

Covid-19 and Export Restrictions: the Limits of International Trade Law and Lessons for the AfCFTA¹

Introduction

The Covid-19 crisis has exposed the deep and systemic deficiencies of the global economic regulatory system and associated national vulnerabilities at a time of great distress. Until this crisis struck, who could have thought it possible that Germany would ban the exportation, to France or Italy, of such potentially life-saving medical supplies as face masks and respirators?² Who could have thought that the most successful European single market, the envy of much of the rest of the world, would fail to guarantee intra-EU trade in essential medical equipment and supplies at a time when trade literally meant saving lives? These are extraordinary times where European contracts for the purchase of Covid-19 medical supplies are being rendered “not worth the paper they were written on” because of export bans.³ If the European single market cannot guarantee access to supplies from within the EU, it is hardly plausible to expect better outcomes from the much looser and less effective global trading regime. According to the International Trade Centre (ITC), some 90 countries have introduced export prohibitions or restrictions as a result of the Covid-19 pandemic.⁴ According to reports from CNN and other media sources, the spread of the pandemic across Europe and the United States has unleashed “a global scramble for medical equipment such as respirator masks and gloves.”⁵ For

1 By Melaku Geboye Desta, Principal Regional Advisor, UNECA (Addis Ababa) and Professor of International Economic Law, Leicester De Montfort School of Law, UK (currently on leave). I would like to take this opportunity to thank a number of colleagues and friends who read this manuscript and gave me invaluable comments, including Assefa Bekele, David Luke, Joost Pauwelyn, James Gathii, Joe McMahon, Zeray Yihdego, Adeyinka Adeyemi, Lily Sommer, Jamie Macleod, Guillaume Gerout, and Stephen Karingi. All views are strictly personal to the author and may not be attributed to his employer; likewise, only the author is responsible for any errors.

2 For information and analysis, see Hans Von der Burchard, Jillian Deutsch, and Maia De La Baum, “Berlin pushes back in coronavirus propaganda war”, available at <https://www.politico.eu/article/coronavirus-propaganda-war-germany-solidarity/>.

3 These are words used by Mr Mark Roscrow, an official in the British healthcare sector, in a testimony he gave to the International Trade Committee of the British Parliament on 23 April 2020. As an example, Mr Roscrow used the ban on the export of a shipment of face masks from France in January 2020. See also Camilla Hodgson, “UK missed out on overseas safety kit deals for health workers”, *Financial Times* (23 April 2020).

4 See ITC, *Global Map of COVID-19 Temporary Trade Measures* (May 07, 2020), available at <https://www.macmap.org/covid19>; see also WTO Secretariat, *Export Prohibitions and Restrictions: Information Note* (23 April 2020, hereafter WTO 2020), available at https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf.

5 The Covid-19 crisis has tested not just the fitness of the global regulatory system for trade for emergency times, it has severely strained the close ties of friendship between the leading Western Powers that has been forged over decades of strategic partnership in times of peace and war. In what the French have labelled the *guerre des masques* – the war of the masks – German government officials have gone as far as accusing the US Government of committing “an act of ‘modern piracy,’ alleging that a consignment of 200,000 respirator masks

countries without domestic technological and manufacturing base, the effect is likely to be devastating.

In this short article, I aim to conduct a brief legal analysis to demonstrate the inadequacy of the global trading system to guarantee access to vital medical supplies during a global emergency to save lives and the absence of a legal or policy fix for it at that level. It is a realisation that, in times of real emergency, law is never a substitute for humanity and solidarity; self-reliance and self-sufficiency – every country for itself – are reclaiming their traditional places. For Africa, perhaps the most important lesson to learn from the current situation is something that has been known for a long time but whose significance has been elevated to a different level – the imperative for Africa to build its scientific and industrial base.

To that end, the rest of this article describes the trade-related aspects of the Covid-19 crisis in general and its implications for access to essential medical supplies in particular, outlines the policy options available to poor African countries in the fight against Covid-19 and its associated socio-economic consequences, interrogates the extent to which the multilateral trading system can be relied upon for access to such supplies, and concludes by identifying a list of legal and policy takeaways.

The Covid-19 Crisis and its Trade-Related Implications

The outbreak of the coronavirus and the disease associated with it, known as Covid-19, has engulfed the entire world within a short period since it was first reported in Wuhan, China, on 31 December 2019.⁶ According to the World Health Organization (WHO), the disease “can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales. These droplets land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose or mouth. People can also catch COVID-19 if they breathe in droplets from a person with COVID-19 who coughs out or exhales droplets.”⁷ Because the disease can be transmitted through contact with mouth and nose droplets from a person with Covid-19, the demand for a number of so-called personal protective equipment (PPEs) and other medical supplies, which the WTO Secretariat has termed “COVID-19 medical products”⁸, such as surgical and medical masks, gloves, respirators, and face shields, has risen dramatically in most parts of the world.

destined for the Berlin police had been diverted to the US while in transit in Bangkok.” See Tim Lister, Sebastian Shukla and Fanny Bobille, “Coronavirus sparks a ‘war for masks’ in desperate global scramble for protection”, CNN (05 April 2020), available at <https://edition.cnn.com/2020/04/04/europe/coronavirus-masks-war-intl/index.html>.

