

## Export Restrictions on Medical Supply Amidst a Pandemic

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2020 witnessed serious disruptions in medical supply. The COVID-19 pandemic prompted a surge in demand for medical products, including protective garments, medical equipment, and pharmaceuticals. This challenge was made worse by many countries' imposing export restrictions, causing disruptions in supply chains. According to the World Trade Organization (WTO), 85 countries imposed such restrictions, with around 58% of the products targeted being medical devices or medical consumables.<sup>1</sup>

Export restrictions typically take different forms. These vary from the most restrictive form (export prohibitions) to less restrictive forms such as licensing requirements. They can affect supply chains in three distinct ways. First, they limit the availability of the product in export markets. Second, by limiting the supply on the world market, they push up price and affect affordability. Third, if the product is an intermediate input, restrictions on it can disrupt the provision of downstream products.

Under the WTO, countries are obligated to eliminate all export prohibitions or restrictions other than export duties. Nevertheless, this discipline does not apply to restrictions "temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party." Arguably, all the export restrictions introduced to preserve national supply to combat the pandemic could fall under this exemption.

However, the exemption is not without limits. First, the essentialness of such a product cannot be a matter of self-judgment. In other words, the product subject to the export restrictions cannot be automatically qualified as essential simply because the exporting country claims so. If disputed, it needs to be subject to an objective assessment by WTO adjudicators, based on the particular circumstances faced by that country at the time when the restriction is applied. Second, not all kinds of shortages can be considered critical. As the restrictions can be applied only temporarily, there must be a point in time at which conditions are no longer critical.

Therefore, even though the WTO disciplines provide for certain leeway for countries to impose export restrictions during a pandemic, such leeway is not unconditional. Whether the export restriction at hand is eligible for the exemption depends on the essentiality of the product, the nature of the shortage, and the duration of the measure. Export restrictions with indefinite duration that serve to protect the exporting country's domestic industry (e.g., an export ban on input materials) are considered incongruent with WTO disciplines. Thus, countries affected by such restrictions can draw on WTO rules to challenge unduly prolonged and potentially protectionist export restrictions that affect the supply chain.

Of course, WTO rules contain other exceptions that countries can use to preserve their policy space to apply export restrictions. However, it is not easy to pass the many thresholds required for the successful

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<sup>1</sup> WTO Report on G20 Trade Measures, 29 June 2020, Box 3.1.

defense of these measures. The exemption discussed is therefore the most common that countries have used while notifying export restrictions adopted during the pandemic.

Some free trade agreements (FTAs) contain stricter rules on the use of export restrictions. For example, some FTAs cover not only quantitative restrictions but also “measures having equivalent effect.” Some FTAs impose additional conditions on the use of exemptions. Others feature procedural requirements such as a prior consultation requirement and a phase-out mechanism. Countries affected by export restrictions can also raise the matter under the relevant regional trade agreements.

While WTO Members have started withdrawing some trade restrictive measures, a significant number of export restrictions remain. Some Members have reintroduced certain export restrictions. The long-term impact of export restrictions on the supply chain of medical products remains to be ascertained, but international trade rules are there to be used.