrictions sometimes cited sanitary and phytosanitary (SPS) concerns covered by the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). However, that agreement requires any new trade measure to be compatible with various legal requirements (resembling those of Art XX in essence), and thus stipulates, most notably, risk assessments based on scientific evidence (Articles 2.2, 5.1) and non-arbitrary treatment of similarly situated states (Article 2.3). SPS measures directed at particular countries, without offering risk assessments, may violate these provisions. On the other hand, when restrictions took the form of import licensing, they implicate the WTO's Agreement on Import Licensing Procedures. Overly broad measures are likely contrary to its Article 3.2, which requires a measure to be tailored only to the extent necessary. Publication of insufficient information may also violate Article 3.3 of the agreement.

That said, to the extent that these measures were introduced as countermeasures against COVID-19, these violations may be justified by the relevant exceptions in WTO Agreements. For instance, temporary export restrictions on essential products (such as medical equipment and medicines) are likely be justifiable under Article XI:2(a). Likewise, and most importantly, to the extent that these measures aim to protect human life or health, they can also be justified under Article XX(b) (Amaral and Kramer, 2019; Bartels, 2015). However, several countries restricted exports of food products, including fish (Cambodia) and vegetables (Egypt). Such restrictions may not satisfy the 'necessity' threshold and represent 'arbitrary or unjustifiable discrimination' (Amaral and Kramer, 2019; Bartels, 2015; Moran, 2016). If the measures are judged to be adopted 'to protect essential security interests [in an] emergency of international relations', they may nevertheless be justified under Article XXI(b)(iii). As discussed above, the exact scope and meaning of the national security exception are not entirely clear, but a plausible argument can be made that the COVID-19 outbreak constitutes an 'emergency of international relations' (Boklan and Bahri, 2020; Prazeres, 2020; Heath, 2020; Lee, 2018). Whether such a public health emergency can justify restrictions on exports or imports of products which are not directly related to managing that emergency, is an open question (Boklan and Bahri, 2020; Prazeres, 2020; Heath, 2020; Lee, 2018) and explains many of the 'yellow' classifications identified below.

With respect to SPS measures, the SPS Agreement also carves out an important exception in Article 5.7, which incorporates the precautionary principle and allows WTO members to adopt import restrictions without conducting a scientific risk assessment in 'an emergency situation' (Scott, 2009). However, members adopting restrictive measures under this Article must continuously assess the situation and conduct risk assessments (op.cit). Viewed from this perspective, import bans on Chinese agricultural products (Egypt and Kazakhstan) may be difficult to justify. Given that COVID-19 is thought to have passed to humans from wild animals (Xie and Chen, 2020), import bans on such animals (China) and all live animals from China (Georgia) may potentially be more justifiable. Although bans which only target certain Chinese agricultural imports, as imposed by Egypt, Jordan, Kazakhstan, may fall foul of the non-discrimination requirement, especially as other countries were subsequently hit harder by COVID-19 than China.

Several measures to restrict imports have no clear link, either to SPS measures, or to managing the emergency. For example, Fiji increased the tariffs on petrol imports, while Kazakhstan restricted imports of cement, Botswana banned imports of tobacco products and Sri Lanka all non-essential goods. With the facts at our disposal, these restrictions do not seem likely to pass the 'necessity' test under current WTO jurisprudence. One of the most surprising measures was an import ban on face masks by Bahamas (the only HI country to institute a measure classified as 'yellow'). The Prime Minister is quoted as saying that *"The move is an effort to protect the local mask manufacturing industry that has sprung up overnight as a result of the COVID-19 virus."* (The Tribune, 2020). Similarly, some

interventions seem to represent an opportunistic attempt to reinstate previously controversial trade measures: both Kenya and Uganda banned imports of used clothing. Although Uganda reversed the decision almost immediately, Kenya's had no end date. Trade in used clothing has long been a sensitive issue and previous bans in both countries were only overturned after threats from the US to remove their market access (Brady and Lu, 2018).

