

EXPORT PROHIBITIONS AND RESTRICTIONS

INFORMATION NOTE¹

KEY POINTS

- *The COVID-19 pandemic presents the world with an unprecedented public health challenge. Measures to curb the spread of the disease have shut down large swathes of the world economy. Worldwide demand for medical products to fight the pandemic is unprecedented. All countries depend on international trade and global value chains to source these products. This is challenging in light of ongoing disruptions to international transport, particularly air cargo, which often goes together with passenger travel.*
- *An additional complicating factor is the growing number of export prohibitions and restrictions, which some WTO members have introduced to mitigate critical shortages at the national level. Responding to COVID-19 urgently requires sharp increases in global production of essential medical supplies. Well-functioning value chains can help quickly ramp up production while containing cost increases. As new production becomes available, trade will be essential to move supplies from where they are abundant to where they are lacking, especially as the disease peaks at different times in different locations. However, a lack of international cooperation risks hampering the urgently required supply response.*
- *The information available thus far suggests that 80 countries and separate customs territories have introduced export prohibitions or restrictions as a result of the COVID-19 pandemic, including 46 WTO members (72 if EU member states are counted individually) and eight non-WTO members. Most of these have been described as temporary measures. At least two members have already removed some of those restrictions.*
- *The products covered by these new export prohibitions and restrictions vary considerably; most have focused on medical supplies (e.g. facemasks and shields), pharmaceuticals and medical equipment (e.g. ventilators), but others have extended the controls to additional products, such as foodstuffs and toilet paper.*
- *While Article XI of the General Agreement on Tariffs and Trade (GATT) 1994 broadly prohibits export bans and restrictions, it allows members to apply them temporarily to prevent or relieve critical shortages of foodstuffs or other essential products. If members move to restrict exports of foodstuffs temporarily, the Agreement on Agriculture requires them to give due consideration to the food security needs of others. WTO rules also contain more general exceptions, which could be used to justify restrictions provided that they do not constitute a means of arbitrary or unjustifiable discrimination between countries, or a disguised restriction on international trade.*
- *Export prohibitions and restrictions applied by large exporters may in the short run lower domestic prices for the goods in question and increase domestic availability. But the strategy is not costless: the measures reduce the world's supply of the products concerned and importing countries without the capacity to manufacture these products suffer. And exporters also risk losing out in the long run. On the one hand, lower domestic prices will reduce the incentive to produce the good domestically, and the higher foreign price creates an incentive to smuggle it out of the country, both of which may reduce domestic availability of the product. On the other hand, restrictions initiated by one country may end-up triggering a domino effect. If trade does*

¹ This document has been prepared under the WTO Secretariat's own responsibility and is without prejudice to the positions of members or to their rights and obligations under the WTO.

not provide secure, predictable access to essential goods, countries may feel they have to close themselves from imports and pursue domestic production instead, even at much higher prices. Such a scenario would likely result in lower supply and higher prices for much-needed merchandise. The long-term effects could be significant.

- *Transparency at the multilateral level is lacking. In principle, all these measures should be notified as soon as possible to the WTO pursuant to the 2012 "Decision on Notification Procedures for Quantitative Restrictions" (QR Decision), while those relating to foodstuffs should also be notified to the Committee on Agriculture. However, to date, 13 WTO members (39 if EU member states are counted individually) have notified the introduction of new measures under the QR Decision and three have notified export restrictions on foodstuffs pursuant to Article 12 of the Agreement on Agriculture.*
- *Economic operators and members are having to cope with a high degree of uncertainty, as it remains unclear what measures have been adopted by which countries, and new measures are being introduced regularly. Insufficient information makes it hard for them to efficiently adjust their purchasing decisions and find new suppliers. This could be particularly damaging for those seeking to procure materials needed for the fight against the COVID-19 pandemic.*
- *The G20 Ministerial Statement of 30 March 2020 stressed that "emergency measures designed to tackle COVID-19, if deemed necessary, must be targeted, proportionate, transparent, and temporary, and that they do not create unnecessary barriers to trade or disruption to global supply chains, and are consistent with WTO rules." More recently, the G20 Agriculture Ministers Statement of 21 April 2020 reaffirmed the "agreement not to impose export restrictions or extraordinary taxes on food and agricultural products purchased for non-commercial humanitarian purposes by the World Food Programme (WFP) and other humanitarian agencies".*
- *WTO Director-General Roberto Azevêdo has urged members to exercise maximal restraint in the use of export restrictions and other measures that could disrupt supply chains. He has also called on WTO members to improve transparency on any new trade-related measures introduced as a result of the COVID-19 pandemic.*
- *Possible actions to improve transparency in this area include:*
 - i. *Ensuring that the new measures are adequately published at the national level and, when possible, making them available in the website(s) of the relevant national authorities.*
 - ii. *Notifying as soon as possible any new export restriction to the WTO pursuant to the QR Decision; in case these restrictions affect foodstuffs, notifying them to the Committee on Agriculture as well.*
 - iii. *Updating as necessary the information under the "transparency notification" of Article 1.4 of the Agreement on Trade Facilitation, including the relevant enquiry points.*
 - iv. *Endeavouring to provide additional information to other members beyond that required by the notifications, whenever possible.*

1. INTRODUCTION

The COVID-19 pandemic is presenting the world with unprecedented public health, social and economic challenges, including in international trade. Measures to curb the spread of the disease have shut down large swathes of the world economy, leading to dramatic downward supply and demand shocks. The need for certain key medical goods, such as medical devices, protective equipment, pharmaceuticals, and other products essential to combat the pandemic, has skyrocketed in practically every country around world. As a result, there is an enormous upward shock in the global demand for medical products, as practically all countries need the same products to fight the pandemic. However, they all depend on international trade and global value chains to source these products. This is challenging in light of ongoing disruptions to international transport, particularly air cargo operations associated with passenger travel.

