HOW TO BALANCE INTERNATIONAL TRADE AND PUBLIC HEALTH IN THE FACE OF EMERGING INFECTIOUS DISEASES? — REFLECTIONS AND RESEARCH BASED ON THE IMPLEMENTATION OF "ADDITIONAL HEALTH MEASURES" IN COVID-19

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ABSTRACT

The COVID-19 has been going on for more than three years now and the impact on global trade has been catastrophic. Nowadays, in the face of the normalization of the pandemic, some countries have in fact gradually found viable ways to balance the health of their citizens with economic recovery, and the global economy is expected to be rebuilt. But this picture of a trade-off between public health and economic and trade development was virtually non-existent at the beginning of the outbreak, and even long afterwards. Faced with the ravages of the pandemic, many countries adopted a series of measures that excessively restricted trade. While these measures may have had the effect of "isolating" the pandemic for a short period of time, the impact on trade and the economy can be enormous and ultimately detrimental to the prevention and control of the pandemic. Article 43 of the International Health Regulations (2005) (hereinafter "the Regulations") specifically provides for a mechanism of "additional

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health measures" to regulate the use of excessive trade-restrictive measures by States Parties. However, past practice in dealing with infectious diseases has shown that States Parties have often breached this provision. Affected States Parties also prefer to apply the SPS Agreement to seek redress from the WTO dispute settlement mechanism rather than using the corresponding provisions of the Regulation. Why does the existing Article 43 not prevent Member States from taking excessive measures? Why has the "additional health measures" mechanism been "left out"? How can countries properly use their "autonomy" to adopt "additional health measures"? In order to effectively prevent countries from taking excessive trade-restrictive measures and to maximize the balance between trade and health during outbreaks of infectious diseases, this paper will reflect on and examine the issues related to the "additional health measures" mechanism in the light of the current situation of the spread of the COVID-19. The first chapter analyses the normative and application dilemmas of the "additional health measures" mechanism; the second chapter explores the causes of the dilemmas of the "additional health measures" mechanism; and finally, some thoughts on improving the mechanism of "additional health measures" are presented.

KEYWORDS: *International Health Regulations (2005), additional health measures, principle of proportionality, COVID-19*

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I. INTRODUCTION

During the past few years, global trade has been greatly influenced by the COVID-19 pandemic. According to the report of the United Nations Conference on Trade and Development (hereinafter "UNCTAD"), overall, global trade declined by about $2.5 trillion in 2020, which was close to that during the global financial crisis of 2008/09 and substantially worse than that during the recession in 2015.[1] There are many reasons for such large losses, but one of them cannot be ignored is the trade restrictions adopted by countries.

World Health Organization (hereinafter "WHO") Director-General declared COVID-19 as a Public Health Emergency of International Concern (hereinafter "PHEIC") on January 30, 2020.[2] The implications of this decision are broad and far-reaching, and are not limited to the public health

[1] U.N. Conf. on Trade and Dev., Impact of the Pandemic on Trade and Development Lessons Learned, at 6-7, U.N. Doc. UNCTAD/OSG/2022/1 (June 24, 2024), https://unctad.org/system/files/official-document/osg2022d1_en.pdf.

[2] *Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, WHO (Jan. 30, 2020), https://www.who.int/news/item/30-01-2020-statement-on-the- second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

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level, *i.e.,* they are capable of generating a worldwide alert and active response. More notably, when COVID-19 was declared as PHEIC, many countries introduced a large number of excessive trade restrictions out of panic or other motives.[3] Although, these excessive trade and transport restrictions can have the effect of "isolating" infectious diseases for a short period of time, the impact on trade and the economy can be so great that it has adverse consequences for the prevention, control and treatment of infectious diseases. So how to deal with excessive trade measures due to disease outbreaks is not purely a trade issue, but also a balance with public health. To this end, the Regulation provides different types of measures to create obligations and provide guidance to States Parties. In this paper, the health measures stipulated in the Regulation can be divided into two categories: "general health measures" and "additional health measures", based on the formal criteria of whether they are integrated by WHO. The term "general health measures" refers to the harmonization of general methods and standards for responding to public health events among States Parties through explicit provisions or guidance recommendations of the WHO. Whereas, "additional health measures" refers to the measures taken by States Parties "autonomously "in accordance with the provisions of the Regulations.[4] In other words, countries have a certain degree of "autonomy" when taking such measures. Generally, the impact caused by "additional health measures" on international trade can be more serious. According to the Regulation, those measures are actually prohibited to take in principle, but only after meeting certain requirements can be implemented, including both substantive and procedural requirements. Article 43 of the Regulation also provides for dispute resolution if a member state violates the provisions of the "additional health measures". However, the experiences of previous influenza A (H1N1) outbreaks and the performance of countries during the COVID-19, show that the "additional health measures" mechanism regulated in the Regulation has not been effective.

Why does the existing Article 43 of the Regulation not prevent member states from taking excessive measures? How can countries properly use the "autonomy" to take "additional health measures"? In order to effectively prevent countries from taking excessive measures to restrict trade and to strike a balance between public health and infectious disease during outbreaks, this paper will analyze and study the "additional health measures"

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[3] *Shihjie Geguo (Diqu) Yin Singuan Feiyan Yicing Caiqu de Maoyi Xianzhi he Renyuan Xianzhi Cuoshi Yilanbiao (世界各国（地区）因新冠肺炎疫情采取的贸易限制和人员限制措施一览表) [List of Trade Restrictions and Personnel Restrictions Adopted by Countries (Regions) Worldwide in Response to the New Crown Pneumonia Outbreak],* XIN SI LU (新丝路) [NEW SILK ROAD NEWS] (May 9, 2020), http://www.newsailing.com/news/hyxw/2020-05-09/219.html.

[4] International Health Regulations (2005) [hereinafter IHR(2005)], art. 43, May 23, 2005, 2509 U.N.T.S. 79.

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mechanism from the perspective of the current situation of the spread of the pandemic.

II. NORMATIVE ANALYSIS OF THE MECHANISM OF "ADDITIONAL HEALTH MEASURES" AND THE DILEMMAS OF ITS APPLICATION

The purpose and scope of the Regulation "are to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade."[5] In order to achieve this goal, the Regulations provide for several health measures that are prohibited in general by States Parties. Those measures will have a huge negative impact on international trade and traffic [6] However, considering that disease prevention and control should, by its very nature, be a matter within the sovereignty of a State[7], therefore, in the case of specific public health hazards or PHEIC, the Regulation allows States Parties to adopt health measures that "provide the same or greater degree of health protection than that recommended by the World Health Organization," or those that would otherwise be prohibited to restrict transportation and trade.[8] This is the basic content of the concept of "additional health measures" provided for in Article 43 of the Regulation. The provision contains substantive principles, procedural obligations, and dispute resolution. However, practical experience shows us that this mechanism has not worked as well as it should. Whether it is the previous H1N1 influenza, Ebola virus, or COVID-19, most States Parties still "take the law into their own hands" and "do not follow the rules" to take excessive public health measures, causing great damage to international trade. This has caused great damage to international trade. In addition, when seeking remedies, the injured parties did not consider the dispute settlement measures in the "additional health measures" mechanism. However, resorted to World Trade Organization (hereinafter "WTO") settlement using the The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter "SPS Agreement") when they also violated international trade law. Therefore, it is also necessary to clarify the provisions of Article 43 of the Regulation, so as to regulate the interpretation and application of the

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[5] *Id*. art. 2.

[6] According to Article 43(1)(2) of the Regulations, these measures include health measures prohibited under Article 25, Article 26, Article 28(1) and (2), Article 30, Article 31(1)(c) and Article 33 of the Regulations. *Id*. art. 43.

