



INSIGHT

RETHINKING SOLIDARITY IN VIEW OF THE WANTING INTERNAL AND EXTERNAL EU LAW FRAMEWORK CONCERNING TRADE MEASURES IN THE CONTEXT OF THE COVID-19 CRISIS

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ABSTRACT: The present *Insight* looks at the EU and the international law framework concerning trade measures in the context of the COVID-19 crisis, focusing on export restrictions. As is shown, the legal framework is fairly permissive with regard to EU Member States, but also the EU as an international actor. Taking into account economics- and policy-based views on export restrictions in the context of pandemics, one may wonder whether one should not rethink the existing legal and institutional framework in order to strengthen international solidarity in such situations.

KEYWORDS: COVID-19 and the EU – internal market – export restrictions – free movement of goods – common commercial policy – WTO law.

I. INTRODUCTION

The COVID-19 crisis has led to a multitude of measures taken by states and international organisations. The present, short *Insight* focuses on trade-related measures, in particular measures restricting exports. One crucial question continues to be at what level measures should aspire for solidarity in this crisis. Is it the best solution if states fend for themselves, opting for “national” solidarity for their respective population? Should European solidarity be the goal? Or should (and can) there be something like global solidarity in light of a global pandemic? Before this background, we first should recall the measures taken by European Union Member States and the EU itself, and inquire as to what extent the existing legal framework – both EU law and international trade law – allow or restrict measures at certain “levels” of solidarity. Then, we can compare this existing legal framework and its

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requirements on the basis of the current political and economic debate.¹ It is suggested that deeper reflection is required to ensure that in the future, the legal framework of trade contributes its share to an efficient global response to comparable crises. We focus primarily on particularly problematic measures restricting exports.

II. THE FACTS: THE EMERGENCE OF MEASURES RESTRICTING TRADE WITHIN THE INTERNAL MARKET AND TOWARDS THIRD STATES FOR THE PROTECTION OF PUBLIC HEALTH

II.1. MEASURES TAKEN BY EU MEMBER STATES

In the context of the COVID-19 crisis, it was first individual Member States that took action, before the EU, namely the Commission, intervened to tackle perceived dangers to the internal market. While an in-detail presentation of the measures taken by the various actors lies beyond the limits of the present contribution, some core features can be presented. We focus on measures targeting the key medical supplies used during the COVID-19 pandemic. The relevant medical supplies are, according to the World Customs Organization's indicative list, test kits and related apparatus, disinfectants and sterilisation products, medical consumables, medical devices like computed tomography scanners or medical ventilators, protective garments and thermometers.² Personal protective equipment in the sense of EU law comprises protective spectacles and visors, face shields, mouth-nose-protection equipment, protective garments and gloves.³

If we now try to establish a rough overview over measures taken by Member States in reverse temporal order (i.e. from early April back to early February 2020), the following resorts: Belgium, the United Kingdom, Hungary, Bulgaria and the Czech Republic have put in place export bans on certain pharmaceutical drugs in response to the COVID-19 outbreak, fearing domestic shortages. Bulgaria has decreed an exporting licensing requirement on disinfectants, whereas Germany has done so for certain personal protective equipment (simultaneously abrogating an export ban for these products put in place shortly before that). Bulgaria has established an export ban on certain medical equipment. Moreover, the Czech Republic and France have introduced an export ban on face masks.

¹ See e.g. on the very different narratives developed on globalisation in the context of the pandemic A. ROBERTS, N. LAMP, *Is the Virus Killing Globalization? There's No One Answer*, in *Barron's*, 15 March 2020, www.barrons.com.

² World Customs Organization, *HS classification reference for Covid-19 medical supplies*, www.wcoomd.org. S.J. EVENETT, *Tackling COVID-19 Together – The Trade Policy Dimension*, in *The Global Trade Alert*, 23 March 2020, www.globaltradealert.org, p. 4, adds soap to this list.

³ Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation, Annex I.