As a full picture of many measures is not yet available and specific implementation of these measures is still amorphous, it is hard to fully affirm their violation or justification at this stage. In addition, many of the most problematic measures were not notified to the WTO. We could therefore only surmise their justification from press reports or government statements. That said, most measures seem in principle to satisfy the requirements of the various exceptions. On the other hand, a substantial number, such as those highlighted above, do not appear to be directly related to the urgent demands of the health crisis, while some seem to primarily seek to protect domestic industries.

Table 3 provides an overview of our findings on the extent to which the measures were considered to be justified, as well as whether they were not notified to the WTO, which could itself carry legal implications and whether they had an expiration date, which would tend to support the argument that they are a temporary response to COVID-19. Clearly such temporary measures, such as the EU's licencing scheme for exports of key medical supplies, are easier to justify under the necessity test. It is evident from the table that most of the measures considered to be of dubious legality were taken by UMI countries, whose measures also most often had no expiration date. Although only one HI country took measures which were categorised as yellow, many HI measures were not notified to the WTO.

<b>Table 3 - Categorisation of measures and WTO notifications</b>				
	Green	Yellow	Not notified to WTO	No expiration date
No of measures	102	38	118	82
HI	29	1	26	16
UMI	41	20	50	35
LMI	18	6	21	17
LIC	7	4	9	6
LDC	6	5	10	8
RG	1	2	2	0

Source – Own calculations on the basis of ITC data.

Finally, in relation to our third question on whether these COVID-19 interventions represent a shift in the rules of international trade and what their wider implications might be, it is clear from our analysis that the crisis has led to widespread and intense instigation of potentially WTO incompatible measures over a very short period. This is unprecedented in post-war history. It undoubtedly further undermines the legitimacy and moral authority of the WTO. As highlighted above, this comes at a time when the institution already faces major challenges as a result of US (non) action vis-à-vis the WTO (Bown and Keynes, 2020). This could be construed, within hegemonic stability theory, as the US, a declining hegemon, failing to defend the public goods which it helped to create and consequently destabilizing the multilateral system developed under its leadership (see also Stokes 2018). A weak WTO risks creating a situation where governments feel less constrained by the previously held tacit agreement that 'exceptions' like security and public health should only be used in truly exceptional circumstances, for a limited period. This situation seems to have occurred during the COVID-19 pandemic, creating a

clear risk that 'creative' use of the flexibility of WTO rules will increase, especially if the US continues to actively undermine the WTO.

In terms of the impact of these shifts on international business, it is difficult not to conclude that the recourse to such measures calls into question the extent to which MNEs can consider trade policy to be a relatively stable given in their decision making. The short-term falls in trade which inevitably follow every global crisis may recede, but the long-term impacts will depend on the policy response. COVID-19 has resulted in a rapid shift in the willingness of governments across the world to intervene in markets, including in goods only tangentially linked to the pandemic. These interventions, coming on top of increasing protectionism before the pandemic, mean that MNEs will need to pay increasing attention to the trade policy environment and its evolution when taking strategic decisions on trade and investment (UNCTAD, 2020).

There has been much concern about the long-term impact of the pandemic on GVCs. Although it is clearly too early to reach firm conclusions on how GVCs will be reshaped, there is little doubt that shifts are likely in response to COVID. A recent UNCTAD report concluded: *'The decade to 2030 is likely to prove a decade of transformation for international production.'* (UNCTAD, 2020: XII). The variations across governance and structure of GVCs suggest that the impact will vary by sector and thus by country (Gereffi et al, 2005; UNCTAD, 2020). While the fragilities in certain GVCs which COVID has exposed will, in any case, push companies to reassess their supply chains and diversify their sourcing (Strange, 2020), the widespread policy interventions analysed here and the uncertainty which they foster, will also impact on decision-making. The current crisis will further strengthen the growing recognition of the importance of trade policy (Curran et al, 2019) and the role of the state in framing GVCs and the 'Global' Factory more generally (Horner, 2017). It will also likely expand the coverage and understanding of 'strategic' industries. As Curran (2015) pointed out, these industries are particularly vulnerable to trade policy interventions.