6 For the chronology of how Covid-19 started in one place and spread to the entire world, see *WHO Timeline - COVID-19*, available at <https://www.who.int>.

7 See *WHO, Q&A on coronaviruses (COVID-19)*, available at <https://www.who.int>.

8 The WTO Secretariat, in a recent report on Covid-9 and world trade, identified a number of what it called “critical” medical products or “COVID-19 medical products”, including “computer tomography apparatus; disinfectants/ sterilization products; face masks; gloves; hand soap and sanitizer; patient monitors and pulse oximeters; protective spectacles and visors; sterilizers; syringes; thermometers; ultrasonic scanning apparatus; ventilators, oxygen mask; X-ray equipment; other medical devices.” See WTO Secretariat, *Trade in Medical Goods in the Context of Tackling Covid-19: Information Note* (3 April 2020), available at https://www.wto.org/english/news_e/news20_e/rese_03apr20_e.pdf.

In response, countries have taken a number of quintessentially trade-related measures that have domestic as well as international implications. Domestically, many governments have directed industry to repurpose their activities and manufacture Covid-19 medical products to the extent possible, including with the help of incentives and subsidies; at the same time, however, a lot of businesses in far too many countries have resorted to hoarding these items with profiteering motives in the full knowledge that supply is naturally slow to respond (the domestic dimension). Furthermore, almost the instinctive first step for many countries – from Australia to South Africa, the EU and the USA – has been to impose restrictions on the exportation of PPEs (the international dimension).⁹ Also, at a time when over 90% of global merchandise trade is seaborne, virtually all coastal states in the world have introduced some degree of restriction on port access to cargo ships. According to recent reports, virtually all coastal states, with the notable exception of Canada, have adopted “variously restrictive measures which range from indiscriminate prohibitions on access to ports to measures discriminating between ships on account of their nationality or based on objective considerations, like previous calls in infected areas.”¹⁰ Considering that over three billion people around the world are dependent on international trade for their food security,¹¹ this has raised significant concerns that the global health crisis caused by the coronavirus outbreak can easily become an equally global food crisis, thereby necessitating a G20-level effort to nip this challenge in the bud.¹²

While the domestic dimension of the problem – the practices of hoarding and price gouging – may be blamed on human greed, the tendency to look for personal advantages regardless of the welfare of others even in the worst of circumstances, a widespread practice of it might also be a sign of failure of the underlying national legal system. The international aspect of the reaction, on the other hand, while easier to understand as it is often couched in terms of national security and national self-preservation, at the human level it is hardly any more innocent than the hoarding of supplies with profiteering motives. In legal terms, however, there is a significant distinction between these two dimensions of the problem. National legal systems are often well-equipped with the necessary powers, tools and effective enforcement mechanisms to ensure compliance by punishing the offenders to make sure supplies are made available to the consumer on reasonable terms. When it comes to international law, on the other hand, not only is it deficient in terms of enforcement capacity, there is little hard law against what is

9 For a list of countries that have imposed export restrictions, see the World Customs Organization, *List of National Legislation of Countries that Adopted Temporary Export Restrictions on Certain Categories of Critical Medical Supplies in Response to COVID-19*, available at <http://www.wcoomd.org/en/topics/facilitation/activities-and-programmes/natural-disaster/list-of-countries-coronavirus.aspx>.

10 See Alina Miron, “Port Denials and Restrictions in Times of Pandemic: Did International Law Lose its North Star?”, *EJIL Talk* (April 22, 2020), available at <https://www.ejiltalk.org>.

11 See WTO Secretariat, *DG Azevêdo Welcomes G20 Farm Ministers’ Commitment to Safeguard Global Food Security*, Press Release dated 21 April 2020, available at https://www.wto.org/english/news_e/news20_e/dgra_21apr20_e.htm.

12 See “G20 Extraordinary Agriculture Ministers Meeting: Ministerial Statement on COVID-19” (virtual meeting held on 21 April 2020). The ministers resolved, *inter alia*, to cooperate and take “concrete actions to safeguard global food security and nutrition”, to “ensure the continued flow of food, products, and inputs essential for agricultural and food production across borders”, and to “guard against any unjustified restrictive measures that could lead to excessive food price volatility in international markets and threaten the food security and nutrition of large proportions of the world population, especially the most vulnerable living in environments of low food security”. Available at https://g20.org/en/media/Documents/G20_Agriculture%20Ministers%20Meeting_Statement_EN.pdf.

effectively “national-level hoarding” that compels countries to share such vital supplies with their neighbours.¹³

International law: a helpless bystander?

When local businesses in a particular country engage in hoarding or price-gouging practices in the domestic market, we typically turn to domestic law to discipline them. When nations impose export restrictions on Covid-19 medical products and engage in national-level hoarding, and to the extent this is harmful to other countries, one would hope that international law would provide the tools with which to deal with such “national malpractice”. We shall see, however, that international law has yet to provide such tools with which to deal with such practices and ensure access to supplies even in times like this. To illustrate this point, we shall briefly look at EU law and the law of the GATT/WTO System as examples.