On the other hand, the situation has been exacerbated by export prohibitions and restrictions that some members have introduced to mitigate critical shortages at the national level. National authorities have been compelled to adopt emergency measures with the aim of avoiding a shortage of key supplies necessary to combat the spread of the disease. Unusually large quantities of certain medical products are required by domestic healthcare providers in order to ensure the appropriate care for and protection of national populations. While the introduction of export-restrictive measures is understandable, the lack of international cooperation in these areas risks cutting off import-reliant countries from desperately needed medical products and triggering a supply shock. And by interfering with established medical supply chains, such measures also risk hampering the urgently required supply response.

Export prohibitions and restrictions are generally prohibited in the WTO. Article XI:1 of the GATT 1994 prohibits members from introducing or maintaining any form of export prohibition or restriction other than duties, taxes or other charges. However, certain measures are carved out the scope of this general prohibition, including Article XI:2(a) of the GATT 1994 which allows "*export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party*". **Section 2** below provides an overview of the main WTO rules, including a description of some of the relevant carve-outs and exceptions.

Economic operators and members are currently coping with a high degree of uncertainty, as it remains unclear what measures have been adopted by which countries, and new measures are being introduced almost on a daily basis. In the context of rapidly emerging emergency export restrictions, up-to-date knowledge of the regulatory context is of key importance to all stakeholders. The WTO has a number of transparency provisions that seek to assist members and economic operators in the situation, including requirements for transparency at the national level, notifications, and the trade monitoring reports. **Section 3** describes some of the relevant transparency provisions at the WTO and the information available on export prohibitions and restrictions, while **Section 4** maps the different measures that have been introduced thus far. **Section 5** discusses some past experiences and the possible economic impact of these measures. **Section 6** discusses international cooperation in this area.

2. WHAT ARE THE WTO RULES ON EXPORT PROHIBITIONS AND RESTRICTIONS?

2.1. As a general rule, export prohibitions and restrictions are banned

Article XI of the GATT 1994, entitled "General Elimination of Quantitative Restrictions", includes a first paragraph that prohibits members from introducing or maintaining any form of "*prohibitions or restrictions other than duties, taxes or other charges*". "*Other charges*" has been generally understood to mean that this provision does *not* prohibit WTO members from applying export taxes. However, some members undertook specific commitments to either bind or eliminate export duties

during their accession to the WTO,² and four members included export duty concessions in their goods schedules.³

The general elimination of quantitative restrictions provided for in Article XI:1 extends not only to the importation of products, but also to measures that prohibit or restrict the exportation and sale for export of goods. This provision clarifies further that the covered prohibitions or restrictions can be "*made effective through quotas, import or export licences or other measures*".

2.2. But there are carve-outs and exceptions

Notwithstanding the general prohibition in Article XI, some measures are "carved out" from the scope of Article XI:1. There are also exceptions that may allow a member to apply export prohibitions and restrictions.

In terms of the export-oriented measures, Article XI:2(a) of the GATT 1994 states that the general prohibition in Article XI:1 "*shall not extend*" to "*[e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting [Member]*".

Article 12 of the Agreement on Agriculture entitled "Disciplines on Export Prohibitions and Restrictions" provides that, where a member⁴ institutes any new export prohibition or restriction on "*foodstuffs*" in accordance with Article XI:2(a) of GATT 1994, it shall undertake two actions. Firstly, it shall give due consideration to the effects of such prohibition or restriction on importing members' food security. Second, before instituting the measure, it shall give notice to the Committee on Agriculture including information on the nature and duration of the measure. Upon request, it shall consult with any member having a substantial interest in the measure in question, which in practice will take the form of bilateral consultations. The member instituting the export prohibition or restriction shall also provide additional information upon request.

Generally, members may also impose export-restricting measures pursuant to the "General Exceptions" of Article XX of GATT 1994. Provided that certain conditions are met, members may impose prohibitions and restrictions to pursue certain legitimate policy objectives, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. These include, for example, Article XX:b of GATT 1994, which relates to measures "*necessary to protect human, animal or plant life or health*".

If a member introduces or maintains a quantitative restriction in accordance with WTO rules, Article XIII of the GATT 1994 requires that its application be non-discriminatory.

Annex 1 of this information note provides additional information on these legal matters, including the interpretation of some of these terms in the context of previous WTO disputes.

3. TRANSPARENCY PROVISIONS ON EXPORT PROHIBITIONS AND PRESTRICIONS

3.2. Transparency at the WTO?

In the context of the COVID-19 pandemic, the Director-General of the WTO, Roberto Azevêdo, recalled the importance of transparency and called on members to share information on the trade-related policies that had been introduced to fight this crisis. But what exactly is transparency? In the WTO framework, it can take many forms and includes, for example, the "publication" of a

² Includes the Protocol of Accession of China and specific commitments undertaken in the working party reports of the following members: Bulgaria, Croatia, Estonia, Georgia, Latvia, Nepal, the Kingdom of Saudi Arabia, Ukraine, Tonga and Viet Nam.

³ Part I, Section II of Australia's Uruguay Round Schedule I includes commitments not to impose export duties in respect of a number of metals, ores and minerals. Afghanistan, Kazakhstan and the Russian Federation included a "Part V".

⁴ The provisions of Article 12 do not apply to developing-country members, unless the measure is taken by a developing-country member which is a net food-exporter of the specific foodstuff concerned.

measure in the domestic system and its "notification" to the WTO Secretariat. Annex 2 provides additional information about transparency at the WTO.⁵

3.3. How should members notify export prohibitions and restrictions?

There are two notification obligations that may be relevant for prohibitions and restrictions introduced as a result of COVID-19. The first one is the 2012 "Decision on Notification Procedures for Quantitative Restrictions" (hereinafter the QR Decision)⁶, which requires members to notify every two years *all* quantitative restrictions in force, on both imports and exports. Several members have notified "temporary" measures as well. The next round of complete notifications should take place in September 2020, but members are required to notify new measures "*as soon as possible, but not later than six months from their entry into force*". QR notifications are automatically placed in the agenda of the Committee on Market Access. Annex 2 provides additional information on the QR Decision, including the types of export measures that have been notified previously and the justifications that have been cited by members.