[7] Gong Xiang Qian (龚向前), *Chuanranbing Quanqiuhua yu Quanqiu Weisheng Zhili (传染病全球化与全球卫生治理) [Globalization of Infectious Diseases and Global Health Governance]*, 2006(3) GUOJI GUANCHA (国际观察) [INT'L REV.] 24, 26 (2006).

[8] IHR(2005), *supra* note 4, art. 43(1).

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provisions of the State Parties. In the following section, the paper will explain the proper meaning of Article 43, *i.e.* the substantive principles, procedural obligations and dispute resolution to be followed by the Contracting Parties when taking "additional health measures".

A. What Should "Additional Health Measures" Actually Mean?

As mentioned above, the "additional health measures" mechanism consists of three parts: the substantive principles, the procedural obligations, and the resolution of disputes that arise.

Firstly, for the substantive principles, the implementation of "additional health measures" by the State Parties should follow the principle of proportionality. According to Article 43(1) and (2),[9] it can be found that the provisions do not provide for the applicable principles in a clear and summarized manner, but are scattered in the first and second paragraphs, which lacks systematic guidance for States Parties to adopt such measures and needs to be summarized and refined. Almost all the domestic and foreign scholars summarizing the principles applicable to "additional health measures" can be divided into three paths: (1) the introduction of the principle of proportionality for interpretation; (2) the principles involved in Article 43 are summarized into other principle but principle of

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[9] *See id.* art. 43(1):

> These Regulations shall not preclude States Parties from implementing health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern, which:
> (a) achieve the same or greater level of health protection than WHO recommendations; or
> (b) are otherwise prohibited under Article 25, Article 26, paragraphs 1 and 2 of Article 28, Article 30, paragraph 1(c) of Article 31 and Article 33, provided such measures are otherwise consistent with these Regulations.
> Such measures shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.

Art. 43(2):

> In determining whether to implement the health measures referred to in paragraph 1 of this Article or additional health measures under paragraph 2 of Article 23, paragraph 1 of Article 27, paragraph 2 of Article 28 and paragraph 2(c) of Article 31, States Parties shall base their determinations upon:
> (a) scientific principles;
> (b) available scientific evidence of a risk to human health, or where such evidence is insufficient, the available information including from WHO and other relevant intergovernmental organizations and international bodies; and
> (c) any available specific guidance or advice from WHO.

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proportionality; and (3) the simple interpretation of the principles mentioned in the text of the article. This paper believes that the introduction of the principle of proportionality is more reasonable and has a high degree of generality.[10] In fact, the WHO's recommendations for international traffic during the outbreak of COVID-19 are clear in their call for countries to follow the principle of proportionality in taking restrictive measures. As early as February 29, 2020, WHO issued an official recommendation that measures that "seriously disrupt international traffic may only be justified at the very beginning of an outbreak. This is because it would somehow give States Parties a certain amount of time, even if only a few days, to quickly implement effective preparedness measures. Such restrictions must be based on a careful risk assessment, be proportionate to the public health risk, be short in duration, and be periodically reconsidered as the situation develops". [11] The principle of proportionality originated in police

[10] Scholars who take path (2) summarize the principles involved in Article 43 as other principles, such as Peng Xianwei and Wu Yanan. Peng Xianwei (彭先伟) & Wu Yanan (吴亚男), *Xinguan Bingdu Yiqing Xia de Youlun Jianyi Chuzhi Wenti Chutan—Yi Guoji Weishengfa Wei Shijiao (新冠病毒疫情下的邮轮检疫处置问题初探—以国际卫生法为视角) [A Preliminary Study on the Quarantine Disposition of Cruise Ships Under the New Coronavirus Epidemic - International Health Law as a Perspective*], 31(1) ZHONGGUO HAISHANGFA YANJIU (中国海商法研究) [CHINESE J. MAR. L.] 20, 21-22 (2020). In their article summarize the applicable principles as: the protective principle, the appropriateness principle and the scientific principle. Specifically, the "protective principle" corresponds to the first paragraph of Article 43, that is, "additional health measures" can obtain the same or better health standards than the WHO recommendations. The "appropriateness principle" means that unnecessary restrictions on international trade and transportation should be minimized; the "scientific principle" corresponds to the relevant provisions of the second paragraph of Article 43. It is easy to see that this generalization of the applicable principles involved in Article 43 is general distilled and organized into three major principles, which is easy to understand. However, there are two limitations, first, it does not fully cover the principle of due diligence. Minimizing unnecessary restrictions on international trade and transportation does not automatically mean that the degree of health protection will outweigh the negative effects of the restrictions. In other words, the measures that can meet the "protective principle" and the "principle of appropriateness" are not necessarily the best choice, and need to make a comparison between protection and harm. This is precisely what the provisions require "reasonable" and "feasible" requirements. Second, these three principles are not necessarily related to each other, and lacking in a systematic manner. Compared with the proposed path of this paper, it seems to be less condensed and lacks emphasis on the close connection between the paragraphs in the article. The path (3) "simple interpretation of the provisions" is the path taken by most scholars, indicating that Article 43 itself should follow the general principles of the Regulation and the principles involved in the textual meaning of the provisions. For example, Li Changsheng and Cui Yi' adopt this path to discuss. Li Chang Sheng (李长升) & Cui Yi (崔毅), *Jiedu Guoji Weidhengtiaoli (2005) Jhong de Ewai de Weisheng Cuoshi (解读《国际卫生条例》(2005)中的"额外的卫生措施") [Interpretation of "Additional Health Measures" in the International Health Regulations (2005)]*, 11(4) KOUAN WEISHENG KONGZHI (口岸卫生控制) [PORT HEALTH CONTROL] 3, 3 (2006). However, considering that there are different types of public health measures regulated in the Regulations and the subjects of applicable measures are different, this path mixes all measures together and does not highlight the uniqueness of Article 43. Thus, the guidelines for State parties are not very specific. At the same time, the simple list also lacks a summary.

[11] *Updated WHO Recommendations for International Traffic in Relation to COVID-19 Outbreak*, WHO (Feb. 29, 2020), https://www.who.int/news-room/articles-detail/updated-who-recommendat

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jurisprudence and has since evolved into the field of administrative law, eventually developing into the "imperial clause" in administrative law.[12] In the period of COVID-19, some administrative law scholars have also studied the principle of proportionality in conjunction with the preventive and control measures taken by the government.[13] Broadly speaking, the principle of proportionality requires that no state agency should take excessive measures and, to the extent that it can achieve its statutory purpose, cause the least infringement on citizens.[14] According to the current general theory, its content consists of three sub-principles, namely the "principle of appropriateness", "principle of necessity" and "principle of narrow proportionality".[15]

The substantive provisions of Article 43 of the Regulation fit perfectly with the three sub-principles of the principle of proportionality. To be more specific, (1) as for the principle of appropriateness, which requires that the means is capable of achieving the end. Article 43(1)(a) specifies that the measure is to achieve the same or greater degree of health protection than that recommended by the WHO. Simply put, the end is the ability to achieve a greater degree of health protection, and the bottom line is the protective effect that WHO's recommendations can bring. This is the requirement of Article 43 for the principle of appropriateness. It can be said that there can be many measures that can meet the requirements of this sub-principle. How to choose, will come to the next level, which is the test of the principle of necessity. (2) The principle of necessity requires that the subject of the measure should choose the least harmful means to the relative rights and interests among the existence of multiple measures that can achieve the purpose.[16] In conjunction with the Regulation, the overall objective is to cause minimal disruption to international traffic and trade, and Article 43 highlights that "additional health measures" should comply with the relevant requirements of the Regulation, and provides that "the restrictions imposed by these measures on international traffic and on persons shall not be more

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ions-for-international-traffic-in-relation-to-covid-19-outbreak.