EU Law as an Example

As an instrument to blunt the sharp edges of national sovereignty and establish a system of cooperation in the common interest, complete with an enforcement mechanism approximating that of national law, nothing in international law comes anywhere close to what the EU has achieved over the past nearly seven decades. The success of this experiment is such that the standard and binary classification of law into national or municipal, on the one hand, and international, on the other, had to be supplemented with a third category, called supra-national law to describe particularly the law of the European Union that has attributes of both. Like all international law, at its foundation EU law is the product of inter-governmental bargaining in pursuit of the common interest of its members. Unlike typical international law, however, and more like national law, the inter-governmental agreements that established EU law have been supplemented with processes and institutions through which to create new law without necessarily waiting for each and every member of the Union to agree. Likewise, EU law has established a judicial system that has the power to impose sanctions, including in the form of fines as well as orders to change national laws, policies and practices of the member states.

It is this highly advanced system of integration that partly buckled under the weight of Covid-19. When the crisis struck, the free movement of goods and services that Europe rightly took for granted for a long time was the first to suffer as countries unilaterally blocked exports of protective equipment to Italy and other countries impacted by the pandemic. Ursula von der Leyen, President of the EU Commission, expressed her dismay at this practice as follows:

“A crisis without borders cannot be resolved by putting barriers between us. And yet, this is exactly the first reflex that many European countries had. This simply makes no sense. Because there is not one

¹³ For an exploration of the state of general international law during times of emergency, see “Rana Moustafa Fouad, The Legal Duty to Cooperate amid COVID-19: A Missed Opportunity?”, *EJIL: Talk*, available at <https://www.ejiltalk.org/>.

single Member State that can meet its own needs when it comes to vital medical supplies and equipment. Not one.”¹⁴

President von der Leyen made this statement in a speech at the European Parliament on 26 March 2020. Yet, less than two weeks before that, the EU Commission that von der Leyen leads had imposed restrictions on the export of those same medical supplies from the EU to third countries. In its *Implementing Regulation (EU) 2020/402* of 14 March 2020, the EU Commission introduced an “export authorisation” requirement “for the export outside the Union of personal protective equipment listed in Annex I, whether or not originating in the Union.” The Commission added: “Without the production of such export authorisation, the exportation is prohibited.” Interestingly, this restriction applies not just to PPEs made in the EU; it applies to all PPEs wherever they might have been made as long as they happen to be within the territorial jurisdiction of the EU.¹⁵ Also, while this Regulation initially applied to all third states, *Commission Implementing Regulation (EU) 2020/426* was introduced five days later, on 19 March 2020, to exempt from the export restrictions the member states of the European Free Trade Association (EFTA, i.e., Norway, Iceland, Liechtenstein, and Switzerland), the overseas countries and territories of some EU member states, and a few principalities associated with the EU, i.e., the Faeroe Islands, Andorra, San Marino and the Vatican City. A second revision came four days later, on 23 April 2020, in the form of *Commission Implementing Regulation (EU) 2020/568*, which reduced the list of products that require export authorisation to masks, spectacles and protective garments, and extended the geographical exception to include the Western Balkans.¹⁶

The rest of the world – Africa included – would not have access to these essential, life-saving, medical equipment in this time of emergency unless and until the competent authority in an EU member state decides that the export of a particular product would not affect the Union’s ability to meet internal demand. The application of these EU decisions is not affected by any of the unilateral or reciprocal preferential trade arrangements to which the EU is a party. As such, those African countries that have concluded Economic Partnership Agreements (EPAs) with the EU are subject to the EU export restriction as much as any other country outside the small list of exempted countries in Europe. To use the example of the 2016 EPA concluded between the EU and the six members of the Southern African Development Community (SADC), i.e. Botswana,

14 See speech by President von der Leyen at the European Parliament Plenary on the European coordinated response to the COVID-19 outbreak (26 March 2020), available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_532.

15 For an example of how this works in practice, see Bernard Hoekman, Matteo Fiorini and Aydin Yildirim, *Export Restrictions: A Negative-Sum Policy Response to the COVID-19 Crisis*, (EUI RSCAS, 2020/23, <http://hdl.handle.net/1814/66828>). The authors’ account of an incident involving Mölnlycke and the Government of France is insightful. Mölnlycke, a Swedish company that supplies medical products, has a warehouse and logistics centre in Lyon, France, but it does not have any production facilities in France. Following President Macron’s decree of 3 March 2020 to requisition all stocks of medical supplies in France and distribute them to French health workers, “French authorities, in full compliance with the decree, requisitioned the entire stock of surgical masks that Mölnlycke had in Lyon that had been produced by plants in Asia and that were in transit to clients in other European countries. This included 1 million masks purchased by Italian customers and 1 million bought by clients in Spain. ... The requisition led to a diplomatic dispute at the highest political (Prime Minister) level between France and Sweden. The resulting political pressure and media attention resulted in an eventual decision by the French government to allow all Mölnlycke’s consignments of masks to be released to their intended final destinations with a 1 month delay.”

