

# **Import Restrictions: the Roadblock to Sufficient Essential Medical Supplies**

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# Import restrictions: the roadblock to sufficient essential medical supplies

Xiaowen Tan and Lei Zhang<sup>1</sup>

The COVID-19 pandemic is an unprecedented challenge to public health and global medical systems. As a result, the worldwide demand for medical products is unprecedented. The current situation shows that existing trade-related agreements cannot guarantee sufficient essential medical supplies in times of need. While the crisis has led to a rapid increase in the production of essential medical supplies responses, various import restrictions hinder the movement of these supplies from where they are abundant to where they are lacking, even though the pandemic has peaked at different times in different countries. This paper (i) discusses the problem of import restrictions during medical crises; (ii) limits the scope to essential medical supplies; (iii) identifies various import restrictions, such as tariffs, technical barriers and administrative procedures, which impede or delay the import of essential medical supplies; and (iv) proposes measures to eliminate import restrictions and facilitate the import of essential medical supplies for future medical crises.

## Executive summary

### *Problem Statement*

The ongoing COVID-19 pandemic has highlighted the problems in the global system of trade in essential medical supplies. This research paper focuses on the impact of import restrictions on medical supplies for hospital and laboratory use, such as syringes and gauze, and medical supplies for personal use, such as face masks, gloves and hand sanitisers. These import restrictions, which are not disputed under WTO rules, prevent or reduce the trade in essential medical goods from places in which they are most in supply to those places where they are lacking. Aside from the direct threat to the health of the world's population, the failure to ensure the delivery of essential medical supplies to where they are needed means that the pandemic will continue and prevent the return to growth of the global economy.

*The import restrictions considered in this paper are:* tariff barriers, internal taxes and administrative fees, technical barriers and regulatory measures, customs formalities and administrative procedures, transport barriers, and limits to transparency.

*The measures proposed in this paper are:*

Reducing import tariffs on essential medical supplies to a minimum.

Reducing internal taxes and administrative fees to a minimum.

Temporarily removing technical barriers, including applications, permits and licensing, for

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essential medical supplies that pose minimum risks to human health.

Simplifying customs formalities and expediting administrative procedures.

Permitting all modes of transport to rapidly provide life-saving service.

All governments publishing measures taken in response to a medical crisis and notifying the measure to the WTO.

Any or all of the proposed measures will help to maintain the flow of global trade and ensure that essential medical goods are supplied to the areas in which they are most needed. The current COVID-19 pandemic has highlighted the need for international cooperation on an unprecedented level, and the measures proposed herein could also be adopted to deal with future crises of a similar nature.

### **1. The problem of import restrictions during medical crises**

COVID-19 is first and foremost a global health crisis, putting tens of thousands of lives in danger. Sufficient medical supplies are the key for people around the world to fight the pandemic. However, the WTO's recent report on trade in medical goods describes around one-third of total trade in medical products as critical and in severe shortage due to the COVID-19 crisis.<sup>2</sup> This situation shows that the current trade-related agreements cannot guarantee sufficient essential medical supplies in times of medical crisis.

Understandably, governments suffering from the medical crisis are taking protective measures, in particular export restrictions,<sup>3</sup> to ensure the safety and health of their citizens. These measures inevitably influence the flow of critical medical supplies across territories; however, they seem to be justified under WTO rules.

Article XI of the General Agreement on Tariffs and Trade (GATT) 1994 only prohibits export restrictions broadly and does not extend to temporary export restrictions that are applied to prevent or relieve critical shortages of goods essential to the exporting country. WTO rules also provide more general exceptions. According to Article XX of the GATT 1994, contracting parties can adopt or enforce measures that are necessary to protect human life or health, insofar as such measures do not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

Essential medical supplies are indispensable to protect human life and health during medical crises. Export restrictions on essential medical supplies can thus contribute materially to the goal of protecting the life and health of local people in a given country. In the case of medical crises such as the COVID-19 pandemic, there are no reasonably available alternatives to achieve the same objective.<sup>4</sup>

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<sup>2</sup> WTO, *Trade in Medical Goods in the Context of Tackling COVID-19*, 3 April 2020, p.1

<sup>3</sup> WTO, *Export Prohibitions and Restrictions*, 23 April 2020, p.1. The report suggests more than 80 countries and separate customs territories have introduced export restrictions as a result of the COVID-19.

<sup>4</sup> See, for example, discussion on the availability of alternative measures in *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394, 395, 398/R, paras 7.489—7.617.