It must be noted that in the EU, production of personal protective equipment is concentrated in the Czech Republic, France, Germany and Poland.⁴ Given the fact that three out of four major producer countries were thus at some point restricting exports, the Commission stepped in on 15 March 2020.⁵

II.2. MEASURES TAKEN BY THE EU

In mid-March, the Commission took a number of measures to deal both with impediments to intra-EU trade⁶ and also to the perceived threat of shortages of medical supplies in the EU due to exports and to export restrictions already undertaken formally or informally by trading partners, including typical suppliers to the EU internal market.⁷

On 15 March 2020, the Commission imposed an export authorization requirement on certain personal protective equipment valid for a period of six weeks.⁸ On 20 March 2020, the Commission amended the temporary export licensing requirement allowing exports without the need for an authorization to the four EFTA countries and other territories, citing as a reason that these entities were closely integrated into the single market or particularly dependent on the supply chains of Member States that they are attached to or neighbours of (e.g. Vatican City).⁹

It is estimated that overall this EU policy limits sales of about 12,1 billion USD of medical gear to third countries. The products covered are face shields, protective garments, mouth-nose-protective equipment, hospital gloves and protective spectacles and visors, which are mostly exported to the United States, Switzerland, Norway, China and Russia.¹⁰

Apart from these export restrictive measures, the Commission has also granted relief from import duties and an exemption from VAT on imports as far as goods needed to combat the COVID-19 outbreak are concerned;¹¹ adopted guidelines on border management measures including advice to give priority to emergency transport services (green

⁴ C.P. BOWN, *EU Limits on Medical Gear Exports Put Poor Countries and Europeans at Risk*, Peterson Institute for International Economics, 19 March 2020, www.piie.com. See more generally on trade numbers and statistics of relevant medical goods in the context of the COVID-19 crisis WTO, *Trade in Medical Goods in the Context of Tackling COVID-19, Information Note*, 3 April 2020, www.wto.org.

⁵ Commission Implementing Regulation (EU) 2020/402, cit., recital 5.

⁶ For the present purposes the United Kingdom is covered by the designation EU in light of the transition period.

⁷ Commission Implementing Regulation (EU) 2020/402, recital 6.

⁸ *Ibid.*

⁹ Commission Implementing Regulation (EU) 2020/426 of 19 March 2020 amending Implementing Regulation (EU) 2020/402 making the exportation of certain products subject to the production of an export authorisation, recitals 2 and 3.

¹⁰ C.P. BOWN, *EU Limits on Medical Gear Exports Put Poor Countries and Europeans at Risk*, cit.

¹¹ Decision C(2020) 2146 final of the Commission of 3 April 2020 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020.

lanes), safeguard supply chains, ensure as a matter of principle the free circulation of goods and only take proportionate measures to protect public health;¹² issued a regulation allowing temporary measures facilitating controls of animals and germinal products transported between Member States or into the EU in light of difficulties of some Member States to operate these control systems during the crisis;¹³ issued guidance on customs issues¹⁴ and the facilitation of air cargo operations;¹⁵ and advised Member States on the use of the flexibilities granted in the EU law framework for public procurement,¹⁶ including references to case law of the Court allowing the satisfaction of procurement needs without delay under simplified procedures in cases of extreme urgency.¹⁷

While the EU has primarily taken “hard law” measures towards third countries, the EU’s intervention has also led, as far as visible, to a number of Member States changing their existing “internal” measures towards other Member States, though not always to the full satisfaction of the Commission. France has thus, for example, abrogated its requisition order for face masks,¹⁸ but still seemed to restrict exports to other Member States for the second half of March citing vital internal needs.¹⁹

III. THE RELEVANT LEGAL FRAMEWORK

In assessing the legal framework, we should distinguish between the rules of EU internal market law, EU external relations law and the international legal framework, in particular WTO law. The present overview cannot provide an in-depth legal assessment of the various measures set out in the previous section. What is aimed for at present is rather an identification of the most relevant legal problems.

¹² Communication C(2020) 1753 from the Commission of 16 March 2020, *Guidelines for border management measures to protect health and ensure the availability of goods and essential services*; Communication C(2020) 1897 final from the Commission of 23 March 2020 on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services.

¹³ Commission Implementing Regulation (EU) 2020/466 of 30 March 2020 on temporary measures to contain risks to human, animal and plant health and animal welfare during certain serious disruptions of Member States’ control systems due to coronavirus disease (COVID-19).

¹⁴ Commission Guidance on Customs issues related to the COVID-19 emergency, ec.europa.eu.