16 For further information, see <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2139>.

Lesotho, Mozambique, Namibia, South Africa and Swaziland, which entered into force in February 2018, Article 39 thereof simply refers the issue of export restrictions to the GATT/WTO system, as follows: “The Parties may apply quantitative restrictions provided such restrictions are applied in conformity with the WTO Agreement.” Likewise, although Article 17(3) of the 2004 Association Agreement between the EU and Egypt,¹⁷ which aimed to progressively establish a free trade area between the two parties, prohibits the use of “quantitative restrictions or measures having equivalent effect” in their trade, Article 26 of the same brings back GATT Article XX-type exceptions that would justify export restrictions justified on grounds, inter alia, of “the protection of health and life”. Finally, nor are those African countries that are subject to the EU’s Generalised System of Preferences (GSP), including the “Everything but Arms” law of the EU, exempt from the EU restrictions on the export of Covid-19 medical supplies.¹⁸

The conclusion from this brief examination of EU law governing trade relations with different categories of African countries is that the whole of Africa, regardless of whether their trade relations with the EU are governed by an EPA, an Association Agreement or indeed through the EU’s regime for generalised tariff preferences, including Everything but Arms, is completely shut off from the EU market for Covid-19 medical supplies during this emergency. Moreover, both the restrictions imposed by EU member states against the exportation of Covid-19 medical supplies to other EU member states, as well as the Commission’s restriction of such exports from the EU to third countries are justified under provisions of the Treaty on the Functioning of the European Union (TFEU) that provide for exceptions to the free movement rules on grounds of public health.¹⁹ Of course, as Glöckle rightly observes, legality is one thing; morality or economic rationality quite another: “unilateral export restrictions vis-à-vis other EU Member States are legal under EU law, but their moral and political justification as well as their economic rationality may be highly disputed.”²⁰

The GATT/WTO System

As indicated above, just as EU member state measures to restrict exports of supplies to fellow EU member states can be justified under EU law, so also are EU Commission measures to restrict exports of supplies to third countries justifiable under WTO law, the only multilateral regime that governs such conduct at global level.²¹ As under EU law, there is an old and established principle under world trade law against the use of quantitative restrictions on exports. Article XI (1) of the General Agreement on Tariffs and Trade (GATT) is sweeping and unequivocal in its prohibition of quantitative restrictions:

17 See Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the one Part, and the Arab Republic of Egypt, of the Other Part, signed in June 2001 and entered into force in June 2004, available at Official Journal of the European Union L 304/43 (30.9.2004), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0039:0208:EN:PDF>

18 Note that the EU GSP scheme as applied through Regulation (EU) No 978/2012 is limited to tariff preferences. As such, countries eligible under this Regulation do not benefit from any preferences when it comes to non-tariff measures, such as the export restrictions applying to Covid-19 medical supplies.

19 See, e.g., Caroline Glöckle, “Export restrictions under scrutiny – the legal dimensions of export restrictions on personal protective equipment”, published in *EJIL: Talk* (07 April 2020), available at, <https://www.ejiltalk.org>.

20 Id.

21 For a brief but authoritative and up-to-date analysis of the legal issues, see WTO 2020, *supra* n. 4.

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or *export* licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

This provision contains an important articulation of the fundamental bargain struck at the very start of the multilateral trading system in 1947 – that to the extent complete free trade was unattainable in the short term, tariffs would be the preferred and therefore accepted method of protection while all non-tariff barriers would, in principle, be prohibited.²² That is why Article XI(1) was written in such sweeping terms: that any trade-related measure that takes a form "other than duties, taxes or other charges" is prohibited regardless of how it is framed or implemented – i.e., "whether made effective through quotas, import or *export* licences or other measures". The prohibition does not distinguish between imports and exports; it applies to both. In other words, just as it is unlawful in principle to ban the importation of a product for purposes, say, of protecting the domestic industry or rationalizing the use of foreign exchange, so is it unlawful in principle to ban the exportation of a particular product to ensure availability of adequate supplies domestically or to keep supplies away from an unfriendly foreign state.

It is notable at this point that most trading partners, including the EU Commission itself as described above, that introduced restrictions on Covid-19 medical supplies did not impose outright bans on exports; instead, they often made exportation subject to production of a license or authorisation to that effect. To use the EU example once again, Article 1 of *Implementing Regulation (EU) 2020/402* of 14 March 2020 provides:

"1. An export authorisation established in accordance with the form set out in Annex II shall be required for the export outside the Union of personal protective equipment listed in Annex I, whether or not originating in the Union. ... 2. Without the production of such export authorisation, the exportation is prohibited."

