

Trade-Restrictive Measures on SPS Agreement: A Case Study of China's Restrictions on Trade in the Context of COVID-19 Pandemic

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Abstract

The outbreak of COVID-19 has led to shortages of essential medical supplies and equipment, creating significant barriers to the global supply chain. A number of countries have imposed trade restrictions in response to internal challenges posed by COVID-19, including threats to the health of their citizens. Since June 2020, China turned its eyes on trade measures to battle the spread of COVID-19 in its country. Extensive testing of containers and the content of imported food and agricultural products leading to complete import bans of specific products; including poultry products from Tyson Foods Inc., were among these trade restrictions. These measures have been met by harsh criticisms from other World Trade Organization (WTO) members who questioned their legality under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The purpose of this article is to examine the legitimacy of the trade restrictions imposed by China in response to COVID-19 pandemic, namely the suspension of imports on Tyson Foods Inc. (Tyson) under the SPS Agreement framework. The SPS Agreement State Parties may, through the implementation of legitimate sanitary and phytosanitary measures, prevent the import of harmful goods that threaten the health of their citizens. Since WTO aims to liberalize trade, the implementation of any trade restrictions is subject to the terms and conditions ignoring which would lead to the international responsibility of the member state.

Keywords: COVID-19, Global Supply Chain, Trade-restrictive Measures, SPS Agreement, China's Response.

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Introduction

Free trade has long been hailed as an important mechanism for expanding competition and eliminating monopolies, which in turn promote efficiency and innovation. The increasing global trade in recent years, however, has been accompanied by the rise of emerging economies, most notably China, which is seen as a significant competitor to major developed economies such as the United States (US) and the European Union (EU). Although the reversal of globalization could well damage economies in the end, many developed economies have slowly shifted from a belief in the benefits of free trade to viewing it as “an issue that requires further consideration”.³

The outbreak of COVID-19, which led to shortages of critical medical equipment and supplies around the world, has exposed the vulnerability and flaws of the global supply chains resulting from increased free trade and globalization. Some countries have engaged in a zero-sum competition for essential goods and imposed unilateral export restrictions or prohibitions at the expense of their trading partners. Under the current WTO regime, countries usually invoke exception clauses to justify restrictive trade measures on the grounds of a “shortage of essential products” or “health risks.”⁴

The global Free Trade regime seeks trade liberation by removing obstacles, including tariff and non-tariff barriers, from trading goods and services. However, some imported goods have safety and health problems and importer countries are worried that importing these goods would endanger their public health and general hygiene; hence they create restrictions or prohibitions on the import path of some commodities in some cases. However, the adoption of these restrictions or prohibitions should not be used as a tool for the countries to constrain importing or exporting goods without justified

³ Hubert Rene, SCHILLINGER, “In Need of Rethinking: Trade Policies in Times of De-Globalisation” (2016), Dialogue on Globalization Friedrich Ebert Stiftung, available at <http://www.library.fes.de/pdffiles/iez/global/12761.pdf>. P. 1

⁴ Yun ZHAO & Lifei LIN, “Trade-restrictive Measures under the WTO Framework in the Context of the COVID-19 Pandemic: The Example of China” (2021), American Journal of Trade and Policy, 8(1), 71-86, p. 71-72.

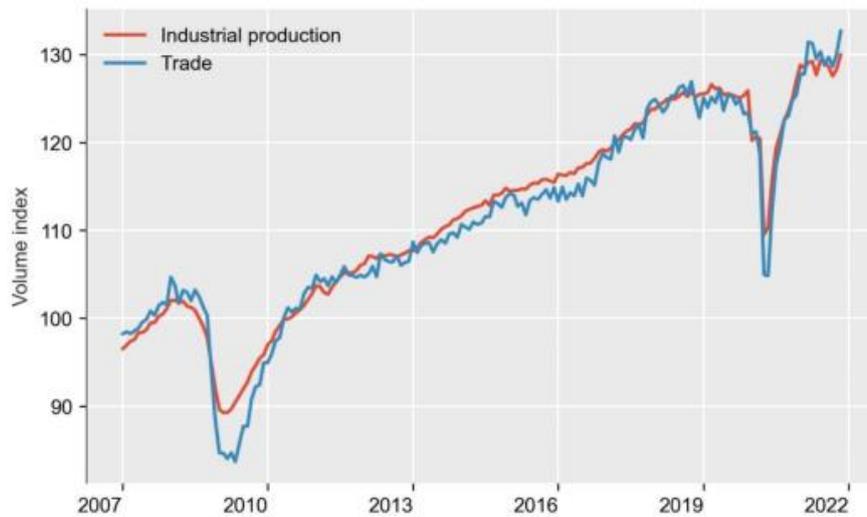
reasons. Thus, at the end of Uruguayan talks in 1994, for attempting to remove non-tariff barriers from free trade path, WTO members were regulated the SPS Agreement⁵.