To the extent that a member introduces a new measure as a result of the COVID-19 pandemic that takes the form of an export prohibition or restriction other than a duty, tax or charge, it shall be notified to the WTO through the QR Decision. Ideally, concerned members should provide as much information as possible (e.g. the specific products affected and other information relating to the measure's administration, such as the duration of the restriction, the national agency/ministry responsible for the measure, additional requirements, etc.), which would allow other members and economic operators to become acquainted with the scope of the new measures.

In addition to the QR Decision, Article 12 of the Agreement on Agriculture requires members⁷ to notify the Committee on Agriculture of any prohibitions or restrictions on foodstuffs introduced pursuant to the carve-out in Article XI:2(a) of the GATT 1994. Article 12 also requires the member wishing to institute an export prohibition or restriction on foodstuffs to give "*due consideration to the effects of such prohibition or restriction on importing Members' food security*". Thus, if a member introduces one such measure on foodstuffs, the measure should also be notified to the Committee on Agriculture under these procedures and follow the procedure in Article 12 of the Agreement on Agriculture.

3.4. How many members have notified export prohibitions and restrictions as a result of the COVID-19 pandemic?

Although only a handful of notifications were submitted in March 2020, when the new export prohibitions or restrictions began to be implemented, the number of notifications has increased considerably since the beginning of April. To date, 13 members (or 39 if the EU member states are counted individually) have notified under the QR Decision the introduction of new export prohibitions or restrictions as a result of the COVID-19 pandemic: Albania, Australia, Bangladesh, Colombia, Costa Rica, Egypt, the European Union, Georgia, Israel, the Republic of Korea, the Kyrgyz Republic, North Macedonia, Thailand and Ukraine.⁸ In terms of the WTO justification, most of these members have cited Articles XI:2 and/or Article XX(b) of the GATT 1994. Thus far, three members have also submitted an export restriction (ER) notification pursuant to Article 12 of the Agreement on Agriculture: the Kyrgyz Republic, North Macedonia and Thailand.⁹

In the face of initial low numbers of notifications, and in an effort to improve transparency, on 24 March 2020 the WTO Director-General called on members to share information on the trade-related policies that had been introduced to fight this crisis.¹⁰ Shortly afterwards, the WTO created

⁵ See also Information Note "Transparency — why it matters at times of crisis" at https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm

⁶ Decision Adopted by the Council for Trade in Goods on 22 June 2012, official WTO document G/L/59/Rev.1 (official WTO documents can be sourced at <https://docs.wto.org/>).

⁷ See footnote 4 of this report.

⁸ See official WTO documents G/MA/QR/N/ALB/1/Add.1, G/MA/QR/N/AUS/3/Add.1, G/MA/QR/N/BGD/1, G/MA/QR/N/COL/1, G/MA/QR/N/CRI/3/Add.1, G/MA/QR/N/EGY/1/Rev.1, G/MA/QR/N/EU/4/Add.1, G/MA/QR/N/GEO/2/Add.1, , G/MA/QR/N/KOR/2/Add.1, G/MA/QR/N/KGZ/1/Add.1, G/MA/QR/N/MKD/1, G/MA/QR/N/THA/2/Add.2, G/MA/QR/N/THA/2/Add.3, and G/MA/QR/N/UKR/4/Add.2.

⁹ See official WTO documents G/AG/N/KGZ/8, G/AG/N/MKD/26, G/AG/N/THA/107 and G/AG/N/THA/107/Add.1.

¹⁰ See https://www.wto.org/english/news_e/news20_e/dgra_24mar20_e.htm

a specific webpage on COVID-19 and world trade to monitor the situation and provide up-to-date information on notifications by members, among others.¹¹ Although the QR and ER notifications are immediately included in the WTO Trade Monitoring Report,¹² it should be noted that there is also information in the trade monitoring exercise that has been validated by members but that has not yet been notified.

4. MAPPING OF COVID-19 EXPORT PROHIBITIONS AND RESTRICTIONS

4.2. Sources of information

The relatively low number of notifications translates as a lack of official information on the scope of the measures that are being introduced by members. There are, however, other sources of information that may be used by the WTO Secretariat to map the new export prohibitions and restrictions that have been introduced as a result of the COVID-19 pandemic.

A first source in the context of the WTO framework is the compilation of measures by the WTO Secretariat for the Trade Monitoring Report.¹³ This Report, which is released twice a year, compiles information from different sources, including:

- information submitted by the member concerned, which may or may not have been notified;
- information submitted by other members; and
- other informal sources (e.g. news on the internet, lists on the websites of other international organizations, and other sources).

Once compiled, the information is then sent to the member concerned for vetting before it is included in the trade monitoring report.

A second source of information is the internet, which can often provide access to "official" information via the websites of the national authorities of a member, many of which have been notified by members pursuant to Article 1.4 of the Trade Facilitation Agreement.¹⁴

A third source is official communications that have been submitted by members to other international organizations, such as the World Customs Organization.¹⁵ One advantage of these sources is that they retain the official nature of the source.

A fourth and final source that may be used to complement the information is other non-official websites, such as news outlets. While information from this last source is abundant, it has the disadvantage of remaining unconfirmed and may be less reliable than the above-mentioned sources.

Although notifications by members are the preferred means of compiling information at the WTO, in a crisis, it would be possible for the WTO Secretariat to compile information based on these other sources while keeping a record of the specific sources used.

4.3. What is out there?

Based on these alternative sources, it would appear that 80 countries and separate customs territories have thus far introduced export prohibitions or restrictions as a result of the COVID-19 pandemic, including 46 WTO members (72 if the EU member states are counted individually) and eight non-WTO members.