Article 2 of this Regulation then provides for an open-ended list of factors that may be considered by the competent national authorities in deciding whether or not to grant an export authorisation, making this a typical example of a discretionary export licensing regime. More importantly, as paragraph 7 of the recitals to this Regulation makes clear, the purpose of the export licensing regime is openly restrictive in that it is intended "to ensure adequacy of supply [of covered PPEs] in the Union in order to meet the vital demand". It is thus clear that *Implementing Regulation (EU) 2020/402* establishes a system of quantitative export restrictions effected through a discretionary export licensing regime. Stated in the language of GATT Article XI(1), this is a typical example of an export restriction "made effective through ... *export* licences", and therefore prohibited on the same level as outright export bans. This also fits into an old and established distinction under GATT/WTO law between discretionary import or

²² It is notable that this prohibition has a long pedigree, being one of the GATT provisions that was "taken from the reciprocal trade agreements of the 1930s" in the USA. See Douglas A. Irwin, *Clashing over Commerce: A History of US Trade Policy* (Chicago 2017), p. 479.

export licensing regimes on the one hand and automatic licensing procedures on the other, prohibiting the former while tolerating the latter. As the WTO Panel in *China – Raw Materials* observed specifically on the question of whether export licences amount to prohibited quantitative export restrictions:

“China’s export licensing regime is not per se inconsistent with Article XI:1 on the basis that it permits export licensing agencies to require a licence for ‘goods subject to ... export restrictions’. ... The Panel finds, however, that the discretion that arises from the undefined and generalized requirement to submit an unqualified number of ‘other’ documents of approval ... as applicable to goods subject to export licensing only, or the ‘other materials’ ... amounts to an additional restriction inconsistent with Article XI:1.”²³

We can thus conclude that measures to restrict the export of Covid-19 medical supplies, such as those contained in *EU Commission Implementing Regulation (EU) 2020/402*, establish quantitative export restrictions of the type that fall squarely within the language of GATT Article XI, having “a limiting effect on the quantity or amount of a product being ... exported.”²⁴ As such, these measures are in principle incompatible with a fundamental principle of WTO law as articulated in GATT Article XI(1).

However, the rule under GATT Article XI(1) is subject to so many exceptions and “carve-outs”²⁵ that, in some senses, the rule itself might appear to be the exception rather than the other way round. To mention just a few examples, paragraph 2(a) of GATT Article XI already provides that the principle enunciated in paragraph 1 “shall not extend to ... Export prohibitions or restrictions *temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.*” While one may ask detailed and technically sophisticated questions relating to how long is “temporary” or what products are “essential” in a particular case, it is plausible to suggest that national measures restricting the export of potentially life-saving Covid-19-related medical products during a global medical emergency that has been declared a global pandemic by the world’s preeminent scientific institution – the World Health Organization (WHO) – should easily meet the requirements set out in paragraph 2(a) of GATT Article XI. Whenever a country decides to restrict exports under this provision, the only other condition it has to meet is that of non-discrimination in the sense of most-favoured nation treatment – i.e., under GATT Article XIII, the prohibition or restriction of exports must apply in a similar fashion to all third countries without distinction. Likewise, these measures are also likely to find justification under the General Exceptions provision

23 See WTO, *China — Measures Related to the Exportation of Various Raw Materials China* (DS394), Report of the Panel issued on 5 July 2011, paras. 7.957-7.958.

24 See WTO, *China — Measures Related to the Exportation of Various Raw Materials China* (DS394), Report of the Appellate Body issued on 30 January 2012, para. 319.

25 WTO law distinguishes between exceptions, on the one hand, and carve-outs, on the other. The WTO Secretariat describes the difference thus: “A carve-out is different from an exception. Members can resort to exceptions, such as those under Article XX of the GATT 1994, to justify a measure that would otherwise be inconsistent with their GATT obligations. By contrast, an exemption or a carve-out, such as Article XI:2, excludes certain measures from the scope of a GATT obligation, thereby removing certain measures from its coverage. Accordingly, where the requirements of Article XI:2(a) are met, there would be no scope for the application of Article XX, because no obligation exists. This distinction has implications for the burden of proof in the context of WTO disputes.” see WTO 2020, *supra* n. 4.

of GATT Article XX(b) and (j) as being “necessary to protect human ... life or health” or “essential to the acquisition or distribution of products in general or local short supply”, provided they meet the additional requirement that they are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”. Indeed, one could go further and argue that these measures might even fall under the national security exceptions of Article XXI(b)(iii) as measures taken under conditions of “emergency in international relations”.²⁶

International health law also follows the same approach and defers to the WTO system regarding restrictions on movement of goods necessitated by the pandemic. The *International Health Regulations (2005)* administered by the World Health Organization (WHO) allow countries to take all necessary health measures “in response to specific public health risks or public health emergencies of international concern”, including measures of the type indicated above. In doing this, members are required to act “in accordance with their ... obligations under international law” and to ensure that these measures “shall not be more restrictive of international traffic ... than reasonably available alternatives that would achieve the appropriate level of health protection.”²⁷ Needless to say, this language is crafted in such a way that national obligations in respect of the movement of goods as provided under the GATT/WTO system remain applicable even when taking measures specific to health emergencies.

The conclusion is therefore clear, that international law does not guarantee access to such life-saving medical equipment and supplies for countries that lack the capacity to produce them. The next question then is: for countries like many in Africa lacking in domestic research and development capacity to develop new cures for such diseases, or indeed the manufacturing capacity to produce the most basic PPEs such as respirators with proven life-saving qualities, what options do they have in the short term and beyond given that they cannot rely on the international market to access them?