Following COVID-19 pandemic, some countries adopted trade restrictions to fight against this pandemic. Their main citation was the thread of importing such products on their citizens' health. China, among these countries, restricted and banned importing some food and agricultural products with the aim of protecting its citizens. Therefore, the question is that whether China's measures like banning the importation of poultry products from Tyson have been in accordance with its commitments in SPS Agreement or not. To answer this question, China's measure is examined within the framework of SPS Agreement and in accordance with the terms and obligations of scientific evidences, risk assessment, non-discrimination and lack of more limitation than necessary. Before that and in order to describe the issue, the effect of COVID-19 on the global supply chain, the implementation of China's trade restrictions and health protection in SPS Agreement will be discussed.

I. The Impact of COVID-19 on the Global Supply Chain

COVID-19 is a humanitarian crisis on a global scale. The virus continues to spread throughout the globe, placing health systems under unprecedented stress in the battle to save lives. The human scale of this tragedy is set to worsen as the virus spreads to lower income countries with weaker healthcare systems. In the March 2020 OECD Interim Economic Outlook, the downside scenario saw global growth halved to 1.5%. That was optimistic. We now estimate that for each month that the necessary containment measures continue, the drop in output is equivalent to a decline in annual GDP growth of up to 2 percentage points. Also, the statistics of the WTO show that volume of world trade and industrial production faced a sharp drop during the COVID-19 pandemic. In 2022, this amount has grown. (Table 1)

⁵ The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

Table 1. Volume of World Trade and Industrial Production

Source; OECD calculations based on CPB World Trade Monitor 2022,z

The global economy has suffered a severe shock since the outbreak of the COVID-19 pandemic. In April 2020, WTO predicted that under an optimistic scenario, global trade would shrink by 12.9% in 2020, while a pessimistic scenario predicted 32%. In October 2020, the WTO issued a newly revised forecast in light of the changing situation, projecting that global merchandise trade would fall by 9.2%. This epidemic has a long incubation period, a high transmission rate, and strict control over the gathering and movement of people. Therefore, under the new situation, it is expected that the impact of the epidemic on industry will be greater than that of SARS⁶ in 2003.⁷

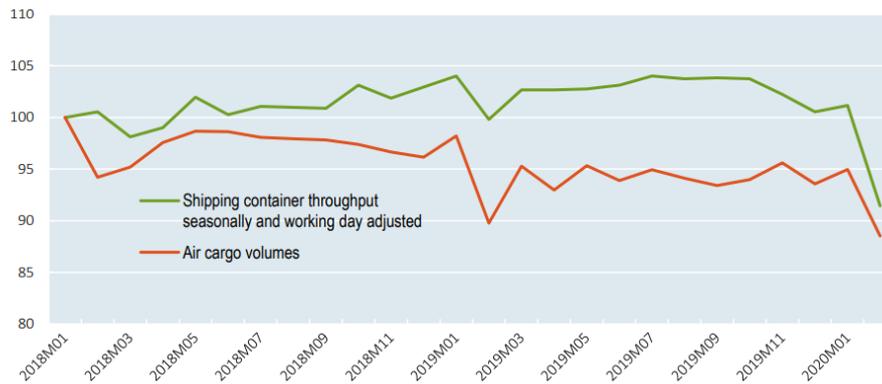
The basic priority in such situation is to maintain the global chain of fundamental goods, especially essential products such as medical materials and equipment and food and health products. However, statistics indicate the lack of integrity in global supply chain and the reduction of commercialization as well as goods and services import and export. The limitation of air trade, due to the prohibition or

⁶ Severe Acute Respiratory Syndrome (SARS)

⁷ Panpan WEI, Cheng JIN, and Chen XU, "The Influence of the COVID-19 Pandemic on the Imports and Exports in China, Japan, and South Korea" (2021), *Front. Public Health*, 9:682693, p. 1

reduction of flights has led to increase the demand for marine trade of essential products as the consequence of continuation of COVID-19 crisis as well as the trade restrictions imposed by WTO members. (Table 2). Therefore, it seems that in March 2022, the global supply chain is far from the existing conditions before COVID-19 pandemic.

Table 2. Impact of COVID-19 on Air and Sea Trade



Source OECD, 2020

II. Restriction or Prohibition of Import: China's Response to the COVID-19 Pandemic

In dealing with the economic and public health impacts of COVID-19 pandemic, many countries have adopted various trade restrictions or related measures, many of them with markedly nationalist characteristics. According to statistical data provided by the WTO, as of July 3, 2020, 83 countries and regions had taken a total of 216 trade or trade-related measures, covering both export and import areas.⁸ Sixty-four countries or regions have placed export control restrictions on personal protective equipment (PPE; e.g., mask, gloves) and certain medical products or equipment.⁹ Most of these export control measures, 108 in total, constitute temporary restrictions or prohibitions on particular drugs and medical devices and can be divided into two categories: licensing or permit