¹⁵ Communication C(2020) 2010 final from the Commission of 26 March 2020, *European Commission Guidelines: Facilitating Air Cargo Operations during COVID-19 outbreak*.

¹⁶ Communication C(2020) 2078 from the Commission of 1 April 2020, *Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis*.

¹⁷ Court of Justice, order of 20 June 2013, case C-352/12, *Comune di Castelveccchio Subequo*, paras 50-52.

¹⁸ Décret no. 2020-247 of 13 March 2020 abrogating Décret no. 2020-190 of 3 March 2020.

¹⁹ L. MARLOWE, *Coronavirus: European solidarity sidelined as French interests take priority*, in *The Irish Times*, 30 March 2020, www.irishtimes.com.

III.1. EU INTERNAL MARKET LAW

There are EU internal market law- and EU external relations law-related rules at issue. Starting with the first, trade measures such as export restrictions by one Member State towards other Member States always raise the question of a violation of the fundamental freedoms, notably the free movement of goods.

Art. 35 TFEU prohibits quantitative restrictions on exports and measures having equivalent effect. The norm has been interpreted in the case law as covering also indistinctly applicable measures which affect export trade more than domestic trade.²⁰ This would cover, as a matter of principle, export bans, but also export authorization or licensing requirements.

Art. 34 TFEU on quantitative restrictions on imports and measures having equivalent effect could be applicable on other measures taken by Member States. For example, France has put in place maximum prices for disinfectant hand sanitizers.²¹ Such measures fall in principle under Art. 34 TFEU, even if some such as maximum prices are easier to justify than others like minimum prices.²² At least some measures such as shop closures or rules on how relevant goods can be sold may fall under the CJEU's *Keck* jurisprudence²³ if they fulfil the criteria and thus do not fall under Art. 34 TFEU at all.²⁴

Even when measures fall *a priori* foul of either Art. 34 or 35 TFEU, there remains, however, the possibility of justifying them as necessary to protect public health under Art. 36 TFEU. A Member State making such a claim will need to provide proof as to the proportionality of a measure;²⁵ but e.g. in case of a genuine verifiable shortage of certain materials, an export ban may be found to be justifiable by the Court of Justice in the context of a pandemic.²⁶ What remains to be seen here is to what extent a pandemic could challenge a purely Member State-focused conceptualization of public health. At least the Commission suggested in a communication that the single market could and should also be read as a "solidarity instrument to ensure that essential goods necessary to mitigate health risks outbreak can reach all those in need", criticizing unilateral Member States restrictions to the free movement of essential supplies.²⁷ According to

²⁰ Court of Justice, judgment of 16 December 2008, case C-205/07, *Gysbrechts*, para. 43.

²¹ *France to regulate price of hand sanitisers amid coronavirus outbreak*, in *France24*, 4 March 2020, www.france24.com.

²² See in the case law e.g. Court of Justice, judgment of 23 December 2015, case C-333/14, *The Scotch Whisky Association*.

²³ Court of Justice, judgment of 24 November 1994, joint cases C-267/91 and C-268/91, *Keck and Mithouard*.

²⁴ W. DEVROE, N. COLPAERT, *Corona and EU economic law: Free movement of goods*, in *CoreBlog*, 15 March, coreblog.lexxion.eu.

²⁵ See also Communication C(2020) 1753 final, cit.

²⁶ W. DEVROE, N. COLPAERT, *Corona and EU economic law: Free movement of goods*, cit.

²⁷ Communication COM(2020) 112 final from the Commission of 13 March 2020, on a coordinated economic response to the COVID-19 outbreak.

the Commission an export ban may not be justified by and of itself, as it does not ensure that the items covered by it would be available for those most in need of them within a Member State. Member States need to ensure that there are accompanying measures such as price controls which could ensure that such products are affordable. Nonetheless, it would appear that combined with other measures, such an export ban can thus be justified under Art. 36 TFEU. Summing up, it appears thus that although one might like the aspirational idea of European solidarity, as internal market law stands today it allows each Member State to fend for itself.²⁸

III.2. EU EXTERNAL RELATIONS LAW

In the EU's external relations, measures take essentially two forms. Either the EU concludes an agreement with a partner country or acts unilaterally in the framework of its common commercial policy, an exclusive competence of the EU. The EU is very closely associated to Liechtenstein, Norway and Iceland through the European Economic Area Agreement (EEA Agreement). Like numerous free trade agreements of the EU with third countries,²⁹ the EEA Agreement contains similar rules to those of the TFEU e.g. with regard to export restrictions (Art. 12 EEA), but also with regard to justifications for such restrictions (Art. 13 EEA). Our above conclusions appear thus to be transposable to this context of export restrictions by EU Member States towards the EFTA EEA countries.