Preparing for the Next Pandemic: Africa needs to take industrialisation, R&D and diversification seriously

When the international market for Covid-19 products suddenly dried up, much of the developed world as well as developing countries with manufacturing capacity adopted policies to mass-produce such products domestically at short notice through, *inter alia*, ordering and/or incentivising private companies to shift their activities, repurpose their manufacturing operations, cancel export contracts, etc. and secure adequate domestic supplies of such products. The research and development institutions in these countries also redeployed themselves into the search for vaccines, cures, and other means of fighting the pandemic, which are already showing encouraging signs. However, much of Africa’s ability to resort to such policies has been hampered by the poor state of its

26 For a detailed account of these and other possible justifications under WTO law, see Joost Pauwelyn, “Export Restrictions in Times of Pandemic: Options and Limits Under International Trade Agreements” (April 30, 2020), available at SSRN: <https://ssrn.com/abstract=3579965>.

27 See WHO, *International Health Regulations (2005)* (3rd ed. 2026), Article 43, available at <https://www.who.int/ihr/publications/9789241580496/en/>.

manufacturing sector and its undeveloped R&D capacity and associated human capital, as well as the lack of diversification. ECA estimates show that Africa is dependent on imports for as much as 94 per cent of its total pharmaceutical and medical supplies.²⁸ When it comes specifically to Covid-19, a recent CNN report shows that there are fewer than 2,000 functional ventilators in 41 African countries and less than 5000 intensive care unit beds in 43 countries, which comes to “about five beds per 1 million people, compared to 4,000 beds per 1 million people in Europe”.²⁹ In response to this worrisome reality, several African countries, including Ethiopia, Ghana, Kenya, Nigeria Senegal, and South Africa, are known to be taking a lead in encouraging repurposing of domestic manufacturing supply chains to address shortages in essential medical equipment.³⁰

Furthermore, there is consensus among the global scientific and policy community that this pandemic will not be the last; sadly, it can only be the first of many to come. As such, this is time for Africa to take decisive action to ensure it will not find itself in a similar predicament next time another pandemic or other disaster strikes – to invest in industrialisation and associated research and development capacity so as to have in place the necessary infrastructure for adaptability and resilience. This does not mean Africa should look inward, invest to be self-sufficient in all such medicines and medical products, prepare to isolate itself from the rest of the world, and live exclusively on what it can produce. Far from it. Indeed, for a region such as this, there is no substitute for a rules-based multilateral trading system that establishes a set of mutually-agreed limits on national sovereignty for the common good and enforced through an impartial adjudicatory system.³¹

The advice is for African policymakers to ensure they have the minimum capacity for resilience, the capacity to ramp up production of essential supplies at short notice when, not if, the next disaster strikes and the human and institutional capacity to undertake research and development (R&D) to quickly understand and explain disease outbreaks or other natural disasters, identify the coping mechanisms and precautions and devise appropriate solutions.

It is worth stressing at this point that the lessons we are learning from Covid-19 are not new. Indeed, far too many policy papers have been written, and high level decisions adopted,³² about the need to launch Africa on a path to industrialisation. Already in 1980,

28 See ECA, *COVID-19 in Africa: Protecting Lives and Economies* (April 2020), available at https://www.uneca.org/sites/default/files/PublicationFiles/eca_covid_report_en_24apr_web1.pdf.

29 See Amy Woodyatt, “The world is scrambling to buy ventilators in the Covid-19 pandemic. One country has only four of them – for 12 million people”, *CNN* (18 April 2020), available at <https://edition.cnn.com/2020/04/18/africa/covid-19-ventilator-shortage-intl-scli/index.html>. For more information on Africa and Covid-19, see Katharine Houreld, David Lewis, Ryan McNeill and Samuel Granados, “Understanding Covid-19: Virus exposes gaping holes in Africa’s health systems”, *Reuters* (7 May 2020), available at <https://graphics.reuters.com/HEALTH-CORONAVIRUS/AFRICA/yzdpxoqbdvx/>.

30 See Tony Blair Institute for Global Change, *COVID-19: Repurposing Manufacturing to Address Medical-Equipment Shortages in Africa* (April 2020).

31 For an elaborate discussion of why inward-looking policies are detrimental to everyone, see Richard Baldwin and Simon J. Evenett (eds.), *COVID-19 and Trade Policy: Why Turning Inward Won’t Work* (Vox 2020), available at file:///C:/Users/meldesta/Downloads/Covid-19_and_Trade_Policy.pdf.

