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Committee on Market Access

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WTO RESPONSE TO THE PANDEMIC: EXPORT RESTRICTIONS AND PROHIBITIONS

COMMUNICATION FROM CANADA

The following communication, dated 29 July 2022, is being circulated at the request of the delegation of Canada.

1 INTRODUCTION

1.1. The rules governing the use of export restrictions were drafted in an era when free resort to such policies would have most certainly slowed, if not set back, domestic and international efforts to recover from the destructive effects of World War II. Not wanting to repeat the experience from the pre-war period, GATT negotiators agreed that such restrictions must be prohibited, hence the resulting Article XI:1 provision. However, in deference to national sovereignty, those same negotiators included a series of carve-outs from the scope of the prohibition, one of which allows the imposition of a temporary measure on exports from a Member "to prevent or relieve critical shortages of foodstuffs or other products essential" to that Member - Article XI:2(a).

1.2. Given the context of world trade in the late 1940's, it is unlikely that those same negotiators could have imagined the level of integration of today's international trade, the rapid advancement of technologies and communications to facilitate that trade, nor forecast the formation of the varied supply chains that support production in the current global economy.

1.3. Moreover, even if restricting exports may make sense in the context of a local crisis, such an action may not be appropriate or helpful in the context of a global effort to address a global crisis. As observed in a technical note prepared by the GATT Secretariat in the 1970's, "not only do [export restrictions] prevent the scarce product from being sold where it is needed most but they also tend to exacerbate the world shortage by reducing, as a result of the lowering of domestic prices, the incentive to produce more and to waste less in the country restricting exports".¹

1.4. The multilateral system of trade rules has provided a stable and predictable environment for the provision of good and services, supporting economic growth and poverty reduction. In the time of real or anticipated global crisis, however, undisciplined resort to export restrictions may upset that stability and predictability and may cause unintended negative effects on the efforts of other Members to also address that crisis. We will have more to say about the particular situation concerning COVID-19 in a subsequent paper.

1.5. As a first step, Canada wishes to share the information it has found regarding the negotiation of GATT Article XI and the examinations of its use by Members that have taken place since this provision was first agreed. This communication also provides a summary of the information gathered so far at the WTO on the actions taken by Members during the COVID-19 pandemic, as well as the statements Members have made regarding the use of export restrictions and prohibitions since the COVID-19 pandemic began. It is not meant to be exhaustive, and we welcome other delegations adding their contributions to the list.

¹ GATT and Export Restrictions: Technical Note by the Secretariat – [MTN/3B/9](#).

2 GATT ARTICLE XI - EXPORT RESTRICTIONS AND PROHIBITIONS

2.1. The GATT Article XI provisions on export restrictions and prohibitions were originally designed to include a right for individual contracting parties to restrict the export of their scarce domestic raw materials and commodities.

2.2. The initial draft of the carve-out that became GATT Article XI:2(a) reads as follows:

"Export prohibitions or restrictions temporarily imposed to relieve conditions of distress which are local to the exporting country and which are caused by severe, shortages of foodstuffs or other essential products".²

It was also emphasized during the preparatory discussions in 1947 that indeed the carve out was intended to respond to situations when "local supplies of a product are scarce".³

2.3. Since the GATT came into existence, there have been at least four examinations by Members of the Article XI provisions and the use of the measures disciplined by them.

2.4. An early effort in 1950 resulted in an agreement on "Standard Practices for the Administration of Import and Export Restrictions and Exchange Controls".⁴ While non-binding, the intent was to improve the administrative practices of Members and reduce unpredictability in the implementation of trade controls. Further efforts in the 1950's resulted in some improvements⁵ to the provisions around import controls in relation to balance of payments provisions.

2.5. Subsequent work in the Framework Group during the Tokyo Round did not result in any improvements, despite as noted by one Contracting Party that "the application of the GATT [on export restrictions] has...been minimal and ineffective". That Party also noted that the rules are "less complete as compared to import restrictions" and "subject to major exceptions".⁶

2.6. Nevertheless, a draft Understanding was circulated and discussed in mid-1978. The draft included an acknowledgement that "the absence of established guidelines and procedures for taking export control actions permitted under GATT provisions has, at times, contributed to instability and uncertainty in international trading conditions and could do so in the future".⁷ The first version of that Understanding listed some new principles and guidelines that had been under discussion in the Framework Group, including:

- Publication and notification – prior notification of such measures, including their specific purpose;
- Consultation - procedures for consultations if a Contracting Party is or may be materially affected by the measure; and
- Guidelines – should be stipulated as temporary and expiring and terminated whenever conditions giving rise to them have moderated sufficiently; be prepared to offer factual evidence that the shortages are critical, the product is essential, and that the measure will be temporary.