Where the EU does not have agreements, it acts unilaterally under its Common Commercial Policy. Regulations 2015/478³⁰ and 2015/479³¹ deal with the common rules for imports and exports, respectively. The Common Commercial Policy is an exclusive competence of the Union (Art. 3, para. 1, let. e) TFEU which means that Member States may only legislate in this domain if the EU has empowered them to do so or to implement Union acts (Art. 2, para. 1, TFEU). Whereas the various export restrictive measures of Member States are thus partly problematic in light of the internal market, they are also problematic as far as they are directed at exports towards third countries. Regulation 2015/479 provides that exports of products from the Union to third countries shall not be subject to any restrictions unless they are in conformity with the regulation (Art. 1), and that it is the Commission which shall take protective measures in a critical situa-

²⁸ P. OLIVER, *Analysis: COVID-19 and the Free Movement of Goods: Which Prevails?*, in *EU Law Live*, 19 March 2020, eulawlive.com.

²⁹ See e.g. on the EU-Switzerland Free Trade Agreement, but also its more limited interpretation by the Swiss courts, C. TOBLER, *EU corona emergency law: Restrictions on the export of protective equipment, notably from the EU into third countries like Switzerland (Regulation 2020/402)*, in *efta-studies.org*, 30 March 2020, www.efta-studies.org.

³⁰ Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports.

³¹ Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports.

tion arising on account of a shortage of essential products or to remedy such a situation (Art. 5). It is on this basis that the Commission adopted its Implementing Regulations discussed previously. Although the Commission does not indicate this clearly in the first Implementing Regulation,³² by introducing a uniform legal framework for the export of personal protective equipment it effectively bound the Member States, rendering the unilateral measures taken by some of them (in particular export bans) previously highly problematic. It is not evident how the Implementing Regulation has supposedly empowered the Member States to take such measures. The Implementing Regulation essentially requires Member States to subject the relevant products to an export authorisation; they enjoy a certain margin of discretion in the implementation, but may only grant an authorisation based on the objective of ensuring the adequacy of supply within the Union.³³ The Member States are therefore only empowered to put in place such a procedure, not to take other measures towards third countries. In a guidance note, the Commission clarifies that the Regulation has been adopted with the understanding that the Member States are to revoke certain actions with regard to exports or intra-EU trade.³⁴ Whereas the legal framework thus seems to permit intra-EU restrictions on exports under certain conditions, by contrast it assures uniform action of the EU towards third countries. Uniformity, however, does not necessarily mean solidarity with third countries; the EU has for now opted for an export authorization system, but could even have gone further in adopting an export ban.

Another issue that has been raised in the context of the EU's external relations is the differential treatment of third countries by the EU. At least initially, the Commission's Implementing Regulation treated all third countries in the same manner. Only the second Implementing Regulation, as mentioned, allowed exports to the four EFTA countries and certain other territories and countries without an authorization, exempting these exports from the export authorization requirement.³⁵ This has raised the question of the compatibility with EU law of such differential treatment of third countries. Generally, the CJEU has emphasized for a long time that the conduct of external relations of the EU implies policy choices and that there is no express obligation imposed

³² Commission Implementing Regulation (EU) 2020/402, cit.

³³ Communication from the Commission of 20 March 2020, *Guidance note to Member States related to Commission Implementing Regulation (EU) 2020/402 making the exportation of certain products subject to the production of an export authorisation, as last amended by Commission Implementing Regulation (EU) 2020/426*. It has been criticized that there seems to be a lack of transparency in the system, namely as Member States are free to implement their own export authorization regime and thus to allow or prohibit exports without being obliged to systematically inform the Commission about their actual authorisation practice, see C. GLÖCKLE, *Export restrictions under scrutiny – The legal dimensions of export restrictions on personal protective equipment*, in *EJIL:Talk!*, 7 April 2020, www.ejiltalk.org.

