

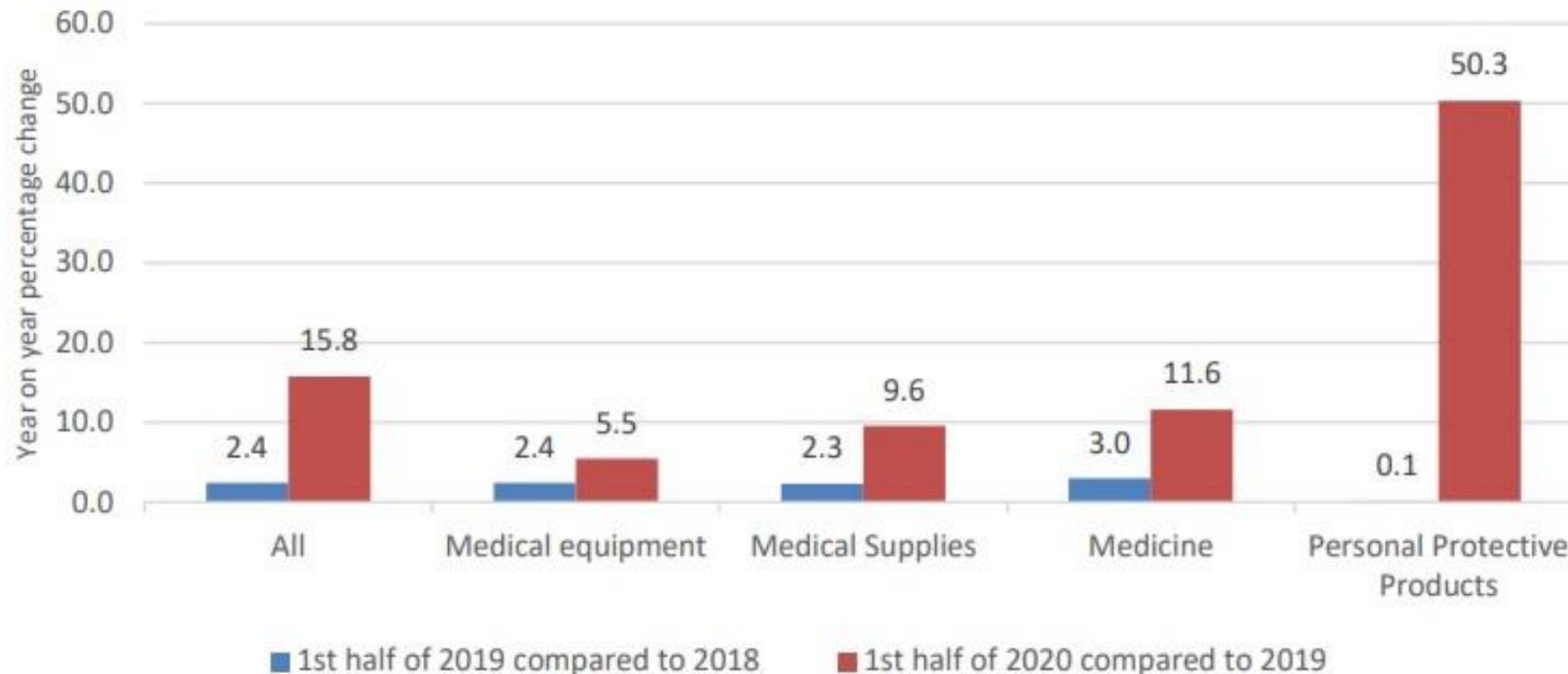


Export prohibitions and restrictions under Article XI:2(a) GATT 1994 – An effective measure to curb the spread of COVID-19?