### **Conclusions, research limitations and future directions.**

In this short paper we sought to shed light on the likely long-term impacts of the COVID-19 pandemic on international business through an exploration of the extent to which trade policy interventions in response to the pandemic were compatible with WTO law. We find that, although the majority of measures are probably justifiable, there were nevertheless many whose coverage or nature was such that a justification under Articles XX or XXI is, at the very least, questionable. The banning of exports is an extreme measure which is relatively rare in the global trading system. Yet we saw widespread recourse to such action during the crisis, sometimes with no published end date. At the very least, temporary trade measures taken in times of crisis need to have a built-in expiration clause. Otherwise they risk persisting long after they have outlived their necessity (ECIPE, 2020).

The increasing policy interventions during the pandemic add to pre-existing trade tensions and change the policy context that has underpinned the growth of globalisation in recent decades. Whether the result is de-globalisation, or a restructuring of existing GVCs, is a key question for the future of international business (Strange, 2020). Observers have suggested that firms will repatriate supply chains (UNCTAD, 2020), retrench into more regionally focused supply chains (UNCTAD, 2020; Javorick, 2020), as well as increasing diversification and replication, potentially increasing inefficiencies (UNCTAD, 2020; Javorick, 2020). For the moment this is largely educated opinion. Much more detailed work will be required to establish exactly how MNEs market and non-market strategies adapt to the new more uncertain and unconstrained context.

The pandemic was still ongoing at time of writing and policy interventions are also shifting. The announcement in June 2020 that the US had bought up the entire supply of a promising treatment

represented a new escalation. Such interventions could mean that other countries face the choice of foregoing novel treatments, or issuing compulsory licences, which could undermine another WTO agreement - the Agreement on Trade-Related Aspects of Intellectual Property Rights (Boseley, 2020). It is therefore still too early to provide robust judgements on the persistent impacts of COVID-19 on international business. This is one of the main limitations of our work. The true effects on MNEs and GVCs can only be accurately judged over time. What is clear is that the international policy environment has further shifted towards a more uncertain and protectionist context, where international trade agreements are less constraining on domestic action. This changes the institutional context in which MNEs evolve. Integrating this qualitative shift will require a 'thick' view of global institutions and their reach (Aguilera and Grogard, 2019). Specifically, in the trade policy context, targeted actions to protect 'strategic' industries and supplies may have relatively minor impacts on commonly used indicators of trade openness, like average tariffs, yet have major impacts on the targeted sectors. Accurately assessing national institutional contexts may therefore require a more sector-specific approach.

Another key limitation of our study is that, given the lack of jurisprudence on such interventions, our judgements on legality are, by definition, educated guesses. However, it is clear from our analysis that there are several legitimate questions about many of these measures which justify serious concern about their implications for the robustness of the international trading system. There is no way of knowing whether any of these measures will be subject to a WTO panel. In general, formal complaints are only launched when a trade measure undermines the core interests of a trading partner, or more precisely, those of companies operating within its jurisdiction (Curran and Eckhardt, 2017). Thus, for a challenge to happen, a member would need to consider that one of the more WTO-compatible measures highlighted here jeopardised one of their key industries. However, even in the absence of a formal dispute, the WTO emerges from the pandemic further fragilized, with its capacity to enforce global rules weakened. This is happening at the very time when the last member of the WTO Appellate Body has completed her term, leaving the institution with no appeal system and undoubtedly facing a major reform process which may take years (Graham, 2020). It will be important for the academic community, in international law, IB and IPE, to remain vigilant in monitoring and analysing governments' trade policy responses to future challenges and, where necessary, highlight their inconsistencies.

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