³⁴ Communication from the Commission, *Guidance note to Member States related to Commission Implementing Regulation (EU) 2020/402*, cit., para. 3.

³⁵ Commission Implementing Regulation (EU) 2020/426, cit., recitals 2 and 3.

by EU law that all third countries must be treated equally, with no such general principle of equal treatment existing in international law either.³⁶ In the present case, the EU has thus decided to treat certain close partners such as the EFTA countries in the same way as Member States. This has, however, not always been the case in the past,³⁷ which has prompted the observation that the judgment as to whether there are comparable circumstances justifying equal treatment of trading partners seems to strongly depend on factual, but also political considerations.³⁸ In addition to the uniformity of EU external action in the field of trade, the legal framework is thus also marked by a considerable policy space for such external action, where there is no strict requirement to comprehensively justify differential treatment of third countries. Presumably, selective international solidarity of the EU with some, but not other partners in the implementation of export restrictions would thus be a legally permissible course of action.

III.3. WTO LAW

International law and in particular international economic law provide the external framework for the measures taken by the EU towards third states. For reasons of space, we presently focus on the global set of rules provided by WTO law.³⁹ This should, however, not mean that an assessment of COVID-19-related measures under the norms of international investment law⁴⁰ or of the multitude of trade agreements of the EU with other countries would not be relevant. Also, even though this will not be covered in more detail here, measures taken against COVID-19 do not only restrict trade in goods, but also impact trade in services.⁴¹

³⁶ Court of Justice: judgment of 24 October 1973, case 55/75, *Balkan-Import Export*, para. 14; judgment of 21 December 2016, case C-272/15, *Swiss International Air Lines*, paras 29-30.

³⁷ In the context of protection measures taken by the EU against US measures in the field of steel trade, the EU exempted the EFTA EEA countries Liechtenstein, Norway and Iceland, but not Switzerland as a country less integrated into the internal market by comparison, see Commission Implementing Regulation (EU) 2018/1013 of 17 July 2018 imposing provisional safeguard measures with regard to imports of certain steel products.

³⁸ C. TOBLER, *EU corona emergency law*, cit.

³⁹ The EU has in the meantime notified its COVID-19 measures in the field of trade to the WTO under the latter's Trade Facilitation and SPS Agreements as well as the Decision on Notifying Quantitative Restrictions, see European Commission, *EU Ensures Transparency Towards Its Trade Partners on Coronavirus-Related Actions*, 7 April 2020, trade.ec.europa.eu.

⁴⁰ See e.g. for a critical take on international investment arbitration's potential role THE IEL COLLECTIVE, *International Economic Law and COVID-19*, 24 March 2020, medium.com; see also on foreign investment screening in the EU in this context E. RUIZ-CAIRO, *Des mesures de politique commerciale pour favoriser la lutte contre le COVID-19*, in *Actualités du Centre d'études juridiques européennes*, 27 March 2020, ceje.ch.

⁴¹ J. ZHOU, *Facilitating WTO-compliant Responses to International Public Health Emergencies*, in *International Economic Law and Policy Blog*, 3 March 2020, ielp.worldtradelaw.net, who points out that three out of four modes of trade in services are concerned (consumption abroad e.g. in the case of tourism, com-

Typically, export restrictions such as the previously mentioned ones fall under Art. XI GATT which prohibits generally quantitative restrictions, be they in the form of quotas or import or export licences. Art. XI, para. 2, let. a), GATT, however, provides an exception for export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of products essential to the exporting WTO member. According to the case law, when the requirements of Art. XI, para. 2, let. a), GATT are met, there is no scope of application for the general derogations of Art. XX GATT,⁴² so that probably the national security exception of Art. XXI GATT would also not apply.⁴³ Only if the conditions of Art. XI, para. 2, let. a), GATT are not fulfilled is there a need to rely on other provisions.