[12] Huang Xue Xian (黄学贤), *Xingzheng Fa Zhong De Bili Yuanze Yanjiu (行政法中的比例原则研究) [A Study of the Principle of Proportionality in Administrative Law]*, 1 FALÜ KEXUE (法律科学) [SCI. L.] 72, 72-73 (2001).

[13] *See* Mei Yang (梅扬), *Bili Yuanze de Shiyong Fanwei Yu Xiandu (比例原则的适用范围与限度) [The Scope and Limits of Application of the Principle of Proportionality]*, 42(2) FAXUE YANJIU (法学研究) [CHINESE J. L.] 57, 57 (2020); Wang Qi Cai (王奇才), *Yingdui Tufa Gonggong Weisheng Shijian de Fazhi Yuanze yu Fali Siwei (应对突发公共卫生事件的法治原则与法理思维) [Rule of Law Principles and Jurisprudential Thinking in Response to Public Health Emergencies]*, 153 FAZHI YU SHEHUI FAZHAN (法制与社会发展) [L. & SOC. DEV.] 65, 65 (2020).

[14] *See* HARTMUT MAURER, GENERAL THEORY OF ADMINISTRATIVE LAW 106-07 (2000).

[15] *See generally* JIANG MINGAN (姜明安), XINGZHENGFA YU XINGZHENG SUSONG FA (行政法与行政诉讼法) [ADMINISTRATIVE LAW AND ADMINISTRATIVE PROCEDURE LAW] (2011).

[16] ZHANG SHUYI, ADMINISTRATIVE LAW 34 (2005).

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traumatic or intrusive to international traffic than other reasonably practicable measures that provide adequate protection of health." [17] Therefore, the principle of necessity is also a necessary part of the principle of application of "additional health measures". After satisfying the requirements of necessity, the State Parties still cannot "conclude" the measures, it has to be subject to the third level of verification. That is, (3) the principle of proportionality in the narrow sense, also known as the principle of "balance". It requires a weighing and comparison between the rights and interests protected and the rights and interests infringed. If the rights and interests protected are greater than the harm that would result, then the subprinciple is met. Although Article 43 does not explicitly mention that the protection of health should be greater than the degree of interference with international traffic and trade, the requirement that measures be "reasonable" and "feasible" literally covers this requirement of balance. It is difficult to imagine that a measure that causes more harm than the interests to be protected can be called reasonable or feasible. As for Article 43(2), States Parties shall base their consideration of "additional health measures" on "scientific principles", "available scientific evidence or information" and WHO guidance or recommendations.[18] These requirements should also be included in the proper content of the proportionality principle. The reason is that the three sub-principles contained in the proportionality principle are themselves a scientific process of inference through layer upon layer of verification, which requires reasonable choices and trade-offs. In the process of inference, to ensure the scientific nature, the indispensable basis must also be the available scientific evidence, if the evidence is not clear, including the existing information in line with the provisions, as well as the WHO recommendations or guidance. So far, the applicable principles stipulated in Article 43 all correspond to the connotation of the principle of proportionality, therefore, the principle of proportionality is the most reasonable path as the applicable principle for the State Parties to take "additional health measures".

The above analysis leads to the following steps to guide States Parties in adopting public health measures: firstly, considering whether the measure can achieve the same or higher degree of health protection than recommended by the WHO; second, choosing the measure that will least interfere with international trade and traffic among all measures that can achieve this purpose; finally, testing whether the public health protected by this measure is greater than the interference with international trade and traffic.

Secondly, States Parties should also follow procedural requirements. The procedural obligations can be summarized in two points: (1) The

[17] IHR(2005), *supra* note 4, art. 43(1).
[18] *Id*. art. 43(2).

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reporting obligation, which means that States should report "additional health measures" they took that could cause significant interference[19] with international traffic and their health basis to the World Health Organization (hereinafter "WHO") within 48 hours after the date of the denial, unless such measures are recommended by the WHO.[20] (2) The obligation to review means that within three months after the adoption of an "additional health measure", the State Party shall review the measure in accordance with criteria such as WHO's advice and scientific principles.[21]

Finally, the "additional health measures" mechanism also makes special provision for dispute resolution. In addition to allowing States to conduct dispute resolution in accordance with Article 56 of the Regulation, Article 43(7) specifically emphasizes the application of consultation. In my opinion, this arrangement can be interpreted as that the consultation is the preferred method of dispute resolution under the "additional health measures mechanism". The Regulation does not prefer that States Parties resort to other forms of dispute resolution for such measures, such as referral to the Director-General and arbitration.

B. The Dilemmas of Applying the "Additional Health Measures" Mechanism

Although the Regulation regulates "additional health measures", countries often fail to comply. Practice shows that countries continue to rely on the "technical model of emergency control" to achieve public health protection, yet the restrictions under this model are "extremely resource-intensive and socially disruptive, and can even interrupt other important public health campaigns".[22] As the information tracking mechanism jointly run by WHO and the University of Sydney shows, of the eight major disease events that have occurred since 2013, there have been 210 cases where the government has implemented "additional health measures" that violate the Regulations. There are mainly two dilemmas of applying the "additional health measures" mechanism.

On the one hand, "excessive trade restrictions" often become the first choice for epidemic prevention and control. In 2009, the outbreak of influenza A (H1N1) from Mexico and other countries became a globally contagious epidemic. Then Margaret Chan, the primer WHO Director-

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[19] *Id*. art. 43(3). According to Article 43(3) of the Regulation, "'significantly interference' generally means the refusal of entry or exit of international travelers, baggage, cargo, containers, vehicles, articles, etc. or delayed entry or departure for more than 24 hours."

[20] *Id*. art. 43(5).

[21] *Id*. art. 43(6).

[22] NA LI (那力) ET AL., WTO YU GONGGONG JIANKANG (WTO 与公共健康) [WTO AND PUBLIC HEALTH] 7 (2005).

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General, declared the epidemic as PHEIC on April 25, 2009.[23] Despite its high public health risk, it is noteworthy that WHO has never recommended any measures for international trade and traffic restrictions to States Parties.[24] However, many countries have imposed trade bans or restrictions on imports of pigs, pork, pork products and other meat from countries affected by influenza A (H1N1), which far exceeds WHO recommendations. [25] Furthermore, from the WHO statement of May 6, 2009, it appears that it has begun to request information from some countries regarding the public health justification for their actions. In light of this, it seems implicit that countries that have imposed trade restrictions to date have not been forthcoming in providing relevant public health information and scientific justification to the WHO as required by Article 43.[26] There is no doubt that those measures were the violation of the procedural requirements and thus did not allow to verify that the measures are in accordance with the principle of proportionality. These excessive measures in violation of the Regulation have caused significant economic losses to the corresponding countries, such as the industry of tourism in Mexico, with an estimated loss of $2.8 billion in May 2009, and as for the imports and exports of pork, with a deficit of $27 million in pork trade in 2009.[27] The same encounter occurred during this COVID-19's outbreak, and WHO has repeatedly stated that there is some evidence of the futility of measures such as excessive restrictions on the movement of people in the prevention and control of public health emergencies.[28] According to the WHO Situation Report on COVID-19, which is updated regularly, the latest report No. 179, which covers "additional health measures," shows that as of July 10, 2020, 192 of 196 States Parties reported that they had adopted "additional health measures. However, only 75 countries have sent formal notifications to WHO regarding the implementation or cancellation of the measures, as well as public health reasons.[29] This is undoubtedly a violation of the procedural requirements set

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[23] *Statement by WHO Director-General Dr. Margaret Chan*, WHO (Apr. 25, 2009), https://www.who.int/emergencies/disease-outbreak-news/item/2009_04_25-en.