⁸ See the WTO website for a link to relevant information and statistical data: "COVID-19: Trade and trade-related measures", Available at https://www.wto.org/english/tratop_e/covid19_e/trade_relat_ed_goods_measure_e.htm(visited 22 Jan 2022)

⁹ Ibid, and ITC Market Access Map, Available at macmap.org/covid19#based on media reports and official legislation

requirements relating to exports and outright export prohibitions. For example, the US Federal Emergency Management Agency (FEMA) has implemented a temporary measure that restricts certain scarce or critical materials to being used to meet domestic demands only, with permission from FEMA required for any export of those materials.¹⁰

On April 1, 2020, China implemented licensing or permit requirements relating to exports of test kits and other medical supplies, which means that enterprises are required to obtain domestic quality certification before exporting them.¹¹ China later expanded these licensing requirements to the export of non-medical masks and other medical supplies, requiring the conformance of such goods with either Chinese or foreign quality standards.¹² The EU also issued rules requiring export authorization from EU member states to safeguard the supply of PPE from March 15 onwards.¹³

As the situation evolves, similar export restrictions and measures may be placed on even more goods deemed “essential” for public health and economic purposes. In the meantime, approximately 100 countries and regions have adopted roughly 129 temporary import measures.¹⁴ Unlike export measures, these measures to promote trade

¹⁰ See Department of Homeland Security - Federal Emergency Management Agency (44 CFR Part 328 - RIN 1660-AB01): Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources to Domestic Use, Federal Register/Vol. 85, No. 70 FR No. 20195 (10 April 2020) Available at <https://www.govinfo.gov/content/pkg/FR-2020-04-10/pdf/2020-07659.pdf> (visited 22 Jan 2022).

¹¹ See General Administration of Customs, Ministry of Commerce, National Medical Products Administration of the People’s Republic of China: Announcement of the General Administration of Customs of the People’s Republic of China national Medical Products Administration No.5 of 2020, Available at: http://www.gov.cn/zhengce/zhengceku/2020-04/01/content_5497878.htm (visited 22 Jan 2022).

¹² General Administration of Customs, Ministry of Commerce, National Medical Products Administration of the People’s Republic of China: Notice on Further Strengthening Export Quality Supervision of Pandemic Prevention Materials (Announcement of the General Administration of Customs of the People’s Republic of China national Medical Products Administration No.12 of 2020), Available at: http://www.gov.cn/zhengce/zhengceku/2020-04/26/content_5506162.htm (visited 22 Jan 2022).

¹³ WTO documents G/MA/QR/N/EU/4/Add.2, 7 May 2020; and G/MA/QR/N/EU/4/Add.3, 16 June 2020; and Commission Implementing Regulation (EU) 2020/568 (23 April 2020). Available at: <https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32020R0568&from=EN> and <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2147>(visited 22 Jan 2022)

¹⁴ See the WTO website for a link to relevant information and statistical data: “COVID-19: Trade and trade-related measures”; ITC Market Access Map

liberalization have primarily targeted PPE and medicines necessary to treat people infected with the virus or basic necessities such as food. Such measures include both import promotion measures and import restriction measures. Among them, tariff relief is the most popular means of promoting the import of certain emergency supplies.¹⁵ China is also affected by these import restrictions and cites them in defense of its restrictions on trade. (Table 3)

Table 3: Selected Restrictive Measures Affecting China

Country	Types of Measures	Measures	Affected Countries	Status
Egypt	Import prohibitions/restrictions for SPS reasons	Temporary suspension of imports of garlic, carrots, and green ginger from China	China	Effective from February 9, 2020
Kazakhstan	Import prohibitions/restrictions for SPS reasons	Import ban on Chinese fruits	China	Effective from March 2 to April 22, 2020
Georgia	Import prohibitions/restrictions for SPS reasons	Import ban on live animals from China	China	Effective from January 28, 2020
Jordan	Import prohibitions/restrictions for SPS reasons	Temporary import ban on all animal and plant-based products from China	China	Effective from February 2, 2020
Mauritius	Import prohibitions/restrictions for SPS reasons	Temporary import restrictions on live animals, including fish, from certain	China, Italy, Iran, South Korea, Switzerland, Reunion Island, and the European	Effective from March 16 to June 3, 2020

¹⁵ Yun ZHAO, *supra* note 2, p. 73

		countries	Union	
Russian Federation	Import prohibitions/restrictions for SPS reasons	Temporary import restrictions on exotic and decorative animals, including insects, arthropods, amphibians, reptiles, and other, live fish and hydrobionts from China (active since January 30, 2020; extended on February 18, 2020)	China	Effective from January 30 to May 21, 2020

Yun ZHAO, supra note 2, p. 82

In such a situation, China took measures and means to control and impose restrictions, and adopted various measures from extensive test of containers and the content of imported foodstuffs and agricultural products to complete importation ban of certain food products, including poultry products of Tyson. These measures have been met by harsh criticism from other WTO members who questioned their legality under SPS Agreement. This issue has been discussed in SPS Agreement Committee in the latest quarterly announcement sent by the US in November 2021 (the first announcement was on 18 November 2020) and the meeting of its subsequent Committee. China has defended its measures in all of these meetings.¹⁶ The question that arises is to what extent China's restrictive measures comply with the standards of the SPS Agreement. For this purpose, in this article, the case of poultry products of Tyson has been studied in order to examine and closely match China's measures with the Agreement. Also, the current case has had the most disagreement and opposition

¹⁶ <http://spsims.wto.org/en/SpecificTradeConcerns/View?ImsId=487>

from countries including the United States in the dispute settlement body of the WTO.