In such cases or in the case of e.g. import restrictions on contaminated goods taken to protect the safety and health of people, states would have to assert a derogation under Art. XX GATT.⁴⁴ Under e.g. Art. XX, let. b), GATT, WTO members can justify measures otherwise in violation of GATT obligations if they are necessary to protect human health. The proportionality of measures is crucial, and they must not give rise to arbitrary or unjustifiable discrimination between countries.⁴⁵ Also, under Arts 2, para. 2, and 5, para. 6, SPS Agreement a WTO member would have to be able to show that any sanitary or phytosanitary measure taken is taken based on scientific principles and not more trade-restrictive than necessary to achieve the chosen level of protection.⁴⁶ In cases like the COVID-19 crisis, typically there is a lack of sufficient scientific evidence as the disease is novel and spreads fast whereas it may take time to develop effective treatments. States must thus protect their population and may want to err on the side of caution because of the potential health effects of the disease. In these contexts, Art. 5, para. 7, SPS Agreement has been interpreted by the WTO Appellate Body to reflect the precautionary principle. Therefore, WTO members can take measures based on precaution, but must nonetheless undertake a risk assessment sufficiently warranted by scientific evidence and principles.⁴⁷

WTO members could also be tempted to justify restrictive measures on the basis of Art. XXI GATT to protect national security. There is a larger debate on the recent practice

mercial presence e.g. in the case of closed factories, and presence of natural persons e.g. in the field of education).

⁴² WTO DSB, Appellate Body report of 30 January 2012, case no. ds394, *United States v. China, China – Measures Related to the Exportation of Various Raw Materials*, para. 334.

⁴³ C. GLÖCKLE, *Export restrictions under scrutiny – The legal dimensions of export restrictions on personal protective equipment*, cit.

⁴⁴ Art. XIV GATS in the case of trade in services.

⁴⁵ See e.g. WTO DSB, Appellate Body report of 12 March 2001, case no. ds135, *Canada v. European Communities, EC – Measures Affecting Asbestos and Products Containing Asbestos*.

⁴⁶ See e.g. WTO DSB, Appellate Body report of 4 June 2015, case no. ds430, *United States v. India, India – Measures Concerning the Importation of Certain Agricultural Products*.

⁴⁷ See e.g. WTO DSB, Appellate Body report of 16 January 1998, case no. ds26 and ds48, *United States and Canada v. European Communities, EC – Measures Concerning Meat and Meat Products (Hormones)*, para. 123.

of WTO members to widely invoke the national security exception to justify trade-restrictive measures in the context of normal international economic relations independently of any particular narrow crisis scenario.⁴⁸ In *Russia – Traffic in Transit*, a WTO panel interpreted the relevant norm rather restrictively to mean that an “emergency in international relations”, as laid down by Art. XXI, let. B (iii), GATT, is an “armed conflict, or (...) latent armed conflict, or (...) heightened tension or crisis, or (...) general instability engulfing or surrounding a state”.⁴⁹ This definition, however, has been criticized by some WTO members as too narrow.⁵⁰

Summing up, WTO law requires certain conditions to be met, but provides ample leeway for export restrictive measures in cases like the present one. WTO law thus allows for the EU to focus on its own adequacy of supply and to impose export authorisation requirements on the Member States, as long as requirements of proportionality and scientific justification – mitigated by the possibility of a precautionary approach – are met.

IV. ASSESSMENT OF THE LEGAL FRAMEWORK IN LIGHT OF ECONOMIC AND POLICY CONSIDERATIONS SURROUNDING A PANDEMIC

After this quick overview over the legal framework, let us recapitulate first before asking whether and to what extent the present crisis could be an opportunity to rethink this framework.

The EU internal market law framework generally allows Member States to fend for themselves in the context of a pandemic, operating e.g. export bans and accompanying measures to ensure their own adequacy of supply. European solidarity is not a prerequisite of measures in this context. The EU’s common commercial policy towards other countries has imposed an export authorization requirement; even though the EU decided to exempt certain close partner countries, there is no general requirement of equal treatment under EU law for third countries. The EU thus must act uniformly, but is not constrained from fending for itself and extending its solidarity only at a European level or from treating its trading partners selectively.

As an external constraint, WTO law adds to this picture that it similarly allows states and the EU to fend for themselves in cases of a pandemic when export restrictions are adopted. Even if the express derogation for export restrictions in the GATT should not apply, there are additional possibilities of justification of trade-restrictive measures, meaning that certain conditions must be met, but that WTO law does not really stand in the way of measures such as the one taken by the EU.

⁴⁸ See, e.g., T. VOON, *The Security Exception in WTO Law: Entering a New Era*, in *American Journal of International Law Unbound*, 2019, p. 45-50.