[24] Margaret Chan, *Influenza A(H1N1): Lessons Learned and Preparedness*, WHO (July 2, 2009), https://www.who.int/director-general/speeches/detail/influenza-a(h1n1)-lessons-learned-and-preparedness.

[25] For country-specific excessive restraint measures, see Renée Johnson, *Potential Farm Sector Effects of 2009 H1N1 "Swine Flu": Questions and Answers*, CONG. RSCH. SERV. 9 (2009), https://digital.library.unt.edu/ark:/67531/metadc26156/m1/1/high_res_d/R40575_2009Jun24 .pdf.

[26] Tim K. Mackey & Bryan A. Liang, *Lessons from SARS and H1N1/A: Employing a WHO–WTO Forum to Promote Optimal Economic-Public Health Pandemic Response*, 33(1) J. PUB. HEALTH POL'Y 119, 122-24 (2011).

[27] Dunia Rassy & Richard D. Smith, *The Economic Impact of H1N1 on Mexico's Tourist and Pork Sectors*, 22(7) HEALTH ECON. 824, 824 (2013).

[28] WHO, *supra* note 11.

[29] *Coronavirus Disease (COVID-19): Situation Report*, 179 WHO SITUATION REP. 1, 2 (2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200717-covid-19-sitrep-179.pdf?sfvrsn=2f1599fa_2.

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forth in Article 43(5). These extensive and excessive restrictions, ostensibly to avoid depletion of health care resources, etc., have contributed to the growing problem of rising unemployment and a massive decline in GDP.[30]

On the other hand, the "additional health measures" mechanism, which places special emphasis on the "negotiated settlement" approach, has not been "accepted" by the States Parties. The main manifestations are: (1) not only do the States Parties not claim their rights and damaged interests from the perspective of the relevant provisions of the Regulation; but also (2) the countries in dispute over excessive restrictive measures prefer to resort to the WTO dispute settlement body (hereinafter "DSB"). This phenomenon was particularly evident during the previous influenza A (H1N1) period.[31] To be more specific, (1) as mentioned earlier, many countries took excessive measures to restrict trade in pork and its products against Mexico, Canada and the United States during the H1N1 influenza. These countries affected by the trade restrictions also made public statements asserting that other countries should fulfill their relevant international obligations and emphasized that their legitimate interests had been harmed.[32] However, it is noteworthy that such statements are hardly made with the Regulations as the starting point, but rather from the perspective of protecting trade and economy. In other words, from the materials that I can collect, the State Party basically does not involve the obligations of countries that adopt excessive trade restrictions under the "additional health measures" and assert their corresponding interests. For example, in the joint statement issued by the trade ministers of the United States, Canada and Mexico in 2009, it can be seen that although they claimed their losses from unreasonable trade restrictions, from the perspective of trade, without any reference to the relevant provisions and obligations of the Regulation. (2) In addition, the parties prefer to resort to the WTO dispute settlement mechanism for potential or actual disputes and ignore the relevant provisions of the "additional sanitary measures" mechanism. For example, Mexico, one of the hardest hit parties during H1N1, urgently requested all of its trading partners in the Committee on Sanitary and Phytosanitary Measures (hereinafter "the SPS Committee") to remove any restrictive measures imposed on its pork products rather than the "additional health measures" mechanism. Mexico believes that these measures are inconsistent with the available scientific

[30] Different countries have suffered different levels of damage, for data and analysis related to the study using the United States as an example. *See* Amelia Janaskie & Peter C. Earle, *The Devastating Economic Impact of Covid-19 Shutdowns*, AM. INST. FOR ECON. RSCH. (Oct. 10, 2020), https://www.aier.org/article/the-devastating-economic-impact-of-covid-19-shutdowns/.

[31] Lawrence O. Gostin, *Global Health, International Trade, and Intellectual Property Toward a Fair Deal for the Global South*, *in* GLOBAL HEALTH LAW 270, 297 (2014).

[32] *Statement by Trade Ministers of the United States, Canada and Mexico*, OFF. OF THE U.S. TRADE REP. (May 7, 2009), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/may/statement-trade-ministers-united-states-canada-and-mex.

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information or with their international obligations under the SPS Agreement.[33] The problem did not lead to a dispute at the DSB, since the measures were lifted relatively quickly. However, because of this, we can clearly see that countries consider the WTO's DSB to be a more effective solution. In contrast, there does not appear to be any information that countries affected by Influenza A (H1N1) have ever objected to trade responses by other States Parties under the Regulation, or even wanted to use the consultation mechanism highlighted in Article 43 to resolve disputes.[34] From this, it seems to be inferred that the affected countries prefer to rely on the relevant WTO agreements and its dispute settlement mechanism; rather than the relevant rules under the WHO and the Regulation.

To sum up, after the amendment of the Regulation in 2005, in order to better achieve its general objective and balance the relationship between public health and trade, an innovative arrangement of the "additional health measures" mechanism was provided for in Article 43. However, practice has shown that this mechanism has not produced satisfactory results. Therefore, it can be simply concluded that the relevant provisions of the "additional health measures" mechanism have been "abandoned" by the States Parties.

III. EXPLORING THE REASONS FOR THE "ADDITIONAL HEALTH MEASURES" MECHANISM'S DILEMMAS

A. The Provision Has Its Ambiguity

Although Article 43 of the Regulation contains the applicable principles, procedural requirements and dispute resolution for the adoption of "additional health measures". However, it can be found that the formulation of its provisions is actually kind of ambiguous. Specifically, the following two aspects are not clear:

1. The Procedures Are not Specific Enough — As mentioned above, Article 43 has two main provisions regarding the procedures for States Parties to take "additional health measures", namely the "reporting obligation" and the "review obligation". With regard to the "reporting obligation", it requires that the States should report to the WHO within 48 hours of the adoption of "additional health measures" that cause significant disruption to international traffic and the health basis for such measures unless such measures are recommended by the WHO.[35] However, it is silent on the scope of what should be covered in the report, *i.e.*, there is no clue

[33] Committee on Sanitary and Phytosanitary Measures, *Information on Outbreaks of A/H1N1 Human Influenza Virus on Mexican Territory*, WTO Doc. G/SPS/GEN/921 (May 5, 2009).
[34] Lin Tsai-Yu, *The Forgotten Role of WHO/IHR in Trade Responses to 2009 A/H1N1 Influenza Outbreak*, 44(3) J. WORLD TRADE 515, 529 (2010).
[35] IHR(2005), *supra* note 4, art. 43(5).

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that how much of the basis and the content of the measures should be reported. Moreover, since the information provided to WHO will be shared with other members and will attract WHO's involvement upon disclosure, States Parties that adopt trade restrictive measures may lack incentives to fulfill these obligations. This is because they may face the legal risk of a challenge by the affected State Party. In particular, as in the case of States Parties affected by Influenza A (H1N1), they may face claims of violations of the WTO's SPS Agreement. This requires Article 43 of the Regulation to include in its procedural provisions the treatment of non-compliance with this obligation, however, there is no mention of what responsibilities and consequences there are for States Parties that fail to comply with their reporting obligations in a timely manner of Article 43. The lack of incentive for States parties to comply with their obligations undoubtedly makes this provision even less "attractive" for application. With regard to the "review obligation", it requires the State Parties to review within three months after the adoption of the "additional health measures", considering the criteria set out in paragraph 2 of the article, such as WHO's opinion and scientific principles. In short, it is required to follow up on the implementation of the measure, whether it is necessary to continue to implement, whether to make some adjustments, etc. However, the details of this obligation are "confusing" in terms of procedure. First of all, it is not clear what will happen when a State Party reviews the measures it has taken. The only thing that is certain is that if the review is justified, then the measure can continue to be implemented. But even then, since the development of infectious diseases is unpredictable and dynamic, the same measures still need to be reviewed and adjusted from time to time. In this case, is it sufficient to require a review only in the first three months? Besides, if problems arise after the review that requires adjustment, is the State Party obliged to make the adjustment? How should adjustments be made? To what extent should adjustments be made? Will WHO be involved in guiding or supervising this process? All of those mentioned above are not clear. Secondly, which is similar to the "reporting obligation" that lacks liability provisions, if the State Party does not comply with the provisions of the review, what legal consequences will it face?[36] Therefore, it can be seen that the procedural provisions of Article 43 are lack