2.7. In the end, the Tokyo Round result was an agreement for Contracting Parties to "reassess in the near future the GATT provisions relating to export restrictions and charges, in the context of the international trade system as a whole, taking into account the development, financial and trade needs of developing countries".⁸

² See Article 19.2 (b) of the [Suggested Charter for an International Trade Organization of the United Nations](#).

³ See page 29 in [E/PC/T/C.II/PV.4](#).

⁴ [Standard Practices for the Administration of Import and Export Restrictions and Exchange Controls - 18 December 1950](#).

⁵ See [L/332/Add.2](#).

⁶ See [MTN/FR/W/2](#), pages 19 and 20.

⁷ See [MTN/INF/20](#) and [MTN/INF/20/Rev.1](#).

⁸ See [MTN/FR/6](#) and Annex VI of [L/4884/Add.1](#).

2.8. Further work in the lead-up to and during the Uruguay Round in the 1980s⁹ did not result in improvements to the rules regarding export restrictions. Indeed, not much has changed regarding the rules since that time, save for some additional transparency obligations for agricultural products in the Agreement on Agriculture¹⁰ and an updated decision in the Market Access Committee on notification procedures for these measures.¹¹ It should be noted that there were discussions during the Doha Round to consider strengthening the existing disciplines on export restrictions. The first involved imposing time limits and requiring a justification in respect of agricultural products while the second sought to improve transparency in respect of export licensing for non-agricultural goods.¹²

2.9. More recently, efforts have been made by some Members to improve transparency in the application of export restrictions to agriculture products in the Committee on Agriculture in Special Session.¹³

3 COVID-19 RELATED NOTIFICATIONS AND WTO SECRETARIAT COMMUNICATIONS

3.1. In addition to the Quantitative Restrictions notifications submitted by Members, the WTO Secretariat has produced several communications that provide factual information on the export-related measures taken during the COVID-19 pandemic. A review of this information contained therein follows.

3.2. The first Information Note¹⁴, circulated on 23 April 2020, provided background information on the WTO rules regarding export restrictions and prohibitions, including the transparency aspects, as well as a summary of the current situation in terms of information received. The note also provided links to additional resources on export restrictions and prohibitions and to legal aspects of interest.

3.3. In the Market Access Committee, three discussions have been held on the Secretariat's reports that summarize the measures notified relating to the COVID-19 pandemic.¹⁵ Regarding export restrictions and prohibitions, the Rev.2 report notes that as of 25 March 2022, a total of 98 measures that prohibit or restrict exports as a result of the COVID-19 pandemic have been adopted by Members, that they have taken the form of full bans and prohibitions (36.3%), followed by export restrictions in the form of non-automatic export licences (17.6%) and conditional prohibitions (14.7%). It also notes that export restrictions and prohibitions mentioned in the context of the Trade Monitoring Exercise, for which it is not possible to specify the exact nature of the measure, account for 29.4% of total measures.

3.4. The vast majority of measures prohibiting or restricting export were introduced by Members between January and April 2020 (67 out of 98 measures). The report also notes that a large proportion of the export restricting measures that have been adopted by Members do not provide complete information on their duration. This includes no indication of the planned duration, or the concerned Member has not submitted a subsequent communication confirming that the measure had expired or had been terminated.

3.5. The majority of measures prohibited or restricted the exportation of the so-called Personal Protective Equipment (PPEs), which includes face and eye protection devices (43 measures), protective garments (27 measures) and gloves (23 measures). Other restricted products included pharmaceutical products (27 measures), sanitizers and disinfectants, such as alcohol (26 measures), different types of medical supplies (21 measures), medical equipment, including mechanical respirators (16 measures) and other products.

3.6. For export restrictions and prohibitions that have been notified under the QR Decision, almost half of the 98 notified QR measures have been justified by Members citing both Article XI:2(a) and Article XX(b) of the GATT 1994, which relate to export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting

⁹ See [MTN.GNG/NG2/W/40](#).

¹⁰ Article 12 of the Agreement on Agriculture.

¹¹ [G/L/59/Rev.1](#).

¹² See paragraphs 171 to 180 of [TN/AG/W/4/Rev.4](#) and [TN/MA/W/15/Add.4/Rev.5](#) respectively.

¹³ For example, see [JOB/AG/175](#).