¹¹ See https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm

¹² See https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm

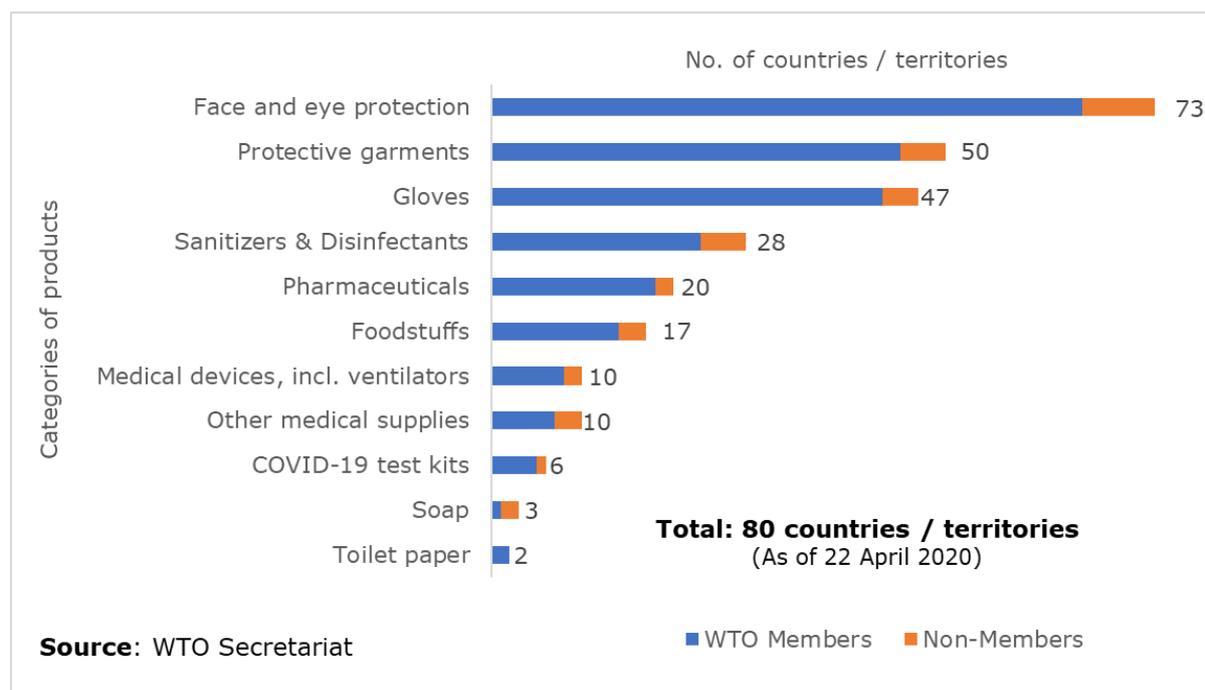
¹³ To promote confidence and transparency, Annex 3 of the Marrakesh Agreement requires the Director General to provide an Annual Overview of Developments in the International Trading System. During the 2008-09 financial crisis, the G20 asked the WTO Secretariat to increase monitoring of trade measures, and a new reporting requirement was added (Section G of Annex 3), whereby: "The overview is to be assisted by an annual report by the Director-General setting out major activities of the WTO and highlighting significant policy issues affecting the trading system". This reporting has continued since that time.

¹⁴ See TFA Database: <https://tfadatabase.org/notifications/transparency>

¹⁵ "List of national legislation of countries that adopted temporary export restrictions on certain categories of critical medical supplies in response to COVID-1", accessible through this link: <http://www.wcoomd.org/en/topics/facilitation/activities-and-programmes/natural-disaster/list-of-countries-coronavirus.aspx>

The information compiled thus far suggests that there is a large degree of variation in terms of the products of which exportation has been prohibited or restricted. Many export restrictions and prohibitions affect the exportation of products that the joint WHO/WCO indicative list of products¹⁶ designates as essential in combatting COVID-19. Based on this information, it would appear that face and eye protection devices (e.g. facemasks and shields) are the most heavily affected category, followed by protective garments, and sanitizers and disinfectants (see Chart 1 below). Fourteen members and three observers have also introduced export prohibitions or restrictions on foodstuffs. Thus far, only one member (Bangladesh) has notified the removal of a temporary export ban.¹⁷

Chart 1. Number of countries and separate customs territory introducing export prohibitions and restrictions as a result of COVID-19, by categories of products



5. PAST EXPERIENCES AND POSSIBLE ECONOMIC IMPACT

5.1. Past experiences with critical shortages

Although international trade has not faced similar problems – at least in recent memory – with respect to healthcare products as a result of a pandemic, there are lessons that may be learned from the previous introductions of export prohibitions and restrictions in the context of food shortages. For example, between 2007 and 2012, the world experienced a tightening of the world food market and increased price volatility, which could be used as a reference point to understand the impact of export prohibitions restrictions in a time of crisis.

An analysis of actual cases submitted by a group of members¹⁸ for the period 2007-12 shows that 251 export-restrictive measures were introduced during this period of successive price spikes, but only eight notifications were submitted under Article 12 of the Agreement on Agriculture. This analysis claims that as many as 88 of these export-restrictive measures remained in place after the 2007-12 period, when the world food market was no longer facing a critical shortage situation, and no new notification was made after the crisis.

¹⁶ See <http://www.wcoomd.org/en/media/newsroom/2020/april/joint-wco-who-hs-classification-list-for-covid-19-medical-supplies-issued.aspx>

¹⁷ See official WTO document G/MA/QR/N/BGD/1.

¹⁸ Communication by Japan, Israel, the Republic of Korea, Switzerland and The Separate Customs Territory of Taiwan, Penghu, Kinmen And Matsu, "Overview of Export Restrictive Measures – Analysis of Actual Cases in Recent Years", official WTO document JOB/AG/175.

This suggests that export prohibitions and restrictions can increase considerably in times of crisis of in the foodstuff sector. The data also seem to suggest that some of these restrictions may remain in place for long periods of time and even subsequent to the period of crisis. The analysis of actual cases suggests that the average duration of measures in the 2013-18 non-crisis period was 995 days, which was nearly double the average duration of measures in the 2007-12 crisis period, i.e. 539 days.