[36] Taiwan scholar Professor Tsai-Yu Lin also mentioned the imperfection of the procedural provisions of Article 43 in her article. But she focused on the self-interest of the States if they follow the procedural provisions, rather than the point of view that the procedural provisions themselves are not easy for States to follow. She argues that, first, in the absence of any public health justification and relevant scientific information to support trade restrictions, it is unlikely that member states would provide anything. Second, even if some relevant information were available because the information provided to WHO would be shared with other members and would elicit WHO involvement upon disclosure, members with trade restrictions may still lack incentives to meet these obligations. In particular, they may face the legal risk of challenges from affected members if the information is provided to WHO and thus to other members. They may also face charges of violating the WTO's SPS Agreement. *See* Lin, *supra* note 34, at 535-36.

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of clear guidance and normative.

2. The Relationship with the SPS Agreement Is Unclear — The reason why we need to deal with the relationship between the two agreements is that there is an overlap in the scope of the objects regulated by those agreements, and the provisions are very similar. So, the relationship needs to be clarified to avoid conflicts in the application of the treaty.

First of all, there is an overlap between the Regulation and the SPS Agreement in terms of the objects of regulation. It is worth noting that, when the measures adopted by the parties fall within the scope of their common regulation, they should first comply with the requirements of the relevant rules of the SPS Agreement. The reason for this is that Article 57(1) of the Regulation clearly states: "States Parties recognize that the IHR and other relevant international agreements should be interpreted so as to be compatible. The provisions of the IHR shall not affect the rights and obligations of any State Party deriving from other international agreements."[37] Furthermore, considering the basic principle of *lex specialis derogat legi generali*, the measures adopted by the State Parties should take precedence over the relevant provisions of the SPS Agreement. The crux of the matter is that, since the applicable principles and other requirements stipulated in Article 43 are not as clear and useful as those in the SPS Agreement when the excessive restrictive measures adopted by the State Parties fall outside the common regulation of the two, that is, they belong to the "unique" area of the Regulation, should the State Parties, or can they refer to the SPS Agreement for application? Article 43 of the Regulation does not clarify this point. In the following, this paper will explain in detail how the two overlap and why the SPS Agreement is clearer and more complete in its application.

In fact, the overlap between the Regulation and the SPS Agreement is very reasonable. It is not difficult to understand the WTO's "involvement" in the field of public health, according to Prof. Nali's classic summary of the relationship between public health and free trade, there are two positive and negative correlations between the two.[38] Positive correlation means that the development of international trade raises the overall standard of living of people, one of the most important indicators of which is the level of health; and the country has the resources to invest more in public health which in turn drives the growth of trade. The negative correlation[39] means that infectious diseases flow into countries with international trade and that the monopolies that may result from free trade can exacerbate the damage to the public from infectious diseases. Thus, the WTO also covers the content of

[37] IHR(2005), *supra* note 4, art. 57.1.
[38] NA ET AL., *supra* note 22, at 13-14.
[39] For a discussion of the impact of the globalization of infectious diseases on trade, see Gong, *supra* note 7, at 24-25.

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agreements related to public health. Among them, the most closely related to infectious disease control are the SPS Agreement, the Agreement on Technical Barriers to Trade (hereinafter "the TBT Agreement") and Article 20b of the GATT.[40] However, this paper only discusses SPS Agreement, because in fact, only SPS agreements are directly related to health,[41] and they are specifically aimed at protecting life or health.[42] Article 20(b) of the GATT provides for a "general exception" to trade measures, and public health issues are allowed as exceptions to the free trade rules in the WTO agreement.[43] However, Article 20(b) is too abstract and principled, and does not have direct reference significance. Moreover, the TBT agreement, is the regulation of technical measures, which is less directly related to health. The purpose of the TBT agreement is to ensure that the technical regulations, standards and conformity assessment procedures adopted by member countries are non-discriminatory and do not cause unnecessary obstacles to trade.[44] Health and sanitation issues in it are only as two of the aspects covered by the agreement. In addition, Article 1.5 of the TBT Agreement provides that it has no regulatory authority when it comes to phytosanitary measures. Therefore, it is the SPS Agreement that is most closely related to the Regulation. And there is indeed an overlap between the two in terms of regulating objects. The definition of "disease" in the Regulations is: "an illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans."[45] Whereas, according to Article 1(1) of the SPS Agreement and the definition of "sanitary or phytosanitary measures" in its Annex A, it can be seen that the SPS Agreement is only for sanitary and phytosanitary measures, except for food-borne viruses. That is to say, only diseases transmitted to humans through plants and animals or plant and animal products fall within the scope of the SPS Agreement. In contrast, the Regulation has a much broader scope of objects, without specifying what kind of public health measures and without limiting the types of diseases. Therefore, the Regulations naturally encompass the scope of the SPS Agreement. Therefore, as mentioned above, if the measures taken by the states that excessively restrict international traffic and trade fall under the SPS Agreement, they should follow the relevant provisions of the SPS Agreement.

Second, the requirements in the SPS Agreement regarding how countries

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[40] NA ET AL., *supra* note 22, at 73.
[41] *Id*. at 50.
[42] Agreement on the Application of Sanitary and Phytosanitary Measures art. 1.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493.
[43] General Agreement on Tariffs & Trade 1994 art. XX(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 190.
[44] Agreement on Technical Barriers to Trade, Preamble, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120.
[45] IHR(2005), *supra* note 4, art. 1.

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may adopt sanitary, animal and plant-specific quarantine measures have a very high degree of similarity to Article 43 of the Regulation. That is to say, Article 43 of the Regulation reflects the relevant standards set out in the SPS Agreement, *i.e.*, health measures should not restrict trade more than is necessary to protect health, measured by available scientific evidence of risk, taking into account guidance or recommendations given by WHO. But the SPS Agreement is more explicit and specific, for example, through its Article 3 "Harmonization", which requires that measures should comply with the appropriate international standards, and Article 5 "Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection" regulates the understanding and application of "scientific principles" and "scientific evidence" by member states, etc. Which gives countries more guidance, that are not existing in the Regulation. Then, in addition to the SPS Agreement, can the "additional health measures" mechanism of the Regulation be interpreted and applied with reference to the corresponding provisions of the SPS Agreement? In particular, in the case of insufficient scientific information, it is also unclear whether States are obliged to conduct further appropriate "risk assessment" to implement such measures. Given the lack of clear answers to the above questions in Article 43, even if affected States are inclined to use the Regulation's dispute settlement mechanism to challenge excessive trade restrictions, this raises a number of questions and uncertainties.

B. The "Weakness" of the Regulation's Dispute Settlement and the "Effectiveness" of the WTO One

It is clear that the Regulation only provides for dispute settlement through a single article. This is more lenient and less attractive to States than the more robust dispute settlement mechanism of the WTO, which is based on a set of established rules that are easier to comply with and more reasonable and effective in terms of structure and effect.