⁴⁹ WTO DSB, panel report of 5 April 2019, case no. ds512, *Ukraine v. Russian Federation, Russia – Measures Concerning Traffic in Transit*, paras 7.102-7.104.

⁵⁰ J. ЗНОВ, *Facilitating WTO-compliant Responses to International Public Health Emergencies*, cit.

In a nutshell, the present trading framework does not take up the issue of international solidarity that one could consider useful or even necessary in times of a pandemic; rather, it provides sufficient leeway for states to implement national solidarity within the EU internal market; and for the EU to act in a spirit of European solidarity excluding others through export restrictions. Now, states and the EU may opt to act differently,⁵¹ but the legal framework does not compel them to do so. The question arises, should it perhaps do so?

In the economic and political debate, there are a number of reflections and proposals that merit consideration here.

There are a number of concerns over export restrictions on medical supplies in the context of a pandemic. At the economic level, firms may benefit from temporary gains, but also fear losses of future export sales and thus hesitate to invest in new capacity; if they are to be induced to expand production through fiscal means, states will have to invest more as a consequence.⁵² At the political level, export bans put the cooperation and good relations with other states at risk, including the possibility of trade retaliation in an area of extensive and vulnerable international supply chains.⁵³ Some suggest export bans may even strengthen nationalist and populist tendencies in harmed trading partners.⁵⁴ Volatile trade relations and retaliatory action by other trading partners could become problematic as the Commission itself recognises that despite efforts to increase the production of personal protective equipment within the EU, the demand for such equipment cannot be met by existing stocks and the current level of production.⁵⁵

More broadly, export restrictions – comparable to the problem of “beggar-thy-neighbour” effects of protectionism in international trade – may amount to “sickening-thy-neighbour”, as e.g. the lack of protective medical kit makes it harder for health professionals in the neighbouring country to cope with the spread of COVID-19.⁵⁶

In this context, alternative measures are suggested, for example the (partial) elimination of a number of existing impediments to trade such as import taxes⁵⁷ or the targeted

⁵¹ Of course, to some extent the EU is bound in the conduct of its external relations by the formal objectives contained in the Treaties, see in particular Art. 21, para. 2, let. g), TEU. Nonetheless, one may question how much of an effect these principles had e.g. in the present crisis.

⁵² S.J. EVENETT, *Tackling COVID-19 Together – The Trade Policy Dimension*, cit., p. 7.

⁵³ C.P. BOWN, *EU Limits on Medical Gear Exports Put Poor Countries and Europeans at Risk*, cit. See also already on measures taken by the United States with regard to respirators, surgical masks and hospital gloves C.P. BOWN, *COVID-19: Trump's curbs on exports of medical gear put Americans and others at risk*, Peterson Institute for International Economics, 9 April 2020, www.piie.com. See also for an example of supply chain disruption Swiss Ventilator Company Inundated by Demand Due to COVID-19, 17 March 2020, www.swissinfo.ch.

⁵⁴ S.J. EVENETT, *Tackling COVID-19 Together – The Trade Policy Dimension*, cit., p. 7.

⁵⁵ C.P. BOWN, *EU Limits on Medical Gear Exports Put Poor Countries and Europeans at Risk*, cit.

⁵⁶ S.J. EVENETT, *Tackling COVID-19 Together – The Trade Policy Dimension*, cit., p. 6.

⁵⁷ *Ibid.*

support of domestic production to address the underlying problem of supply shortages at its source.⁵⁸ Where there is concern that subsidising domestic production may benefit foreign buyers disproportionately, one could set guaranteed minimum prices for a given announced quantity of medical supplies sold to the state, which could reassure domestic producers. Joint initiatives of states may also be beneficial, both in increasing the revenue pool for producers and in facilitating the distribution of the products.⁵⁹

There are broader concerns with regard to export restrictions, too. Medical ventilators for example are technologically rather sophisticated equipment; as the only countries with notable trade in such ventilators can be found in South East Asia, Australia, Europe and North America, export restrictions are likely to make ventilators practically inaccessible in many countries of Africa, the CIS region, Latin America, the Middle East and South Asia.⁶⁰ After having pushed countries to open their markets to imports, the EU policy thus now threatens their access to global markets just when they would need them the most.⁶¹ And nothing in the relevant EU rules prevents that the most vulnerable countries are the first to be cut off during the crisis.⁶²

If we thus accept that there are severe mid- and long-term economic concerns with regard to the economics of export restrictions and problems regarding the treatment of vulnerable countries, one may be led to consider rethinking the existing legal framework. Rather than merely allowing for national and/or European solidarity as shown, shouldn't there also be elements of compulsory European or even international solidarity? Whereas within the EU, such solidarity "with teeth" seems at least possible, it is perhaps illusory to expect binding international obligations to which states or the European Union would be willing to sign up. But there may nonetheless be some less binding instruments worth thinking about.