In terms of the types of measures, members seem to have given effect to prohibitions and restrictions on agricultural commodities using methods that allowed for a minimum of trade to take place, but with variations. For example, while export quotas (e.g. absolute limits on the quantity of a product that can be exported) and export taxes (which are not considered to be QRs) were the most common types of measures during the time of the crisis (2007-12), export licenses and minimum import prices were most frequent during the subsequent non-crisis period (2013-18).

In terms of product coverage, exports of rice were affected by more than 40 per cent of the measures in both periods covered. 2007-12 also saw 27 per cent of measures being enforced on wheat. This number dropped to 15 per cent in 2013-18.

5.2. Possible economic impact of the new export prohibitions and restrictions

During a crisis or emergency, a member may decide to erect export restrictions to ensure that there are sufficient domestic supplies of key products or that these products are available domestically at a lower price than the world price. However, the negative effects of export restrictions can be substantial. This is especially true when the country is a large exporter of the good on which the export prohibition or restriction is enacted. When a large exporter prohibits or otherwise restricts exports of a particular product, the world supply decreases and the world price of that good increases. Importers suffer, and in particular poor countries with limited production capacity.

It should also be borne in mind that the strategy is not without cost to the exporter. Export restrictions reduce the domestic price of the affected product, while relatively increasing the foreign price. The fall in the domestic price reduces the incentive of producers to manufacture the goods domestically. On the other hand, the higher foreign prices provide an incentive to purchase the domestic products and to try to smuggle them out of the domestic economy and sell them in the foreign market. Thus, export restrictions run the risk of triggering a boomerang effect and effectively reducing the availability of the product in the countries that implement them.

In addition, export restrictions can also trigger a domino effect and push other exporters to introduce similar restrictions to keep domestic prices low. When the crisis is global, this domino effect is amplified. Prohibitions and restrictions in one country may lead the authorities in other exporting countries to feel compelled to adopt similar measures. Ultimately, prices spiral up, thus defeating the very reason they were first introduced. Exporters themselves may lose out due to the introduction of export restrictions. First, they may face retaliatory restrictions in the supply of inputs from their trading partner, which creates the risk of significant disruption in their own production chain. Second, they may lose part of their market in the long term, because importing countries may choose to invest in self-sufficiency as an insurance against supply disruption at times of crisis.

Beyond the supply and demand shocks, a third issue that may compound the negative effects of such restrictions in the context of the COVID-19 pandemic are the considerable disruptions in logistics, distribution and international transport services. For example, the contraction of air passenger traffic worldwide has led to a considerable reduction in air cargo capacity and has increased the price of this means of transport. This is potentially problematic, given that countries typically rely on air cargo to transport urgent medical supplies and other goods around the world. Crucially, when the health services in one country become overwhelmed and depleted, getting supplies and medical staff quickly from other countries may be the only way to address the crisis efficiently and effectively.

Other possible economic effects during a global crisis include the following:

- The use of export restrictions in one sector may also trigger the use of similar measures in other sectors beyond those required to combat the COVID-19 pandemic. For example, some countries have also introduced export restrictions in agricultural commodities, probably out

of fear of a critical shortage. This could ultimately trigger negative spill-overs into the food security of other countries and a domino effect in other sectors.

- Confidence in global value chains may be eroded. In some cases, this may lead to a breakdown of regional and global value chains, as importers are unable to source key inputs due to export restrictions. In the short term this would lead to scarcity while producers reorganize, and in the long term it is likely to result in higher prices due to a less efficient supply chain.
- Additional tariff and non-tariff barriers to trade may be erected. A potential reaction to export restrictions now is tariffs in the future, as countries may want to build up their domestic industries of essential products in order to shield themselves from international competition.

5.3. Other possible consequences

As a result of these economic impacts, it is possible that profound changes in other areas may be triggered at the political level, including:

- A weakening of the fight against the COVID-19 pandemic. Given its global nature, if some countries are not able to combat the disease, this coronavirus, or mutated strains of it, will inevitably recirculate and contaminate the populations of all countries, including those imposing the export restrictions.
- Self-defeating delays and economic inefficiencies as governments seek to set up new domestic production systems rather than continuing to work with existing foreign suppliers.
- An erosion of confidence in the multilateral trading system, in particular if restrictions negatively impact the most vulnerable, especially least-developed countries, whose healthcare systems are already strained. It would be difficult for importing members to trust a system that fails to produce tangible benefits in times of crisis and may lead to general calls to ensure that production of medical and other products only take place at the national level.

6. IMPROVING INTERNATIONAL COOPERATION TO DEAL WITH THE COVID-19 CRISIS

Based on the above-mentioned elements, it is clear that international cooperation in the area of export prohibitions and restrictions should seek to strike a balance between the shortages in essential medical products being faced in some exporting countries due to the COVID-19 pandemic, and the negative impact that such measures may have on the public health of the importing members, which depend on international trade to obtain these products. There is also a marked risk that too-broad measures that stay in place may irreparably alter the supply chains that produce those goods, or of spill-over into other areas beyond medical goods.