On the one hand, the "weakness" of the dispute settlement of the Regulation is mainly reflected in the following three points: (1) both the overall provisions of the Regulation on dispute settlement and the relevant provisions of Article 43 itself emphasize "peaceful settlement". There is no compulsion in the initiation of the dispute settlement mechanism, and the State Party can implement excessive health measures regardless of the claims of other injured countries, without worrying that it will be drawn into the dispute settlement "battlefield"; (2) the dispute settlement resolutions include arbitration, but even so, it is a voluntary choice of the State Party. Moreover, the Regulation does not establish its own arbitration rules and procedures, nor does it create any committee or body for this purpose. Its operation relies entirely on the existing arbitration procedures of the

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Permanent Court of Arbitration (hereinafter "the PCA"). That is, once a State Party declares its acceptance of arbitration as a means of dispute resolution, questions involving the interpretation or application of the Regulation are governed by the PCA's Optional Rules for Arbitration of Disputes between States; (3) the Regulation does not specify the measures that can be taken by the WHO or the injured State in the event of a State Party's non-compliance with the Regulation, nor does it require that the State Party must stop violating the measures of the Regulation, which is the "weakness" caused by the lack of attribution or punishment mechanism. It is worth noting that, even aside from the lack of coercive power, there are issues to be considered in the form of mediation or referral to the Director-General. Functionally, such a peaceful settlement may help informally resolve disputes between States Parties regarding the "implementation" of the Regulation. However, as far as the disputes over the interpretation of the Regulations are concerned, it remains to be seen whether the subject of these interpretations is qualified, how effective the interpretation is, and how to ensure the reasonableness of the interpretation.[46]

On the other hand, the WTO's Dispute Settlement Mechanism (hereinafter "DSM") appears to be complete and more effective. In fact, the WTO's DSB and related rules are also one of its important cornerstones, known as the "crown jewel" of the WTO.[47] Since the focus of this paper is on the application of the relevant rules of the Regulations, we will not discuss the specific rules of the DSM here, but will only point out a few points that are more reasonable than the dispute resolution mechanism of the Regulation: (1) the structure is better, as the DSM has its own procedural rules (including detailed arrangements and timelines for each phase, as well as a panel of experts and an appellate body, etc.). The Dispute Settlement Understanding of the Rules and Procedures (hereinafter "Understanding") provides a comprehensive and specific regulation of its structural arrangements, and this unified institutional design is not found in the Regulation dispute settlement mechanism;(2) The "reverse consensus" makes it easier to initiate dispute resolution. This is mainly reflected in two aspects, firstly, a member state will request the establishment of a panel of experts after consultations fail, unless the consensus is not to establish one.[48] And since the requesting party often does not change its mind, the establishment of a panel is almost a given. On the other hand, the report made by the panel should be adopted unless one member state "appeals" or the DSB makes a consensual decision

[46] For a similar viewpoint, see Lin, *supra* note 34, at 525.
[47] *See* Peter Sutherland, *Concluding the Uruguay Round--Creating the New Architecture of Trade for the Global Economy*, 24(1) FORDHAM INT'L L.J. 15, 26 (2000).
[48] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

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not to adopt the report.[49] Even if an appeal is filed by a member state, the report shall be unconditionally accepted by the member state unless the DSB consensus does not adopt the report of the Appellate Body.[50] (3) The DSM is more binding. The effectiveness of a dispute resolution mechanism depends largely on whether it is mandatory and whether the violation bears the corresponding legal consequences. In this regard, the WTO's DSM have the relevant rules and is more effective.

In summary, it is the more stringent discipline established by the SPS Agreement, as well as the WTO's comprehensive and robust dispute settlement mechanism, which has prompted those aggrieved parties to prefer the WTO to the WHO, ultimately making the "additional health measures" provided for in Article 43 of the Regulation a formality without attention.

IV. A FEW THOUGHTS ON IMPROVING THE MECHANISM OF "ADDITIONAL HEALTH MEASURES"

As a result of the above discussion, it can be tentatively concluded that the "additional health measures" provided for in the WHO Regulation do not work as they should, *i.e.*, it kind of failed to protect public health while minimizing disruption to international trade and traffic. So, can it be said that this mechanism should be "abandoned" or abolished because of its shortcomings? Can the parties completely rely on the relevant provisions of the WTO to solve the dispute well? In my opinion, the answer is no.[51] There are two main reasons: on the one hand, from the perspective of the WTO, it has limitations in dealing with public health events, especially public health emergencies such as infectious diseases; on the other hand, from the perspective of the WHO, both in terms of its responsibilities and mission as an international organization specializing in public health and its professional and complete organizational structure, it plays an indispensable role in solving international health and trade balance problems. The mechanism of "additional health measures", as an important provision in the Regulation for balancing health and trade, is irreplaceable and should be further improved to give full play to its important role. The following of this paper will discuss these two aspects and put forward a few suggestions to improve the mechanism in the light of the shortcomings of Article 43 of the Regulation.

A. The Limitations of WTO Rules in the Face of Public Health

[49] *Id*. art. 16.4.
[50] *Id*. art. 17.14.
[51] It should be pointed out that this article does not intend to deny the feasibility and necessity of WTO in dealing with trade issues related to health, but the WTO mechanism has obvious shortcomings for the special issue of infectious diseases.

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Emergencies

In my opinion, the SPS Agreement and the WTO's DSM have more prominent limitations and do not play a good role in balancing public health and trade, especially when dealing with emergency outbreaks of infectious diseases, these limitations are particularly prominent. Four major shortcomings are broadly summarized:

1. The SPS Agreement Is Not Comprehensive in Regulating the Object — As mentioned above, in addition to food-borne diseases, only diseases transmitted to humans through plants and animals or their products fall within the scope of the SPS Agreement. According to scientific experiments, the main and easiest way of transmission is from person to person, followed by airborne transmission, contact with contaminated surfaces, and rarely from person to animal.[52] Thus, the SPS Agreement cannot function if it is dealing with the prevention and control of COVID-19, and the parties use measures that unduly restrict trade or traffic. This is beyond the scope of the regulatory target it covers. In this case, only a broader legal instrument such as the Regulation can be applied to regulate excessive trade or transport restrictions.

2. The Dispute Settlement Process Is Time-Consuming — Although the WTO DSM is relatively well structured, easy to initiate, and binding, it has the limitation of taking a long time to respond to public health emergencies, which is a significant disadvantage. According to the DSU, it has a number of key time limits, including minimum and maximum time limits for certain stages of a dispute, and overall time limits for panel and appeal proceedings.[53] In practice, however, the times followed by the DSB are always subject to some variation, depending on factors such as the complexity of the case, the scheduling problems faced by the parties, and the workload of the panelists in the course of their normal work. A comparison of the original ten WTO panel reports with the most recent ten panel reports (as of November 23, 2019) clearly illustrates that cases today are taking much longer than they did when the WTO was established in 1995.[54] Therefore, when a State Party imposes unreasonable trade restrictions, it may take years to resolve them through the WTO's DSM, by which time a great deal of damage to the economy and health has already occurred and is even irreparable.

3. Insufficient Attention Was Paid to Public Health — This is mainly

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[52] *About COVID-19*, CDC (June 13, 2024), https://www.cdc.gov/covid/about/index.html (last visited Aug. 31, 2024).

[53] DSU, arts. 4.7, 6.1, 7.1, 8.7, 12.8, 12.9, 16.4, 17.5, 17.14, 21.3, 21.5.

[54] *See* James Bacchus & Simon Lester, *Trade Justice Delayed Is Trade Justice Denied: How to Make WTO Dispute Settlement Faster and More Effective*, CATO INST. (Nov. 20, 2019), https://www.cato.org/free-trade-bulletin/trade-justice-delayed-trade-justice-denied-how-make-wto-dispute-settlement.