¹⁴ See [Export Prohibitions and Restrictions – Information Note](#).

¹⁵ CMA meetings of April and November 2021 and March 2022, [see G/MA/W/168 and its revisions](#).

party, and measures necessary to protect human, plant or animal health, respectively. Members cited exclusively Article XI:2(a) of the GATT 1994 for 16% of the measures. Other policy objectives, such as the protection of human life or health or the protection of essential security interests without the reference to a specific WTO provision, or no justification at all was given for the remaining cases. No information in this respect is available for the 30 measures taken from the Trade Monitoring Exercise.

3.7. Finally, a recent information note¹⁶ outlining trade-related bottlenecks for critical products to combat COVID-19 highlighted that several export restrictions continue to impede access to vaccine inputs and contribute to uncertainty on delivery timeframes by suppliers. These measures also impact the ability of vaccine producers to conduct clinical trials.

4 MEMBERS SUBMISSIONS

4.1. Canada would also like to highlight a number of submissions from Members over the past two years that make reference to the topic of export restrictions. It is not an exhaustive list.

4.2. In May 2020, the LDC Group noted the dependence of its Members on imports to secure access and availability of medical supplies and basic food products, and observed that several other WTO Members had imposed restrictions on trade. They further observed in respect of food products that such action could impact import-dependent countries and particularly LDCs' ability to purchase foods and meet their domestic demand. In that context, LDCs called on Members not to impose export prohibitions or restrictions within the meaning of Article XI:1 of the GATT 1994 with respect to essential medical products as identified by the WHO and WCO, and with respect to basic food products, when such products are requested or purchased by LDCs for their domestic use or are exported for humanitarian purposes.¹⁷

4.3. In its communication issued in June 2020, the Ottawa Group Members committed to lead by example by exercising maximum restraint in introducing any trade measures that might serve as an unnecessary obstacle or impediment to trade, and to withdraw any trade restrictive measures introduced in response to COVID-19 as quickly as possible.¹⁸

4.4. APEC Ministers of Trade emphasized that Members that adopt export restrictions and prohibitions with respect to COVID-19 vaccines and related goods should evaluate their ongoing necessity as COVID-19 conditions change, in order to ensure that those measures remain targeted, proportional, transparent, temporary, and do not create unnecessary barriers to trade. They also called on other WTO Members to exercise equal restraint.¹⁹

4.5. The proposed Declaration on "Trade Policy Response to the COVID-19 Pandemic and to Enhance Resilience Against Future Pandemics"²⁰ outlined a number of actions that the co-sponsor supported as a means to help ensure equitable distribution of scarce essential medical goods, including COVID-19 vaccines, therapeutics, diagnostics and related vaccine materials amongst WTO Members, in particular the most vulnerable ones.

4.6. Finally, a group of Members²¹ called for a number of steps to be taken regarding export restrictions and prohibitions on COVID-19 vaccines and their components, including: (i) the immediate or prompt removal of all export restrictions on them and of any obstacles related to their supply chain; (ii) a commitment to prohibit any future export restrictions on them; and (iii) a commitment to transparency on measures affecting exports them and other associated goods, as well appropriate areas in which to discuss them.

¹⁶ See [Indicative list of Trade-Related Bottlenecks and Trade-Facilitating Measures on Critical Products to Combat COVID-19](#).

¹⁷ See [WT/GC/211](#) – Securing LDCs Emergency Access to Essential Medical Goods and Food Products to Combat the COVID-19 Pandemic.

¹⁸ See [WT/GC/217](#) – June 2020 Statement of the Ottawa Group: Focusing Action on COVID-19.

¹⁹ See [WT/GC/232](#) – APEC Ministers Responsible for Trade Virtual Meeting Joint Statement 2021.

²⁰ See [WT/GC/W/823](#) – COVID-19 and Beyond: Trade and Health.

²¹ See [WT/GC/W/826](#) – Communication by Colombia; Costa Rica; Dominican Republic; Ecuador; Panama; and Paraguay on Trade Restrictions that Hamper Access to COVID-19 Vaccines.

5 NEXT STEPS

5.1. Canada welcomes the ongoing discussion in the Committee on Market Access to share experiences and take stock of lessons learned throughout this pandemic. The informal exchanges continue to provide a strong foundation of knowledge for delegates.

5.2. Canada looks forward to the experience sharing on export restrictions and the discussion of why certain types of measures were chosen, what factors determined the non-renewal of such measures, and any review of their effectiveness in supporting efforts to combat COVID-19.