Following the G20's March 2020 meeting, G20 trade ministers have stressed that "emergency measures designed to tackle COVID-19, if deemed necessary, must be targeted, proportionate, transparent, and temporary, and that they do not create unnecessary barriers to trade or disruption to global supply chains, and are consistent with WTO rules".¹⁹ This commitment was reaffirmed by the G20 agriculture ministers' statement of 21 April 2020, which commended the G20 trade and investment ministers' commitment to notify the WTO of any trade-related measures taken, including those related to agriculture and essential foodstuffs. In addition, it reaffirmed "their" agreement not to impose export restrictions or extraordinary taxes on food and agricultural products purchased for non-commercial humanitarian purposes by the World Food Programme (WFP) and other humanitarian agencies".²⁰

The WTO Director-General has called on members to improve transparency on new trade-related measures introduced as a result of the COVID-19 pandemic. In the area of export prohibitions and restrictions, possible actions to improve transparency include:

¹⁹ See

http://www.g20.utoronto.ca/2020/G20_Statement_Trade_and_Investment_Ministers_Meeting_EN_300320.pdf

²⁰ See

https://g20.org/en/media/Documents/G20_Agriculture%20Ministers%20Meeting_Statement_EN.pdf

- a. Ensuring that the new export-restricting measures are adequately published at the national level, including by making them available on the website(s) of the relevant national authorities.
- b. Notifying as soon as possible all new export-restricting measures through the QR Decision; and, where they also include foodstuffs, also notifying them under Article 12 of the Committee on Agriculture.
- c. Updating as necessary the information under the "transparency notification" of Article 1.4 of the Agreement on Trade Facilitation, including the information on the relevant enquiry points.
- d. Endeavouring to provide additional information to other members beyond that required by the notifications, whenever possible.

7. ADDITIONAL RESOURCES ON EXPORT PROHIBITIONS AND RESTRICTIONS

Notifications under Article 12 of the Agreement on Agriculture

- Communication by Japan; Israel; Korea; Switzerland; and The Separate Customs Territory of Taiwan, Penghu, Kinmen And Matsu, "Overview of Export Restrictive Measures – Analysis of Actual Cases in Recent Years", [JOB/AG/175](#)

QR notifications

- Quantitative Restrictions, status of notifications, [G/MA/QR/8](#)
- Practical Guide on QR notifications, [JOB/MA/101/Rev.2](#)
- Factual information on QR notifications, Report by the WTO Secretariat, [G/MA/W/114/Rev.2](#)
- WTO webpage: https://www.wto.org/english/tratop_e/markacc_e/qr_e.htm
- **Other sources**
 - WTO Analytical Index, Article XI of the GATT, [jurisprudence](#) and [practice](#)
 - WTO Analytical Index, Article XX of the GATT, [jurisprudence](#)
 - Piermartini, R. (2004), "The Role of Export Taxes in the Field of Primary Commodities", WTO Discussion Papers No. 4: https://www.wto.org/english/res_e/publications_e/disc_paper4_e.htm
 - Giordani, P. E., Rocha, N. and Ruta, M. (2016), "Food prices and the multiplier effect of trade policy", Journal of International Economics, 101:102-122: <https://ideas.repec.org/a/eee/inecon/v101y2016icp102-122.html>

ANNEX 1 ADDITIONAL INFORMATION ON LEGAL ASPECTS OF INTEREST

Article XI:1 of the GATT 1994

- In the context of Article XI of the GATT 1994, a "**prohibition**" means a legal ban on the trade or importation of a specified commodity, while a "**restriction**" implies a limiting condition or regulation. The coverage of Article XI includes those prohibitions and restrictions that *limit the quantity or amount of a product being imported or exported*. Therefore, not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that limit the importation or exportation of products, as demonstrated by the design and structure of the measure.²¹

Carve-outs vs exceptions

- A carve-out is different from an exception. Members can resort to **exceptions**, such as those under Article XX of the GATT 1994, to *justify* a measure that would otherwise be inconsistent with their GATT obligations. By contrast, an exemption or a **carve-out**, such as Article XI:2, excludes certain measures from the scope of a GATT obligation, thereby removing certain measures from its coverage. Accordingly, where the requirements of Article XI:2(a) are met, there would be no scope for the application of Article XX, because no obligation exists.²² This distinction has implications for the burden of proof in the context of WTO disputes.

Carve-out in Article XI:2(a) of the GATT 1994

- The reference to a measure that is "**temporarily applied**" indicates that the carve-out applies to measures applied for a limited time, taken to bridge a "passing need". In turn, "critical shortage" refers to deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point. The word "foodstuffs" provides an indication of what might be considered a product "essential to the exporting Member" but it does not limit the scope of such products.²³

Article XX of the GATT 1994 ("General exceptions")

- The justifications under **Article XX(b)** of the GATT 1994 could be relevant for export restrictions motivated by the desire to ensure the health or food security of citizens. One has to bear in mind that, when members invoke certain exceptions to justify border restrictions, such as the exceptions under Article XX, the burden of proof is on the country invoking the exception, i.e. on the defendant.
- **Article XX(b)** of the GATT 1994 provides for a justification of WTO-inconsistent measures when "necessary to protect human, animal or plant life and health".
- For a measure to be provisionally justified under one of the sub-paragraphs of Article XX, it must, first, fall within the range of policies "designed" to protect the value at stake (members would enjoy significant deference in determining this element); second, the measures must be "necessary" (in the case of sub-paragraph (b)) to protect such values.²⁴ The determination of "necessity" involves "weighing and balancing" a number of factors: (i) the importance of the interests or values at stake; (ii) the contribution of the measure to achievement of the objective pursued; and (iii) its trade-restrictiveness. Furthermore, the country challenging the restriction may suggest reasonably available alternative measures, technically and financially feasible for the country imposing the restrictions and which will offer the same level of protection.

²¹ Appellate Body Reports, *Argentina – Import Measures*, para. 5.217.

²² Appellate Body Reports, *China – Raw Materials*, para. 334.

²³ These different concepts impart meaning to each other. For example, whether a shortage is "critical" may be informed by how "essential" a particular product is; the characteristics of the product and factors pertaining to a critical situation may inform the duration for which a measure can be maintained in order to bridge a passing need. Inherent in the notion of criticality is the expectation of reaching a point in time at which conditions are no longer "critical", such that measures will no longer fulfil the requirement of addressing a critical shortage (Appellate Body Reports, *China – Raw Materials*, paras. 323-328).

²⁴ Panel Reports, *China – Raw Materials*, paras. 7.479-7.480.