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reflected in: (1) the lack of explicit provisions requiring panels to interpret issues involving public health in their deliberations, resulting in a lack of certainty in panel deliberations; and (2) the lack of sufficient public health expertise in the composition of panel members, which inevitably makes the deliberations of cases lack sufficient scientific rigor. It is certain that the relevant WTO treaties, declarations and jurisprudence do not provide for the "protection of health" as a principle of interpretation, nor is health mentioned as a purpose in the preamble of the main WTO agreements.[55] Although the WTO system has considered the protection of health as a de facto interpretative principle when the meaning of trade agreements is in dispute, the effect has been less than satisfactory. For example, in his monograph, John Hilary notes that panels in WTO dispute settlement consider cases involving public health issues on the basis of trade considerations, not public health.[56] There are even scholars who argue that WTO policies are in conflict with the priorities of many national health systems.[57] This limitation is further amplified by the DSM's lack of transparency. The greater discretion of the panel on public health issues raises another worrying consequence: it will make the legal liability boundaries of the trade regime increasingly blurred.[58] In other words, if the WTO's dispute settlement mechanism does not have relatively clear standards or principles guiding the interpretation of issues involving public health protection and trade balance, then the resulting binding cases will affect the subsequent hearing of similar cases. Thus, the lack of attention to public health issues will continue and may even expand the focus on trade, making the trade regime expand outward and blurring the boundaries of responsibility. Furthermore, with regard to the composition of panelists, according to the latest version of the Indicative List of Governmental and Non-Governmental Panelists published by the WTO in 2021,[59] the panelists are basically experts in trade law and economics-related fields. However, as a case involving public health issues, an important part of its legal investigation is that the Panel must delve into the underlying science to determine whether the members of the measure are based on scientific findings supported by reliable and legitimate science. Panelists receive a wealth of scientific studies from both sides that often directly contradict each other. It is naturally difficult for panel members who lack scientific theoretical research to deal with these complex information

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[55] M. Gregg Bloche & Elizabeth R Jungman, *Health Policy and the WTO*, 31(4) J.L., MED. & ETHICS 529, 530 (2003).

[56] JOHN HILARY, THE WRONG MODEL: GATS, TRADE LIBERALISATION AND CHILDREN'S RIGHT TO HEALTH 46 (2001).

[57] *See* David Price et al., *How the World Trade Organization Is Shaping Domestic Policies in Health Care*, 354(9193) LANCET 1889, 1889-92 (1999).

[58] Sutherland, *supra* note 47, at 28.

[59] *See generally* WTO, Indicative List of Governmental and Non-Governmental Panelist, WTO Doc. WT/DSB/44/Rev.52 (Jan. 13, 2021).

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processes. When there is a conflict among scientists, how should the expert panel choose different points of view and positions? After all, the panelists are not highly specialized in purely scientific issues, and this choice is undoubtedly extremely unscientific and rigorous. And this unscientificness will be further amplified after the appeal because the Appellate Body (hereinafter "AB") does not review questions of fact. Thus, this choice increases the uncertainty and lack of rigor in the outcome of the deliberations and thus lacks the weight that should be given to the relevant issues in cases involving public health issues.

4. The AB Is "Paralyzed" — In addition to the three limitations mentioned above, the most "fatal" impact on the role of the WTO in the face of public health emergencies is the "paralyzed" AB. At the end of 2020, the AB ceased to function, with the last Chinese member announcing his departure. This has not only had a significant impact on the DSB in trade cases but has also made it difficult for the WTO to effectively play its role in balancing trade and health issues. Members affected by excessive trade restrictions are also unable to use the SPS Agreement to seek relief through the DSM. Specifically, the logic behind the AB "paralysis" that prevents member states from seeking effective relief is that it denies the DSB the opportunity to correct errors at the legal level. This is because once a panel report on a case does not satisfy either member state, the member state may appeal. In the current situation where the AB is not functioning properly, as long as the member state is involved in the appeal, the immediate result is "pending", effectively creating the effect of "ineffective appeal".[60] This, at another level, exacerbates the time-consuming limitations of the WTO's DSM itself. The long lead time of the ruling makes the conflict between the DSM and the urgency of the non-infectious disease scenario even more acute. It is worth mentioning that on April 30, 2020, seventeen WTO members, including China and the EU, negotiated the Multi-Party Interim Appeal Arbitration Arrangement (hereinafter "MPIA"), and completed the notification to the WTO. The MPIA has been notified to the WTO and has entered into force.[61] This arrangement is an innovative system that emerged in the wake of the AB "paralysis" and provides an opportunity and avenue for participating member states to seek appellate relief. However, the MPIA still has some limitations, and thus does not address the shortcomings of the WTO in resolving disputes related to public health and trade balance after the "paralysis" of the AB. For example, some scholars believe that the MPIA

[60] *See* Hsien Wu, *WTO Dispute Settlements in the Wake of Coronavirus Disease 2019 (COVID-19): Exploring the Possible Benefits and Limits of Contemporary Mechanisms*, 13(1) CONTEMP. ASIA ARB. J. 291, 300-02 (2020).

[61] *See generally* WTO, Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes - Multi-Party Interim Appeal Arbitration Agreement Pursuant to Article 25 of the DSU, WTO Doc. JOB/DSB/1/Add.12 (Apr. 30, 2020).

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is inherently theoretically flawed.[62] The reason is that arbitration as an appeal procedure of panel decision is "hybridization", and litigation and arbitration are completely different in nature. Therefore, there are jurisprudential doubts. In addition, some scholars point out that the biggest limitation of the MPIA lies in the United States.[63] The MPIA will find it difficult to resolve the vast majority of cases because of its very negative attitude towards reforming the AB.

To sum up, the WTO DSM cannot play its role of dispute settlement well after the "suspension" of AB. Even if some member states signed the MPIA, it is difficult to reach a temporary solution with "no way to appeal". But also because of its temporary nature, there are more ambiguities in the rules, and not as good as the AB dispute resolution.

B. Few Thoughts on Improving the Mechanism of "Additional Health Measures"

Although the "additional health measures" mechanism provided for in the Regulation is unsatisfactory, the normative value of the WHO as the only international legal document directly regulating transmissible diseases makes it an irreplaceable position in balancing health and trade. Fundamentally, the implementation of "additional health measures" still requires the "conscientiousness" of countries, and international cooperation should be strengthened to accelerate the process of epidemic management.[64] However, the normative role of Article 43 of the Regulation should also be further strengthened. As discussed above, the WTO has serious limitations in dealing with the balance between public health, especially infectious diseases, and trade restrictions, while the WHO has an organizational and institutional significance that cannot be ignored. Therefore, this paper believes that it is necessary to further improve the mechanism of "additional health measures" stipulated in Article 43 of the Regulation, so as to play its

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[62] Yang Guohua (杨国华), *WTO Shangsu Zhongcai Jizhi de Jianli* (*WTO 上诉仲裁机制的建立*) *[The Establishment of WTO Appellate Arbitration Mechanism]*, 27(6) SHANGHAI DUIWAI JINGMAO DAXUE BAO (上海对外经贸大学報) [J. SUIBE] 29, 33 (2020).

[63] Shi Jingxia (石静霞), *WTO《Duofang Linshi Shangsu Zhongcai Anpai》: Jiyu Zhongcai de Shangsu Tidai (WTO《多方临时上诉仲裁安排》:基于仲裁的上诉替代) [WTO's "Multiparty Interim Appellate Arbitration Arrangement": An Alternative to Arbitration-Based Appeals]*, 42(6) FAXUE YANJIU (法学研究) CHINESE J.L. 167, 182 (2020).

[64] In this regard, see generally Zhang Liying (张丽英), *Xinguan Yiqing Xia Ewai Weisheng Cuoshi de Shi yong Ji Qi Juxianxing Yanpan (新冠疫情下额外卫生措施的适用及其局限性研判) [The Application and Limitation of Additional Health Measures Under the New Epidemic]*, 15(2) TSINGHUA U.L.J. 177 (2021), for the suggestion that countries should be guided by the idea of "human health community" to restrain the implementation of additional health measures. The "human health community" should be the ideological guide for countries to restrain the implementation of "additional health measures".