III. The Balance between Trade Liberalization and Health Protection in SPS Agreement

As the SPS's preamble indicates, the agreement is aimed at striking a balance between, on the one hand, Member States' right to adopt measures protecting human, animal, and plant life and health and, on the other, the negative trade effects such measures may cause.¹⁷ Therefore, the purpose of this article is whether China's measures in restricting poultry products of Tyson's imports were in line with this goal or not.

The main issues of SPS Agreement are health and international trade. The health issue of SPS Agreement means that members are able to protect their citizens, animal or plant life or health in their territory through the adoption of some measures. These measures can be carried out in terms of trade restrictions or prohibitions, which are so called sanitary and phytosanitary measures in SPS Agreement. An important question that arises is whether the health protection range is specified in SPS Agreement or not? In response, it could be said that according to section one of Appendix A of SPS Agreement, member states can adopt sanitary and phytosanitary measures to fulfill specific goals below:

- a) To protect animal or plant life or health within the territory of the member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- b) To protect human or animal life or health within the territory of the member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- c) To protect human life or health within the territory of the member from risks arising from diseases carried by

¹⁷ Boris RIGOD, "The Purpose of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)", (2013), *The European Journal of International Law* Vol. 24 no. 2, p. 504

animals, plants or products thereof, or from the entry, establishment or spread of pests; or

- d) To prevent or limit other damage within the territory of the member from the entry, establishment or spread of pests.

Therefore, any action outside this framework, even if it is aimed at protecting health, is not considered a health action.¹⁸ First, the SPS Agreement acknowledges that WTO members have a sovereign right to determine their own level of health protection, which means that members can temporarily implement necessary trade-restrictive measures on imports in the event of a disease outbreak or uncontrollable epidemic. However, such measures should not constitute unnecessary, arbitrary, scientifically unjustifiable, or disguised restrictions on international trade.¹⁹

The SPS Agreement also requires that member states justify their implementation of trade measures on the basis of scientific evidence showing an actual risk of endangerment to human life and health.²⁰ Members should not take excessive measures without sufficient evidence or if those measures have the implied purpose of trade protection. The measures taken must be “necessary,” “reasonable,” “evidence-based,” and “limited.” Footnote 3 to the SPS Agreement also contains a necessity test, whereby any alternative measure must “achieve the appropriate level of sanitary or phytosanitary protection,” be “reasonably available, while also taking into account technical and economic feasibility,” and, finally, be “substantially less restrictive on trade.”²¹

If scientific evidence sufficient to prove or assess the risk to human, animal, or plant life or health is unavailable, WTO members may take interim measures based on the available information on potential health risks. This stipulation is pertinent to the COVID-19 situation, as knowledge of the coronavirus remains limited, requiring

¹⁸ SPS Agreement. Annex A. article 1

¹⁹ Yun ZHAO, *supra* note 2, p.77

²⁰ Joost PAUWELYN, “The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes. EC-Hormones, Australia-salmon and Japan-varietals” (1999), *Journal of International Economic Law*, 641, p. 645

²¹ SPS Agreement, Art 5.6 and footnote 3

in-depth scientific research in the future. However, the concerned members should specify the period that related measures will be in place and re-examine their scientific nature within a reasonable period of time. Otherwise, the measures could evolve into substantial trade barriers. The transparency obligations pertaining to SPS measures are stipulated in Art. VII of the SPS Agreement. With regard to measures or any changes relating to sanitary or phytosanitary issues, member states must also provide notification and information in accordance with the provisions of Annex B.²²

By establishing WTO, many health and safety issues that were previously considered merely domestic, became in the realm of WTO Agreements.²³ This caused the tension between the governments' rights to confront with health threats and the rules and regulations governing international trade. The cases claiming a violation of the Agreement in WTO Dispute Settlement Body show this tension. Since the enforcement of SPS Agreement, WTO Dispute Settlement Body and WTO Appellate Body have investigated important claims on Member States' violations from the provisions of this Agreement. The most important claims are the Hormones-European Communities²⁴, Salmon-Australia²⁵, Agricultural products-Japan²⁶, Apples-Japan²⁷ and approval and marketing of Biotech Products-European Communities²⁸. In all of these cases, importer countries have been sentenced to non-compliance with some regulations of SPS Agreement.

²² SPS Agreement, Art 7.