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1. Introduction

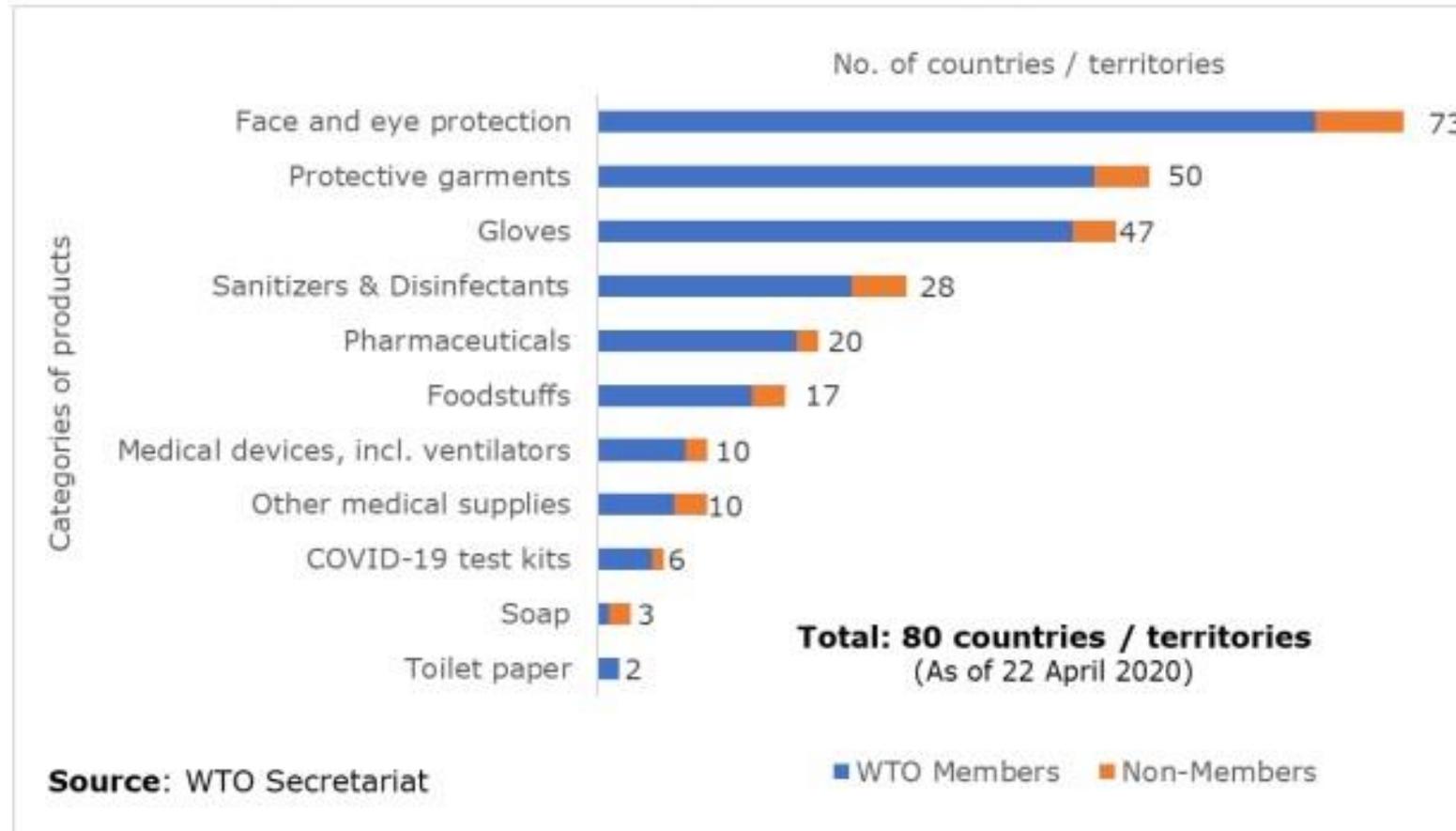
Chart 1: Percentage change of trade in medical goods in the first half of 2019 and the first half of 2020 compared to the same period of previous year



Source: WTO, Trade in medical goods in the context of tackling COVID-19, 22 December 2020, p 3.

1. Introduction

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



Source: WTO, Export prohibitions and restrictions, 23 April 2020, p 7.

2. WTO provisions on export prohibitions and restrictions regarding COVID-19

Article XI GATT 1994 → “General elimination of quantitative restrictions”

Export prohibitions and restrictions are generally prohibited (see Article XI:1 GATT 1994). 

Exception in Article XI:2(a) GATT 1994: Export restrictions on certain medical goods and foodstuffs → Prevention of critical shortages of foodstuffs or other essential products.

Article XX GATT 1994 → “General Exceptions”

Export restrictions pursuant to Article XX:b GATT 1994 on COVID-19 vaccines and their components → Protection of human life and health.

Article XXI GATT 1994 → “Security Exceptions”

Export restrictions pursuant to Article XXI:b(iii) GATT 1994 on certain medical supplies → Maintenance of international security.

3. WTO rules regarding export prohibitions and restrictions under Article XI:2(a) GATT 1994

On **12th May 2020** **92** countries had already implemented temporary export prohibitions and restrictions related to COVID-19.

On **29th October 2021** export prohibitions and restrictions in **97** countries were in force.

Example Thailand:

One of the first WTO members who adopted export prohibitions related to COVID-19 on surgical and protective face-masks and certain foodstuffs under Article XI:2(a) GATT 1994.

Main objectives: to prevent a critical shortage of masks and foodstuffs; to ensure adequacy of the products, because they are essential to curb the spread of the COVID-19 virus.

Export prohibitions or restrictions under Article XI:2(a) GATT 1994 on “**foodstuffs**” → **Article 12 of the Agreement on Agriculture** has to be considered.

3. WTO rules regarding export prohibitions and restrictions under Article XI:2(a) GATT 1994

Article XI:2(a) GATT 1994: the provisions of Article XI:1 GATT 1994 shall not extend to “export prohibitions or restrictions **temporarily applied** to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting member”.

1. Export prohibitions and restrictions under Article XI:2(a) GATT 1994 in relation to COVID-19 have to be **temporary**.

China – Raw Materials case → temporary measures have to be applied for a **‘limited timeframe’**.