Within the EU, it appears worthwhile to reflect on the notion of public health as it appears e.g. in Art. 36 TFEU. Can one make the argument that in the context of a pandemic like COVID-19 the notion of public health acquires a European dimension, taking into account systematically the interests of the populations of other Member States?

At the international level, what institutions and legal provisions would be needed to strengthen international solidarity for pandemic cases? In this context, should e.g. the WTO and its law be reformed? Or step aside as unhelpful, given its current crisis of its

⁵⁸ C.P. BOWN, *EU Limits on Medical Gear Exports Put Poor Countries and Europeans at Risk*, cit.

⁵⁹ S.J. EVENETT, *Tackling COVID-19 Together – The Trade Policy Dimension*, cit., p. 7.

⁶⁰ *Ibid.*, p. 6.

⁶¹ C.P. BOWN, *EU Limits on Medical Gear Exports Put Poor Countries and Europeans at Risk*, cit.

⁶² *Ibid.*; see also J. BOUSSOU, *Comme le protectionnisme a aggravé la grande dépression, le nouveau protectionnisme pourrait aggraver la pandémie de Covid-19*, in *Le Monde*, 7 April 2020, www.lemonde.fr.

own?⁶³ What other international institutions are needed to avoid the present situation of everyone fending for themselves at the detriment of internationally efficient solutions to shortages of important medical goods and particularly harmful consequences for the populations of vulnerable countries?⁶⁴

One useful suggestion at the EU level is to improve its own relevant institutions to strengthen the joint response capacity of the EU. It has been suggested that the EU ought thus to increase its own capacity to test for diseases (starting, but not limited to, the coronavirus); expand the staff, financial resources, research technology and competences of the Commission and the European Centre for Disease Control and Prevention; develop true European joint procurement of vaccines and equipment, using the internal market's size as a weapon; and create a true disaster response institution, either anew or by properly funding the still young RescEU, giving it stockpiles, staff and equipment for pandemic situations.⁶⁵

Yet, such proposals leave us ideally at the level of European solidarity and perhaps a better outcome in a future crisis for the EU and its Member States. At the international level, more will be needed to avoid the current widely-spread zero-sum mentality. As one suggestion puts it, perhaps what is needed is rather something like a reinvigorated G 20 rather than the current stop-gap policy of the EU Commission.⁶⁶ In any event, it can only be hoped that reflections on a more robust international legal framework will not subside together with the most acute threat from COVID-19. As history has shown, the next similar pandemic is only a matter of when, not if.⁶⁷

⁶³ See recently e.g. J. PAUWELYN, *The Real Rot in the System: Delays Are Making WTO Dispute Settlement Irrelevant, Especially During a Pandemic*, in *International Economic Law and Policy Blog*, 27 March 2020, ielp.worldtradelaw.net.

⁶⁴ P.S. GOODMAN, K. THOMAS, S.-L. WEE, J. GETTLEMAN, *A New Front for Nationalism: The Global Battle Against a Virus*, in *New York Times*, 10 April 2020, www.nytimes.com.

⁶⁵ S.L. GREER, *How Did the E.U. Get the Coronavirus So Wrong?*, in *New York Times*, 6 April 2020, www.nytimes.com.

⁶⁶ C.P. BOWN, *EU Limits on Medical Gear Exports Put Poor Countries and Europeans at Risk*, cit.

⁶⁷ See already in 2007 V.C.C. CHENG, S.K.P. LAU, P.C.Y. WOO, K.YUNG YUEN, *Severe Acute Respiratory Syndrome Coronavirus as an Agent of Emerging and Reemerging Infection*, in *Clinical Microbiology Review*, 2007, p. 660 *et seq.*