²³ Andrew T. GUZMAN. "Food Fears: Health and Safety at the WTO" (2004), *Virginal Journal of International Law*; 45:38

²⁴ EC (Measures Concerning Meat and Meat Products (Hormones), 1996

²⁵ Australia- Measures Affecting Importation of Salmon, 1995

²⁶ Japan- Measures Affecting Agricultural Products, 1997

²⁷ Japan- Measures Affecting the Importation of Apples, 2002.

²⁸ European Communities- Measures Affecting the approval and marketing of Biotech Products, 2003, see: Caroline E. FOSTER, "Public Opinion and the Interpretation of the world Trade Organization's Agreement on Sanitary and Phytosanitary Measures" (2008), *Journal of International Economic Law*, 11(2), pp. 427-458, p. 429

IV. The Legitimacy of China's Trade Restriction under the SPS Agreement Framework

The SPS Agreement has been signed in 14 articles and 3 appendixes on 15 April 1994 in Morocco, along with other main WTO agreements. This Agreement has recognized the right to adopt criteria and standards to protect human health and lives for its members in essential cases. Nevertheless, the determination of these criteria, standards and the requirements of determining them has been deposited to the members. This, of course, may create the possibility of supporting domestic products, which leads to discrimination in international trade law. In this regard, to prevent the conversion of standards, some barriers against global trade rules and regulations were created under SPS Agreement in which, however, health issue is considered as a legal goal to restrict trade.²⁹ This Agreement is regulated for the expansion of Article 20(b) of the General Agreement on Tariffs and Trade (GATT),³⁰ while recognizing WTO members' right to adopt essential measures to protect human, animal or plant life or health, imposes obligations and commitments on them so that these measures would not make the process of free trade in the world difficult or restricted as much as possible. To achieve this goal, the provisions of this Agreement impose important obligations on WTO members over creating sanitary and phytosanitary provisions and regulations.

a) The Need for Scientific Justification and Risk Assessment

The SPS Agreement considers a special role for science due to its subject, which can be seen in different Articles (Article 2(2), Article 3(3) and Article 5(1and 2)).³¹ The science element has made SPS Agreement unique in WTO global system. In this regard, Article 2(2)

²⁹ WTO Agreements and Public Health, A Joint Study by the Who and the WTO Secretariat, 2002, p. 32

³⁰ Gruszczynski, LUKASZ, Regulating Health and Environmental Risks under WTO Law, A Critical analysis of the SPS Agreement, (Oxford University Press, 2010), p. 68

³¹ Joanne SCOTT. The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary. (New York: Oxford University Press; 2007). p.3.

of Agreement asks members to adopt their sanitary measures based on “scientific principles” and do not maintain them without sufficient scientific reasons.

The rules about scientific reasons are one of the disagreement factors between WTO member states and experts; in the meantime, the silence of SPS Agreement has increased the severity of disagreements.³² The meaning of “sufficient scientific reason” is among the most important ambiguities of SPS Agreement. The Primitive Panel in “Importation of Apples - Japan” case has tried to eliminate this ambiguity by providing a method-driven definition of “scientific reason”. In the opinion of primary organ, the reasons, which have been collected through scientific methods, can merely be considered scientific.³³ However, the Primitive Panel does not address which method can be considered scientific. The Research panel in “Importation of Salmon-Australian” case in a new attempt to describe scientific reason links it to the concept of risk assessment (Article 5(1)).³⁴ As the result of this linkage, the breach of Article 2(2), automatically leads to the violation of Article 5(1). This means that when it is possible to consider the country’s sanitary action based on scientific reasons that the risk assessment necessarily has been performed and consequently the proportion between risk and sanitary measure be verified.³⁵ Assuming, if the Member State adopts a rigorous and severe sanitary measure for fighting against a small and minor danger, such a disproportionate measure cannot be based on a scientific reason.

Another related issue to the scientific reason, which should be considered, is the “adequacy of reason”. According to the judicial procedure, two factors are involved in diagnosis the adequacy of scientific reason. The first factor is the risk seriousness; for example, in cases where irreparable dangers, such as death or human health risks are involved, governments act with more prudence; and as a

³² Robert HOWSE. “Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization” (2000), *Michigan Law Review*; 98(7): 2329.

³³ Panel, Japan-Measures Affecting the Importation of Apples, WT/DS 945/R (10 December 2003).

³⁴ AB, Australia-Measures Affecting Importation of Salmon (Australia Salmon), WT/DS 18/AB/R; 1998. Para, p. 138

³⁵ AB, Japan-Apples, Para. p.164.

result, the more serious the risk becomes, less scientific reasons are needed for adopting sanitary measures and vice versa.³⁶ The second factor is to examine the relationship between sanitary measures and the scientific reason; in other words, when the scientific reason is enough that an “objective and reasonable” relationship exists between it and the sanitary measure.³⁷ At the same time, elements such as the specifications and characteristics of discussed sanitary measure and the quality and quantity of scientific reason are also involved in identifying this relationship.³⁸ Today, new social science approaches along with referred objective criteria, suggest paying attention to mental criteria for determining concepts such as the scientific reason adequacy and the importance of danger. For example, the comments of those who are at risk, mental judgments of experts and specialists about a subject, public opinion and the values of each society can be important criteria for obtaining proportionality and the adequacy of scientific reason ultimately.³⁹ Mental criteria have the benefit of being different from one country to another one.