32 See, e.g., the African Union programme for Accelerated Industrial Development in Africa (AIDA), available at https://au.int/sites/default/files/documents/30985-doc-plan_of_action_of_aida.pdf, which describes industrialization as “a critical engine of economic growth and development” and equates it with development itself.

the *Lagos Plan of Action*, that landmark document in the history of Africa's efforts towards economic integration, considered industrialisation as a critical element of the cure for all the Continent's ills and declared that industrialisation "constitutes a fundamental option in the total range of activities aimed at freeing Africa from underdevelopment and economic dependence."³³ The adoption of the *Lagos Plan of Action* was immediately followed by successive declarations of the so-called *Industrial Development Decades for Africa (IDDA)*, with the current iteration, *IDDA III*, lasting until 2025.³⁴

The result, while encouraging, remains far from satisfactory. The Covid-19 crisis once again demonstrates that the old model of a global division of labour in which Africa still supplies predominantly raw materials and largely imports finished products has left it unable to produce even basic PPEs essential to save lives. If Africa ever needed one more wake-up call to build its industrial and R&D capacity, and diversify its economy, Covid-19 has provided it. Until now, the driver for the industrialisation imperative in Africa has been economic; Covid-19 has now made it a matter of life and death. Literally so. This needs to end, and end soon.

Covid-19 Lessons for the AfCFTA

At this point, we need to pause and ask one important question: imagine several countries in Africa invest and build sufficient manufacturing and R&D capacity that has enabled them to produce and supply PPEs and other medical products at short notice. Would those African countries that do not have manufacturing capacity be able to rely on the AfCFTA to access those supplies in the event of a medical emergency such as now? The answer to this question is in the negative.

As of today, there is no obligation that prevents a State Party to the AfCFTA Agreement, say South Africa, from imposing a ban on the exportation of PPEs to another State Party, say, Uganda, during this time of emergency. Today, some 14 African countries have imposed export restrictions on Covid-19 medical supplies unrestrained by their WTO and/or other international obligations.³⁵ The AfCFTA Agreement does not make much improvement on the GATT/WTO regime for export restrictions described earlier. Indeed, the AfCFTA effectively reproduces the principle under GATT Article XI along with the exceptions and carve outs associated with it. Article 9 of the Goods Protocol to the AfCFTA Agreement provides that principle, saying:

"The State Parties shall not impose quantitative restrictions on imports from or exports to other State Parties except as otherwise provided for in

³³ See Organization of African Unity, *Lagos Plan of Action for the Economic Development of Africa 1980-2000*, adopted by the Assembly of Heads of State and Government of the Organisation of African Unity at its Second Extraordinary Summit held in Lagos, Nigeria, 28-29 April 1980, para. 56.

³⁴ The first IDDA was declared by the UN General Assembly on 5 December 1980; IDDA II, covering the period 1991-2000, was declared by UN General Assembly on 22 December 1989, followed by IDDA III which was declared once again by the UN General Assembly on 25 July 2016 covering the period from 2016-2025. For further information, see OAU, ECA and UNIDO, *Industrial Development Decade for Africa (IDDA) II Report of the Mid-Term Programme Evaluation* (21 April 1997) para. 43, available at https://www.unido.org/sites/default/files/2007-11/43904_FINAL_EVAL_REPORT_TH_19970421_IDDA97_0.pdf.

³⁵ See ITC, *supra* n. 4.

this Protocol, its Annexes and Article XI of GATT 1994 and other relevant WTO Agreements.”³⁶

Articles 26 and 27 of the Goods Protocol then provide for a list of general and security exceptions, respectively, in language closely based on, if not reproducing verbatim, the texts of GATT Articles XX and XXI. In other words, all the inadequacies of the multilateral trading system in the regulation of export restrictions outlined above are alive and well inside the AfCFTA as well. What this means is that even if a group of African countries parties to the AfCFTA were to have the capacity to produce all Covid-19 medical equipment and supplies, to the extent those countries would not wish to allow exports of such products even an AfCFTA in full operation would not have helped to save lives in other African countries without such production capacity.

From this perspective, the fact that Covid-19 happened at a time when the AfCFTA Agreement was to enter operational phase gives Africa a window of opportunity to revisit the rules of the game and craft additional provisions to cater for such contingencies. The fact that even the EU legal system is struggling to ensure intra-Union trade in Covid-19 medical products today is indicative of the gravity of the challenge for Africa to make the AfCFTA fit for purpose in the event of such emergencies, but it is clear that the AfCFTA Agreement as it stands today is not an option.

Conclusion

In a world economic model where Africa exports predominantly raw materials and imports mainly finished products, including in this particular case much of the Covid-19 medical supplies, the crisis seems to leave Africa facing a double whammy:

- 1) the economic lockdown in much of the world has sent the price of commodities of export interest to Africa, including oil and hard minerals, to record lows, thereby causing significant and dramatic *declines in much-needed foreign exchange revenues* for most resource-dependent African countries; and
- 2) when advanced countries with production and supply capacity impose restrictions on the export of essential medical supplies, the inevitable outcome is a sudden drop in supplies, a jump in prices, and an equally dramatic *escalation in import bills* for African countries at a time when their already meagre resources are overstretched.³⁷

Even if African countries were able to find resources from somewhere – loans, grants, local fund-raising initiatives, cancellation of other priorities, and the like – their ability to procure a sufficient supply of essential drugs and equipment to save lives is being stymied because the products are in short supply on the market in the first place. Powerful nations such as members of the European Union procure these essential medical supplies collectively, further diminishing Africa’s ability to compete and

³⁶ See Article 9 of the Goods Protocol to the AfCFTA Agreement.