Dealing with the threat to public health, as pointed out by WTO Deputy Director-General Alan Wolff, is the priority and the most pressing issue, before global economic recovery and the structural reform of the WTO.<sup>5</sup> It is governments' primary task to keep their citizens safe. Hence, it is unrealistic to require a country to export essential medical supplies of which the country itself is also in desperate need. Export restrictions, in this regard, neither violate WTO rules nor go against the humanitarian spirit.

However, a problem remains when essential medical supplies are in severe shortage in countries without medical goods production industries or with only limited production capacity. In global medical crises such as the COVID-19 pandemic, where the crisis peaks at different times in different areas, instead of counting on countries to reduce export restrictions, it may be more appropriate and more feasible to rely on countries that no longer suffer from shortages of essential medical supplies, and are capable of mass production of these supplies, to export these goods.<sup>6</sup>

Evidence shows that there has been a rapid increase in the production of essential medical supplies in response to the COVID-19 crisis.<sup>7</sup> However, these supplies do not move from where they are abundant to where they are lacking. Various import restrictions—tariff and non-tariff measures—impede the delivery of essential medical supplies and undermine the global response capacity to emergencies.

These import restrictions were not made temporarily for the medical crisis but were implemented before the crisis and are not disputed under WTO rules. Their persistence in a time of medical crisis may have the consequence of delaying or even preventing the delivery of life-saving medical supplies. This causes tremendous harm and even death to people who are affected by the threat to health due to the lack of medical supplies.

If the medical crisis only affects certain countries or regions, there may not be substantial export restrictions from countries outside disaster areas. However, import restrictions on medical supplies that persist in times of medical crisis still constitute a major obstacle to the delivery of sufficient essential medical supplies.

Therefore, provisional measures to reduce the minimum import restrictions are critical to facilitate trade in medical supplies and to bring the emergency under control. These measures will ensure access to essential medical supplies in domestic markets as soon as possible, during both global and regional medical crises.

No single country is capable of manufacturing all the medical supplies that are necessary to

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<sup>5</sup> Deputy Director-General Alan Wolff, *Time to Start Planning for the Post-pandemic Recovery*, a virtual talk delivered to the Washington International Trade Association on 9 April 2020.

<sup>6</sup> The top 10 exporters accounting for almost three quarters of world exports are Germany, the US, Switzerland, the Netherlands, Belgium, Ireland, China, France, Italy and the UK. See WTO, *Trade in Medical Goods in the Context of Tackling COVID-19*, p.5.

<sup>7</sup> See, for example, CCTV news, National Mobilization to Produce Masks and Protective Garments, <<http://tv.cntv.cn/video/C10447/4715e0e5678342d58d85de53627a380a>>, accessed 18 June 2020.

combat medical crises. Statistics show that countries manufacturing medical equipment may import personal protective equipment from other countries, while countries manufacturing medical supplies for hospital use may import medical equipment from other countries.<sup>8</sup> In that respect, eliminating import restrictions promotes international cooperation and brings mutual benefits.

Besides, countries manufacturing essential medical supplies need to transport materials from other countries and then to transport final products to where medical supplies are in shortage. Thus, minimising import restrictions contributes to maintaining the global medical supply chain flow. This also helps to retain some job opportunities.

The following sections start by delineating the scope of discussion, which is to focus on essential medical supplies in time of medical crisis. Then, the paper identifies various forms of import restrictions that impede the delivery of essential medical supplies and offers measures to deal with these import restrictions. All the measures are recommended to provide guidance for future medical crises.

## 2. Essential medical supplies

This paper and all the proposed measures focus on import restrictions of medical supplies that are essential to cope with medical crises. In general, medical products can be categorised into four main groups:<sup>9</sup>

- (i) medicines (pharmaceuticals);
- (ii) medical equipment and technology;
- (iii) medical supplies for hospital and laboratory use (e.g. alcohol, syringes, gauze, reagents);<sup>10</sup> and
- (iv) medical supplies for personal use—personal protective equipment (e.g. face masks, protective spectacles, gloves, hand sanitisers, disinfectants.)

Essential medical supplies in this paper refer to those falling within categories (iii) and (iv). The term ‘essential’ indicates medical supplies that are ‘important’, ‘necessary’ or ‘indispensable’ to a particular member to fight a global or regional medical crisis.<sup>11</sup> However, the medical supplies that are essential for COVID-19 may not be essential for future medical crises. The determination of whether certain medical supplies are ‘essential’ must be made under the particular circumstances faced by a particular member during a particular medical crisis.<sup>12</sup> This free determination thus questions the certainty and credibility in trading ‘essential medical supplies’.