Accordingly, China can prove that the taken suspension is based on scientific principles by conducting and providing risk assessment in accordance with Article 5(1 and 2) of SPS Agreement. Moreover, the risk assessment must take place in accordance with paragraph 4 of the Appendix A, so that China can investigate the potential adverse impacts on human or animal life due to the presence of contaminants or pathogenic organisms in food.

³⁶ AB Report, Hormones para. p. 124

³⁷ AB, Japan Measures Affecting Agriculture Products, WT/DS 76/AB/R; 1999. Paras. p.73-74

³⁸ The Appellate Body implicitly expressed in Hormones case that members can build regulations and sanitary and phytosanitary standards relying on scientific beliefs as well as scientific ideas with the degree of prevalence and acceptability. In this case, the Appellate Body announced that in most cases, governments tend to build their legal and administrative standards on major scientific reasons. In other cases, governments may act with goodwill based on a different opinion, which is originated from qualified and respectable resources.

Appellate Body Report, European Communities-Measures Concerning Meat and Meat Products, para.194.

³⁹ Douglas CRAWFORD-BROWN, Joost PAUWELYN, Kelly SMITH, “Environmental Risk, Precaution, and Scientific Rationality in the Context of WTO/NAFTA Trade Rules” (2004), *Journal of Risk Analysis*; 24(2): 467.

The proper review in this case has taken place in US/Canada-Continued Suspension⁴⁰: the Member State must (i) identify the additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs at issue; (ii) identify any possible adverse effect on human or animal health; and (iii) evaluate the potential for that adverse effect to arise from the presence of the identified substance. While there is no doubt that the first two issues are available about COVID-19, but its abusive effect on imported poultry requires more assessment. In general, it is more assumed that COVID-19 is spread through air. In addition, most scientists agreed that there is not much risk for spreading it through food imports⁴¹. However, it is not completely safe. Member States are not obliged to carry out their evaluation based on the majority view. In EC-Hormones⁴², the Appellate Body receives that if governments do this with good faith, they may take their assessments and evaluations based on minority comments (qualified) or divergent opinions, especially when the risk is of a life-threatening character. Since China has eradicated almost all cases of catching and transferring COVID-19 in its territory, and China's goal was to prevent any other danger for the re-immersion, and in fact there were some virus signs in imported foods⁴³, seems that China has done the risk assessment in the above mentioned manner. However, even if China has done such an assessment, the suspension cannot be justified based on it. In US-Poultry⁴⁴, the Panel found that the US import ban was not based on a risk assessment as the US itself did not provide evidence that, in fact, it was. As China has yet to provide a risk assessment, the same situation applies here. Therefore, despite the fact that the

⁴⁰https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?DataSource=Cat&query=@Symbol=WT/DS321/R*&Language=English&Context=ScriptedSearches&languageUIChanged=true

⁴¹ <https://www.icmsf.org/publications/papers/>

⁴²https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?DataSource=Cat&query=@Symbol=WT/DS26/AB/R&Language=English&Context=ScriptedSearches&languageUIChanged=true

⁴³ <https://www.foodsafetynews.com/2020/11/china-reports-further-food-related-coronavirus-findings/>

⁴⁴https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?DataSource=Cat&query=@Symbol=WT/DS392/R&Language=English&Context=ScriptedSearches&languageUIChanged=true

transmission of COVID-19 by food has not been scientifically proven, China has not cited this factor as a basis for risk assessment.⁴⁵

b) Arbitrary or Unjustifiable Discrimination and Prohibition of More Trade Restrictive than Necessary

Even if we admit that the suspension was made by China based on risk assessments, the SPS measure must not arbitrarily or unjustifiably discriminate. In *India-Agricultural Products* the⁴⁶, the Panel considered two conditions: (i) whether the measure arbitrarily or unjustifiably discriminates between Members where similar conditions prevail, including between the own territory and that of other Members and (ii) whether the measures are applied in a manner that constitutes a disguised restriction on international trade. On the other hand, Article 4 also emphasizes on the temporariness of the measures. Since the scientific findings about COVID-19 are still inadequate and the mortality rate of the disease throughout the world is increasingly daily, it is unclear that until when government will be continuing trade restrictions. In addition, it should be considered that