Panel: “the ordinary meaning of ‘temporarily’ is ‘for a time (only)’ and ‘during a **limited time**’. The term ‘limited time’ is defined as ‘**appointed, fixed**’ and ‘**circumscribed within definite limits, bounded, restricted**’.”

3. WTO rules regarding export prohibitions and restrictions under Article XI:2(a) GATT 1994

Article XI:2(a) GATT 1994: the provisions of Article XI:1 GATT 1994 shall not extend to “export prohibitions or restrictions temporarily applied to **prevent** or **relieve** critical shortages of foodstuffs or other products essential to the exporting member”.

2. Export prohibitions and restrictions under Article XI:2(a) GATT 1994 in relation to COVID-19 have to **prevent** or **relieve critical shortages** of food-stuffs or other products essential to the exporting member.

The term ‘**prevent**’ was added to enable WTO members to take action even **before** a critical shortage emerges.

China – Raw Materials case → ‘**critical shortage**’ refers to those **deficiencies in quantity** that are **crucial** and of decisive importance, or that reach a vitally important or decisive stage.

3. WTO rules regarding export prohibitions and restrictions under Article XI:2(a) GATT 1994

- World Health Organization classified SARS-CoV-2 (COVID-19) on 30th January 2020 as a “Public Health Emergency of International Concern (PHEIC)” → global pandemic can be categorized as a **crisis**.
- Critical shortages in certain foodstuffs or essential medical devices may justify temporary application of export restrictive measures → Measures have to be applied in **bounded timeframes** and only as long as they are necessary to help to prevent or remediate critical shortages.
- Prohibitions and restrictions have to be **non-discriminatory** (see Article XIII GATT 1994).
- Quantitative restrictions permitted under Article XI:2 GATT 1994 have to be a **mandatory form of internal control** and should not be used as a protective measure.

4. Impacts of export prohibitions and restrictions

If export prohibitions or restrictions are adopted by a country or region which is a **high exporter** of the respective good → **world supply decreases** and **world market price increases**.

Especially **developing countries** with **limited financial capacities** will be affected adversely. Healthcare systems can be extremely endangered by **disruptions in supply chains** and **increasing prices** for certain medical goods.

Economies of developing countries are in many cases not resilient enough to compete with those of industrial countries. If these countries do **not have access to medical goods** or **certain foodstuffs**, the **COVID-19 virus** and its **mutated strains** may infect the populations in poorer countries as well as those in the countries who adapted the export prohibitions and restrictions. **Mutations** are being boosted by **low standards of hygiene** and **few possibilities** for the virus control.

4. Impacts of export prohibitions and restrictions

Increase in **smuggling** of goods from the domestic to the foreign market. Higher prices on the world market as well as the dependency of exporters on business relationships and contracts make smuggling more attractive and in some cases necessary for businesses to survive the pandemic.

Exporters can **lose market shares**, because countries or regions may decide to invest in domestic production in order to be prepared against supply disruptions.

Domino-effect: more countries adopting further measures to prevent a domestic shortage of foodstuffs or other essential goods → Trading partners may adopt retaliatory restrictions, which can lead to shocks in domestic production chains.

Confidence in global supply chains may be **disrupted** and increased domestic productions may cause **increasing prices** because of **less efficiency** in production processes.

5. Conclusion

In the **short term**, export prohibitions and restrictions can **reduce a critical shortage** of foodstuffs, medical devices or other goods that can **help** the **exporting country deal** with the **COVID-19 virus**.

Long term economic and political impacts: lower domestic investment, the loss of markets for exporters, retaliatory restrictions from other countries, disruptions in supply chains, decrease in confidence in global trade and its supply chains.

Transparency and **cooperation** among WTO member states are mandatory to keep trade flowing.

To curb the spread of the disease, WTO member states have to **collaborate in all sectors**.

5. Conclusion

In conclusion, **export prohibitions or restrictions under Article XI:2(a) GATT 1994** can be **justified** under WTO law, but can at the same time **not be effective to curb the spread of the disease.**

In case of a **local critical shortage** of foodstuffs or essential goods, an export prohibition or restriction under Article XI:2(a) GATT 1994 can **help an economy to prevent negative impacts** like shortages of the aforementioned goods on the domestic market and health system. But in times of a **global pandemic**, these measures may lead to **domino and boomerang effects** with a **tremendous negative impact** on the **global health system** as well as the **trading system.**

5. Conclusion

Export restrictions and prohibitions under Article XI:2(a) GATT 1994 are only a **small part of trade-restrictive measures** and trade **disruptions related to COVID-19**.

Avoidable export prohibitions and restrictions should be **repealed**.

The **productions** of vaccines and medical devices necessary to curb the spread of the COVID-19 virus should be **raised** und **distributed equally** with **special regard to developing countries**.

In times of a global pandemic, national restrictions are **no solution** in the **long run** and thus **not an effective measure to prevent the spread of the virus**.

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