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role. This improvement is not only conducive to the formation of a more complete and effective epidemic prevention system of WHO but also makes the Regulation more operable and enhances the binding force of its relevant provisions. More importantly, as the WTO reform is still in a "confused" stage, the improvement of the Regulation can effectively "fill in" the relevant dispute resolution, and provide a fair and effective platform for the parties to ensure that the relevant disputes can be better resolved. This paper intends to take into account the shortcomings of the mechanism of "additional health measures" under Article 43 of the Regulation discussed above, and put forward several suggestions in the following:

1. The Regulation Should Learn from the SPS Agreement to Regulate the Understanding and Application of Scientific Matters by the States Parties — It is suggested that the provisions on scientific principles, scientific evidence and other information processing should be consistent with the interpretation of the SPS Agreement.[65] The SPS Agreement has eight main provisions for member states to take relevant measures. Which involves the understanding and application of scientific principles and scientific evidence, this paper believes that the main points are as follows: (1) State Parties must justify such measures through sound scientific assessment (risk assessment). According to the SPS Agreement, "risk assessment" means " the evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs."[66] Article 43 of the Regulation may introduce a "risk assessment" provision, depending on the object of its regulation and the standard of requirements. (2) The only exception to the scientific substantiation or risk assessment requirement in the SPS Agreement is the interim SPS measure, *i.e.*, in the case of "insufficient relevant scientific evidence," a member may apply the measure if certain other requirements are met.[67] This exception is of particular value to Article 43, because infectious diseases that constitute "public health emergencies of international concern" are often difficult to prove scientifically, and most countries will initially adopt a large number of temporary "additional health measures" out of fear. For example, in the case of today's COVID-19, it would be unreasonable to require that countries that initially adopted trade restriction measures have sufficient scientific evidence. However, risk assessments can

[65] It is not the intention of this paper to deal with the controversies involved in the SPS Agreement, but to examine more than the rationality of its norms.
[66] SPS, Annex A, ¶ 4.
[67] *Id.* art. 5.7.

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take a relatively long time in the process of gathering information, etc.[68] Therefore, for such cases, the Regulation can reasonably lower the standards and requirements for risk assessment by the States Parties. Moreover, (3) Members shall avoid arbitrary or unreasonable distinctions at levels they deem appropriate in different circumstances.[69] That is, it is required that there is no differential treatment by a State Party that adopts trade-restrictive measures. (4) The trade-restrictive measures adopted shall be necessary to achieve a proportionate level of protection.[70] This is consistent with the principle of proportionality in Article 43 of the Regulation. (5) The SPS Agreement also requires that if the exporting member achieves the same level of protection, the importing member shall accept the exporting member's SPS measures albeit in a different (equivalent) manner.[71] This norm compensates for excessive trade-restrictive measures imposed by some members due to lack of scientific evidence or unreasonable differences. In order to meet this requirement, it is necessary to objectively determine which methods can achieve the same level of protection. This allows States Parties to the Regulation to use different means to ensure the same level of protection and is therefore another practical way to achieve harmonization. (6) Countries may have different production areas and certain pests and diseases may not be found in all of these areas. the SPS requires Member States to recognize pest-free areas as well as certain areas where pest and disease prevalence is low.[72] This article also has important implications for Article 43 of the Regulation, limiting the scope of trade restriction measures to achieve minimal disruption to trade and traffic.

2. Refining the Procedural Obligations of Member States — This paper suggests that the "reporting obligation" should be specified in the specific content that countries should report, or set the "minimum scope" that should be covered. This will help the WHO to grasp such information more comprehensively, so as to better provide more targeted and professional scientific advice to the relevant parties. In addition, in order to avoid excessive trade-restrictive measures taken by the State Party out of fear of facing the legal risk of challenge by the affected State Party, so as not to fulfill the "reporting obligations," can be added in the article to deal with the non-compliance of the obligation. However, this paper believes that when providing for the treatment, should not take a "one-size-fits-all" model, more flexible provisions should be set. For example, the scientific control of

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[68] Bian Yongmin (边永民), *Guojifa Shiyu Xia de Xinguanfeiyan Yiqing Yingdui* (*国际法视域下的新冠肺炎疫情应对*) *[Response to the New Coronary Pneumonia Epidemic in the Perspective of International Law]*, ZHONGGUO FAXUEWANG (中国法学网) [CHINA LEGAL NET], http://iolaw.cssn.cn/zt/gzyq/fydt/202004/t20200417_5115582.shtml (last visited Dec. 20, 2024).

[69] SPS, art. 5.5.

[70] *Id.* art. 5.6.

[71] *Id.* art. 4.

[72] *Id.* art. 5.6.

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infectious diseases in poorer developing countries may not be as good as in developed countries, so the WHO should adopt the appropriate way to deal with the breach of the obligation according to the actual situation. The "obligation to review" has similar procedural shortcomings, and the article does not address how to deal with the review of measures taken by States Parties. This paper suggests that provisions can be made for different review results, (1) if the review results are reasonable, then the measure can continue to be implemented. However, since the development of infectious diseases is unpredictable and dynamic, the same measures still need to be reviewed and adjusted from time to time. Therefore, States Parties can be further required to continuously follow up on the review and regular evaluation, the specific length of which can be determined according to the development of infectious diseases and the effect of epidemic prevention; (2) on the contrary, if the review results are not reasonable, then States Parties have the obligation to make adjustments, and such adjustments should be based on the recommendations or guidance provided by WHO, of course following the substantive scientific principles and other provisions. In this process, WHO should be involved in monitoring and giving guidance; finally (3) if the State Party does not conduct the review in accordance with the provisions, it should provide for the handling of non-compliance with the "review obligation", which should also be a more flexible provision.

3. Adjusting the Dispute Resolution Rules Related to "Additional Health Measures" — Although there is a need to reform the overall dispute resolution mechanism of the Regulation, considering the scope and difficulty of the reform, it cannot be achieved in a short period of time. Therefore, the author believes that it could start with the reformation of Article 43, which has special characteristics. We may consider (1) reaching an arbitration agreement in advance, as provided for in some existing bilateral agreements, and accepting mandatory arbitration in the event of disputes. This will put pressure on the parties that adopt excessive trade-restrictive measures to comply with the relevant provisions; (2) consider formulating a set of PCA arbitration rules that are more suitable for addressing the balance between infectious disease prevention and control and trade traffic measures. Since Article 56 provides that States Parties may submit to the PCA for dispute resolution, and since the PCA has already established separate rules for environmental issues, it is not entirely impossible to "tailor" rules related to infectious disease control and trade.

V. CONCLUSION

When countries consider taking "additional health measures" stipulated in Article 43 of the Regulation, they should follow the principle of proportionality and the corresponding procedural rules in substance.

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However, the majority of countries have not fulfilled their obligations in COVID-19, which poses a great threat to international public health and trade. In retrospect, many major pandemics in the past also had a large number of States Parties that did not comply with the rules and excessively restricted trade or transportation. Moreover, the affected Parties prefer to use WTO rules and dispute settlement measures when the disputed matters are also within the jurisdiction of the SPS Agreement. The main reasons for this are that Article 43 of the Regulation does not clearly define the relationship with the SPS Agreement, and lacks detailed and operational procedural provisions and binding dispute settlement measures. In view of the limitations of the WTO in dealing with public health and trade balance issues, and the important organizational and institutional status of the WHO, Article 43 of the Regulation should be reformed. This can be done by refining the procedural provisions and adjusting the relevant arbitration rules, so as to better achieve the original purpose of the article and the ultimate goal of the Regulation.

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