⁴⁵ The precautionary principle is another criterion that can be applied in the present issue. The principle has a significant role in striking a balance between international trade liberalisation and public health protection. Generally speaking, the precautionary principle was reflected in article 5.7 of the SPS Agreement, (Appellate Body Report, *EC-Hormones* case, Doc. WT/DS26/AB/R, para.124) which allows Member States to provisionally impose precautionary measures in case of scientific uncertainty. Within the language of the SPS Agreement, the precautionary principle is considered merely as a part of the risk management and only allows precautionary measures for a temporary period. In the *EC-Hormones* case, the EC contended that the principle shall not be constrained as such, but rather be broadly applied also in risk assessment and thus can justify the adoption of non-provisional measures. (*EC-Hormones*, Para.16). Therefore, the practice of the WTO shows that China could invoke the precautionary principle in the current issue within the framework of international environmental law. However, there are different interpretations and claims of the application of this principle in international trade law. In this article, we have refrained from applying this principle to the present case due to the fact that the discussion is too long. For more information, see: Akawat LAOWONSIRI, “Application of the Precautionary Principle in the SPS Agreement”, (2009), *Max Planck Yearbook of United Nations Law*, Volume 14, 2010, p. 565-623.

⁴⁶[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20wt/ds430/r*%20not%20rw*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20wt/ds430/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true)

in accordance with the WTO's information table⁴⁷ that is updated daily, some countries have somehow controlled the disease with their own sanitary measures; therefore, there is a flaw that WTO members need re-commerce with countries, which have white situation for estimating their business and trade. This will also lead to discriminatory limiting measures and will be in conflict with the explicit text of Article 5(5). In the dispute between China and US in the case of "Certain Measures Affecting Imports of Poultry from China"⁴⁸, the Dispute Settlement Body expressed that all conditions of Article 5(5), including different situation, unjustified measures and arbitrary discriminations have been done by US by immersive review of the subject 29 September 2010. On the other hand, the US Agricultural Adjustment Act is in conflict with the provisions of Article 5(5) of SPS Agreement, so here the ruling was in favor of the Chinese government.

In the case of China's suspension vis-à-vis Tyson, there are two interesting considerations: the first one is that these regulations have only been applied to a specific factory in the US and none of the WTO Member States has been influenced by this particular measure. The second one is that China itself faced the prevalence of the virus

⁴⁷<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports>

⁴⁸ WTO, DS392: United States — Certain Measures Affecting Imports of Poultry from China, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds392_e.htm
The US limited the importation of poultry products from China based on the Agricultural Adjustment Act (2009), section 727 and the SPS Agreement. In contrast, the Chinese government was protesting the US government measure and asked consultation on 29 April 2009 from WTO Dispute Settlement Body. China claimed that applying a distinct level of US sanitary measures has caused a different situation that Article 5(5) of SPS Agreement strictly prohibits. In other words, the different situation at first has led to the prohibition of imports from China, secondly the standard of the importation of poultry products from other WTO Member States, which is obeyed by the US due to the implementation of food inspection and sanitary services law, have the lower level in comparison with the provisions of SPS Agreement. As a result, the Chinese government is the only victim the arbitrary and unjustified US discriminations. Thirdly, the enforcement of food inspection and sanitary services law has only excluded China from exporting to US and does not include other members. While this country has the best sanitary and food health system in the world.
[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(@Symbol=%20wt/ds392/r*%20not%20rw*\)&Language=ENGLISH&Context=FomerScripte dSearch&languageUIChanged=true](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds392/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScripte dSearch&languageUIChanged=true)

in a wholesale market in Beijing⁴⁹ when has applied the suspension, which seems to be a discriminatory behavior towards its own people and foreign parties, because this suspension does not cover domestic products. Consequently, China has also imposed this discrimination in poultry importation from US case, not only to other member states but also to domestic Chinese market. This discriminatory behavior, even if the same conditions are applied between China and other countries, will continue to be unjustified, especially because of the fact that nowadays all countries are facing the pandemic. However, if a distinct measure is not arbitrary or justifiable, it can still be valid. Here, the considerations of the cause or basic logic of this discriminatory measure should be expressed. Being arbitrary or unjustified may be due to the lack of risk assessment, which is true about this case. However, even by ignoring the lack of risk assessment, the basic logic behind this measure shows its arbitrariness. By expressing the point that the implementation of restriction and prohibition has been done with the goal of preventing the prevalence of the virus, there is no logical explanation of why China has only suspended a specific factory, instead of targeting the entire poultry industry and all countries including its own country in which significant number of them exist.

The next condition is that the suspension must create a changed and fake discrimination or restriction in trade. This criterion is actually not related to the purpose of SPS Agreement, it is but a trade constraint criterion that is hidden under the criterion of this Agreement⁵⁰. It should be considered that China and US have a very difficult history about the poultry trade, including a multi-year ban that has recently been lifted by China⁵¹. In addition, China and US were recently conducting a business deal which requires China to buy agricultural products at 36.5 billion \$. Any more problems with food exporters could lead to a dissolution of renegotiation of the deal.