- Once a measure is determined to be provisionally justified under one of the sub-paragraphs of Article XX, an examination of the actual application of the measures is conducted under the **chapeau of Article XX**.²⁵ This requirement is an expression of the principle of good faith and ensures that measures are not *applied* so as to abuse the exceptions of Article XX. For instance, a measure may fail to comply with the chapeau of Article XX because it is applied in an incoherent or inconsistent manner.²⁶
- In the context of COVID-19, Article XX(b) of the GATT 1994 could be used to justify a ban or quantitative restriction on the exportation of goods, so long as such a measure would be necessary and effective in contributing to protecting the health of that country's citizens. The trade-restrictiveness of the export ban or restriction would have to be weighed against the contribution it makes to the achievement of the objective of protecting human health. The importing country could come with reasonably available alternatives, e.g. arguing that a less stringent restriction on exports would achieve the same degree of contribution and would be reasonably available to the exporting member.
- Differently from Article XX(b), Article XI:2(a) covers only "temporarily applied" export prohibitions or restrictions with the aim of preventing or relieving "critical shortages" of products "essential" to the exporting country. These are specific criteria that would be used to determine the duration and scope of the export restrictions covered under Article XI:2(a).

²⁵ The chapeau of Article XX of the GATT 1994 imposes the requirement that measures justified under one of the sub-paragraphs of this provision "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".

²⁶ For example, a country bans the importation of a certain products for health reasons but allows for an exception for imports from certain countries in which the same conditions prevail.

ANNEX 2

ADDITIONAL INFORMATION ON TRANSPARENCY AND THE QR DECISION

What is transparency at the WTO?²⁷

In the WTO framework, transparency can take many different forms and include "publication" in the domestic system and "notification" to the WTO Secretariat.

At the domestic level, transparency seeks to ensure that all stakeholders have access to government laws and regulations. The general rule is set out in Article X:1 of the GATT 1994 ("Publication and Administration of Trade Regulations"), which requires that certain measures be "*published promptly in such a manner as to enable governments and traders to become acquainted with them*". This obligation extends to "*restrictions or prohibitions on imports or exports*". Many other WTO agreements contain specific provisions relating to transparency. For instance, the Trade Facilitation Agreement requires members to promptly publish information in a non-discriminatory and easily accessible manner, such as procedures for importation, exportation and transit, applied rates of duties and taxes, rules on valuation and classification, etc.

At the multilateral level, most WTO agreements require members to "notify" different types of information to the WTO Secretariat, so that members and other stakeholders can be acquainted with them. Generally, members are required to notify laws and regulations of general application concerned with WTO matters. These include actions and measures covered by the WTO provisions, especially those actions affecting the rights of other members, and obligate members to provide due consideration to requests by other members for information on such regulations. Some of these obligations have been complemented over the years by decisions by the General Council and the Council for Trade in Goods. Most WTO notifications are translated and made publicly available in the three official WTO languages (English, French and Spanish) through different online systems, including Documents Online (<https://docs.wto.org/>) and specialized databases.

Review process: Once the measures have been notified, they are often reviewed by members in the context of the different WTO committees. This may also involve a process of bilateral consultations. Although the review procedures may vary across the different bodies, the other members normally have the possibility of commenting, raising questions, or requiring additional information on the notified measures. Once a question has been raised or a request has been made, the other member is expected to engage in a *bona fide* process of exchanging information. Some notification procedures allow for "reverse" or "cross-notifications" which, together with the mechanism to raise "specific trade concerns" in the agenda of a meeting, allow members to comment on measures introduced by other members, even if they have not been notified. In the context of the Transparency Mechanism for Regional Trade Agreements²⁸, the WTO Secretariat is tasked with reviewing and commenting on such notifications, even though most committee procedures do not allow for this.

The QR Decision

The 2012 "Decision on Notification Procedures for Quantitative Restrictions" or QR Decision²⁹ requires members to notify every two years all quantitative restrictions in force, on both imports and exports, and including seasonal measures. The next round of complete notifications should take place in September 2020, but members are required to notify changes, including new measures, as soon as possible, "but not later than six months from their entry into force". These notifications are automatically included for review in the agenda of the Committee on Market Access.

The QR Decision seeks to enhance transparency on these measures. It requires the notifying member to specify whether the measure affects imports and/or exports, and if the measure is "seasonal", meaning that temporary measures should also be notified. In practice, several members have also included "temporary" measures. Although the QR Decision also allows for reverse notifications, i.e. prohibitions or restrictions imposed by another member, the possibility has only been used once.

²⁷ See also the WTO Secretariat Information Note entitled "Transparency – Why it matters at times of crisis", available for download at: https://www.wto.org/english/tratop_e/covid19_e/transparency_report_e.pdf

²⁸ See https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm

²⁹ Decision Adopted by the Council for Trade in Goods on 22 June 2012, official WTO document G/L/59/Rev.1.