³⁷ For initial reflections on these issues, see ATPC, Trade Policies for Africa to Tackle Covid-19 (27th March 2020), available at https://www.uneca.org/sites/default/files/PublicationFiles/briefing_paper_on_trade_policies_for_africa_to_tackle_covid-19_290820.pdf.

purchase these products on the open market. As a result of this combination of factors, African governments whose foreign exchange reserves are fast-depleting due to falling commodity prices have to compete globally to purchase life-saving Covid-19 essential products whose supplies are low and declining and whose prices are high and rising. Considering the structural nature of the challenge, there is little that can be done in the short term. As a consequence, much of Africa is once again forced to rely significantly on the charity of others. The questions African policymakers are facing include: for how long and at what cost in terms of human lives, and what is the way out?

First comes the industrialisation imperative. A cardinal lesson Covid-19 has taught the developed world is about the unreliability of the economics of offshoring and outsourcing, whose otherwise efficient production and supply chains ceased to function as soon as the pandemic struck. As a result, and despite the fact that offshoring has, under normal circumstances, enhanced global production efficiency and led to cheap products on the market without compromising on quality, a number of developed countries are seriously considering policies of reshoring manufacturing operations, thereby potentially trading a degree of economic efficiency for supply security. If such policy prescriptions are valid for the developed world, they are even more so for African countries. The economic case for industrialisation and diversification in Africa has been compelling for too long; Covid-19 now makes it a matter of survival for the Continent and its citizens. The Covid-19 crisis is a wake-up call; Africa must now put industrialisation at the core of its development strategy.

Second, and related to the industrialisation imperative, is the need for an infrastructure of knowledge made up of skilled manpower to maintain a degree of research and development capacity. Africa can succeed in its industrialisation and diversification drive only if it is underpinned by robust research and development strategy and knowledge base. It is Covid-19 today; tomorrow it will be another pandemic-driven or natural disaster that makes certain products a matter of life and death. Medical supplies, PPEs and professional skills in high demand today to fight Covid-19 might not necessarily be of use tomorrow when another pandemic or other emergency strikes. In such circumstances, a society can only rely on its ingenuity and human and institutional infrastructure to carry out research to understand and explain new hazards, develop coping mechanisms, and design and manufacture necessary equipment and supplies. To this extent, R&D capacity therefore becomes an essential complement to a policy of industrialisation and diversification.

Thirdly, not only does industrialisation take time, even an industrialised Africa cannot aim to become self-sufficient in medical supplies or indeed other essential products; trade with the rest of the world will remain a critical part of the search for supply security in all sectors and for all countries, enabling African manufacturers to be part of well-functioning regional and global value chains. As such, Africa needs to continue to advocate for effective multilateralism in trade that ensures the rules of

the game are tightened³⁸ and interpreted and applied by its members in good faith, in the collective interest, and with a sense of solidarity.

Fourthly, and learning from the deficiencies of the global trading system exposed by Covid-19, Africa needs to explore legal and policy tools that would enable the AfCFTA Agreement to guarantee the freest possible flow of trade in essential products at times of difficulty such as this. From this perspective, Africa should keep the momentum triggered by Covid-19 to introduce new rules into the AfCFTA framework intended to remedy the deficiencies identified earlier.

Finally, the Covid-19 crisis has demonstrated that international law is inadequate as a basis for international cooperation in times of emergency. It is difficult to imagine a scenario where government officials would sit around a table and agree to a binding treaty obligation that limits their sovereign prerogative, and indeed obligation, to prioritise the lives of their citizens over those of others in times of emergency. To that extent, in times of emergency the use of export restrictions may be impossible to discipline by law. The challenge for diplomats and trade negotiators is to find a point of equilibrium between the current state of international law where governments are free to impose export restrictions almost at will under certain circumstances, on the one hand, and that imaginary world where states will be under strict legal obligation to share essential supplies with their neighbours, on the other. A good place to start is to ensure that, whenever governments have to impose such restrictions, they do so in a manner that is “targeted, proportionate, transparent, and temporary” as the G20 recently observed.³⁹

38 Former WTO Director-General Pascal Lamy recently argued, for example that the WTO might benefit from the export-side equivalent of the “Agreement on Safeguards”, saying “the WTO should have a similar agreement allowing countries to take emergency measures in exporting, but the key is how to define and contain these exceptions to prevent abuse.” See Wang Tianyu, “Former WTO chief: Globalization to look different after COVID-19”, *CGTN* (03 May 2020), available at <https://news.cgtn.com/news/2020-05-03/Former-WTO-chief-Globalization-to-look-different-after-COVID-19-Qcn0XXqHm0/index.html>.

39 See G20, *supra* n. 12; and WTO 2020, *supra* n. 5.



African Trade Policy Centre

United Nations Economic Commission for Africa
Menelik II Ave., P.O. Box 3001, Addis Ababa, Ethiopia
E-mail: luke@un.org • www.uneca.org/atpc