⁴⁹ <https://www.bbc.com/news/world-asia-china-53034924>

⁵⁰ https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?DataSource=Cat&query=@Symbol=WT/DS18/AB/R&Language=English&Context=ScriptedSearches&languageUIChanged=true

⁵¹ <https://www.dw.com/en/china-lifts-ban-on-us-poultry/a-51259010>

Such a dissolution would not be desirable for China. It seems that this country would not be able to do some parts of the deal. Considering this point, it is logical to conclude that the criterion of SPS Agreement (being arbitrary and discriminatory) is actually a disguised restriction in international trade.

Lastly, the other SPS measure shall not be more trade restrictive than necessary. The condition which should be observed is the existence of a trade criterion that (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the member's appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the contested SPS measure (US-Poultry; Australia-Salmon). For example, we can point to the dispute between the US and India regarding the importation of agricultural products.⁵² On 4 June 2015, WTO Appellate Body said in its report that India's importation restrictions on agricultural products had nothing to do with Article 2 of SPS Agreement and based on Article 5(6), India's measures were beyond the necessary and disproportionate. Hence, since India did not pay attention to the risk assessment in its decisions, its defenses in this section are not acceptable. WTO Dispute Settlement Body in similar rulings, including the dispute between the EU and Russia regarding the

⁵² WTO, India — Measures Concerning the Importation of Certain Agricultural Products, 6 March 2012,

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds430_e.htm.

On 6 March 2012, the US was on this opinion that India's restrictions on importations with the aim of preventing the prevalence of avian influenza, in violation of WTO Agreements and complained of this country. US believed that the risk assessment was not done based on scientific evidence in discriminations on importation resulting the violation of SPS Agreement. In addition, the US claimed that some provisions of GATT, such as the removal of quantity restriction, transparency and non-discrimination were not observed. The Indian government as a response referred to the General Importation Act 1989 and its amendment approved 2001. India also justified its measures under international standard rules and noted that the importation restrictions applied by this country are not related to the risk assessment of Article 5(2), but India has adopted the decisions because of scientific principles and evidence of Article 2(2). The Indian government while defending its measures asked WTO Dispute Settlement Body to obey the advice of competence international organizations' experts.

[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(@Symbol=%20wt/ds430/ab/r*%20not%20rw*\)&Language=ENGLISH&Context=FomerScripstedSearch&languageUIChanged=true](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds430/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScripstedSearch&languageUIChanged=true)

“Measures on the Importation of Live Pigs, Pork and Other Pig Products from the EU”, in 2017⁵³ and Japan and South Korea dispute in the case of “Import Bans, and Testing and Certification Requirements for Radionuclides” in 2018⁵⁴, has also repeated the same procedure. Here, it can be claimed that the testing of products at the time of importing to the country, provides an acceptable and feasible alternative, which by maintaining the goal of preventing the virus pandemic still makes a good sanitary level, and does not make a significant discrimination on trade. This also has been used by China in other cases. The only barrier to the implementation of testing will also be the lack of risk assessment.

Conclusion

The global free trade system that WTO is responsible for, is seeking to liberate trade and remove the trade barriers. Undoubtedly, reducing the tariff and non-tariff barriers which goods and services trade is facing is one of the most specific encouragement trade tools. However, some imported goods can be problematic for human health and safety and it is natural that the importing countries are always worried about the entry of such goods to their territory and for resolving it start to make prohibitions. Nevertheless, according to the free trade system, these prohibitions should not be a ground to make restriction in goods trade. WTO members have regulated an Agreement to monitor sanitary and phytosanitary measures to remove non-tariffs barriers like this. In fact, the SPS Agreement is facing a kind of challenge between protecting health and preventing trade constraints. Hence it announced its goal to keep balance between the governments’ rights to adopt sanitary measures and to reduce the negative effects of these measures on international trade.

⁵³ WTO, DS475: Russian Federation — Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds475_e.htm

⁵⁴ WTO, DS495: Korea — Import Bans, and Testing and Certification Requirements for Radionuclides, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds495_e.htm

The COVID-19 pandemic encountered the global chain of goods trade with a principal barrier. It also caused a reduction in international trade. In addition, has led some countries to adopt some trade restrictions on importations in response to the crisis caused by COVID-19 and the threat of their citizens' health. In such a situation, China adopted some trade measures including the import ban of poultry products from Tyson, which faced the protest of other countries including the US and the issue was raised in SPS Agreement Committee. The study of the legitimacy of China's trade constraints in accordance with SPS Agreement, showed that the country's measure was in contrast with the obligations in SPS Agreement including the basis of scientific evidence and risk assessment of trade restrictions. It was also proven that China's measure over prohibition the importation of poultry products from Tyson was discriminating and was a restriction more than necessary according to the Agreement; therefore, China has violated its commitments of SPS Agreement. Seems that the best solution for reducing the damages caused by facing similar crises in the future, is referring to the regulatory framework of WTO, especially emphasizing the narrow interpretation of its Agreements and the creation of transparency in the performance of members relating to fair access to the global supply chain.