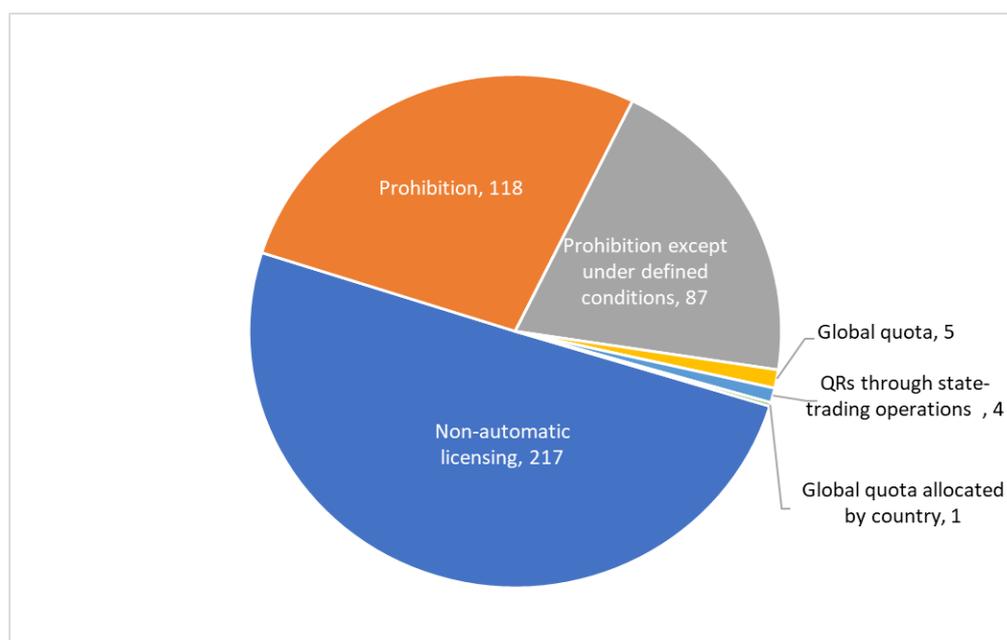
However, compliance with the QR notification has been poor, both in terms of timeliness and completeness, and the Committee on Market Access has frequently discussed the challenges faced in preparing these notifications. As of 10 May 2019, only 39 members (counting the European Union as one) have submitted notifications of all QRs in force. The 39 notifying members maintained a total of 1,118 QRs that account for 1,367 measures.³⁰ The majority of the measures notified by members consist of import measures (68.4 per cent of the total number), whereas 432 are export-related restrictions or prohibitions.

What kind of measures are normally notified under the QR Decision?

Annex 1 of the QR Decision provides an indicative list of measures covered by the notification requirement, including prohibitions, global quotas, non-automatic licensing, restrictions made effective through state trading operations, mixing regulations, voluntary export restraints, etc.

In terms of the export prohibitions and restrictions, a survey of the QR notifications suggests that members maintain a wide range of measures and controls on products that pose special risks, including trade in nuclear materials, endangered species, narcotic drugs and precursors, weapons and chemicals. In terms of the types of specific measures used, Chart 2 suggests that export restrictions typically take the form of non-automatic licensing procedures, full export bans, and prohibitions except under defined conditions.

Chart 2. Number of notified export prohibitions and restrictions, by type of measure



Source: WTO Secretariat based on the QR notifications and official WTO document G/MA/W/114/Rev.2

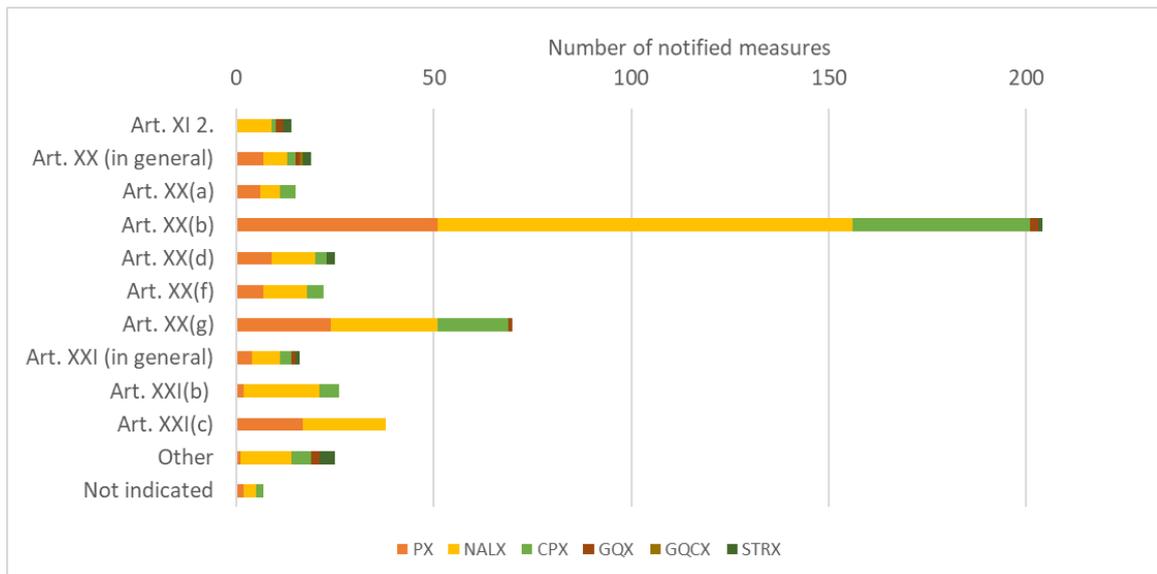
Although most of the notified measures have been implemented on a permanent basis, members have also notified temporary measures. In the context of the Committee on Market Access and the Council for Trade in Goods, some members have expressed concern over the fact that some of these temporary measures have been repeatedly renewed.

³⁰ For the purpose of this report, the term "QR" and "measure" are used to identify two different concepts, as each notified QR may be enforced through more than one measure. For example, one QR could involve a conditional prohibition that is administered through a non-automatic licence procedure. For the purposes of this report, this QR will be counted as two different measures.

What kind of justifications have been cited by members?

The QR notifications should also include the "WTO justification" that, in the opinion of the member imposing the measure, allows its introduction. An analysis of the QRs that have been notified shows that 75 per cent of the measures were considered as justified by the "General Exceptions" of Article XX (75.1 per cent of notified QRs), and that paragraph b of this provision (measures "necessary to protect human, animal or plant life or health") accounted for the largest share of all justifications (almost 50 per cent of the QRs) (see Chart 3).

Chart 3. Number of export measures notified, by type of justification cited



Source: WTO Secretariat based on QR notifications and official WTO document G/MA/W/114/Rev.2.

Note: PX: Export prohibition; NALX: Non-automatic export licence; CPX: conditional prohibition on exports; GQX: Global quota on exports; STRX: state trading enterprise restriction on exports.

List of abbreviations

ER	export restriction
EU	European Union
G20	Group of 20
GATT	General Agreement on Tariffs and Trade
QR	quantitative restriction
QR Decision	2012 "Decision on Notification Procedures for Quantitative Restrictions"
WCO	World Customs Organization
WHO	World Health Organization