The solution is to provide a *publicly recognised list* of medical supplies. For example, shortly

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<sup>8</sup> WTO, *The Treatment of Medical Products in Regional Trade Agreements*, 27 April 2020, pp.2–4.

<sup>9</sup> WTO, *Trade in Medical Goods in the Context of Tackling COVID-19*, 3 April 2020, p.2.

<sup>10</sup> Notably, protective garments are essential medical supplies for hospital and laboratory use but cannot be distinguished from general clothing products based on HS classification.

<sup>11</sup> *China—Raw Materials*, para 7.275.

<sup>12</sup> *China—Raw Materials*, para 7.282.

after the outbreak of COVID-19, the WHO and the WCO jointly prepared the Classification Reference for COVID-19 Medical Supplies.<sup>13</sup> The list contains a detailed classification of medical supplies that are critically needed to combat the pandemic. Such a list integrates the information and quality of medical supplies and serves as the basis for trade facilitation in these goods.

There are some key elements in providing such a list. First, the list should be provided by *an international health organisation* such as WHO. In case of a regional medical crisis, a regional health organisation would also qualify. Second, the list should be *broad enough* to cover almost all medical supplies that are used to respond to the medical crisis. Countries suffering from the medical crisis could choose from the list the essential medical supplies that are critical for them. Third, the list should indicate the *technical standards* and industrial product standards that are attached to different medical supplies.

Meanwhile, customs administrations and government agencies regulating the cross-border movement of goods are responsible for *making public their own list* of the essential medical supplies they regard as critical during the medical crisis for their countries, based on practical needs. Such a list may vary from country to country. There is no need for all countries affected by the medical crisis to have one single list, and it is unlikely that countries could reach an agreement on a single list. Countries publishing a list of their selected essential medical supplies on official websites, and committing to reducing import tariffs, internal taxes and administrative fees, would allow countries producing medical supplies or countries outside disaster areas to conduct demand-oriented mass production, bringing both efficiency and efficacy and providing timely humanitarian support.

Import restrictions for the other two categories of medical products have already been dealt with under specific trade agreements. Medicines and pharmaceuticals are dealt with under the TRIPS Agreement and other multilateral trade agreements.<sup>14</sup> These agreements reduce tariffs, update the list of medicines periodically and provide access to medical technologies. Medical equipment and technology are covered by the expanded Information Technology Agreement (ITA), including the ultrasonic scanners and respirators that are indispensable for treating COVID-19 patients. Under this agreement, the majority of tariffs will be eliminated on 201 products.

Therefore, some of the proposed measures, such as reducing import tariffs, may be unnecessary for medical product categories (i) and (ii). Some measures cannot be applied, such as removing licensing requirements and some may remain available with the scrutiny of national regulations and policies, such as simplifying customs formalities and expediting administrative procedures. Due to this complexity, this paper has no intention of discussing these two categories of medical products in detail. Governments are at liberty to apply some of the proposed measures to these

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<sup>13</sup> *HS Classification Reference for Covid-19 Medical Supplies 2.1 Edition*, prepared jointly by World Customs Organization and WHO, 30 April 2020. <[http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/covid\\_19/hs-classification-reference\\_2\\_1-24\\_4\\_20\\_en.pdf?la=en](http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/covid_19/hs-classification-reference_2_1-24_4_20_en.pdf?la=en)>, accessed 24 June 2020.

<sup>14</sup> See e.g. Trade in Pharmaceutical Products, (25 March 1994) L/7430.

two categories, where practically possible.

### **3. Import restrictions in medical crises and corresponding solutions**

#### **A. Tariff barriers**

Tariffs on imports, in principle, are allowed under WTO law. National customs tariffs on imports are primarily applied for a government to collect revenue, and secondly to protect and/or promote domestic industries.<sup>15</sup> These purposes must give way to satisfying health needs in time of crisis.

Tariffs on COVID-19 related essential medical supplies are fairly high. According to the WTO report, the average most-favoured-nation (MFN) applied tariff on COVID-19 related medical products is 4.8%.<sup>16</sup> However, the tariffs charged for COVID-19 related personal protective equipment amount to 11.5%, higher than for any other medical products, including medicines and medical equipment.<sup>17</sup>

Moreover, tariffs that WTO members apply to personal protective equipment vary significantly. While 29 members apply an average tariff of less than 5%, 47 members apply an average tariff of more than 15% to personal protective equipment. Notably, most countries that impose higher customs duties on personal protective equipment are developing countries. For instance, Dominica and Egypt impose 50% and 56.7% tariffs, respectively, for hand soap; Djibouti, Bangladesh, Tonga and Mauritania impose the highest tariffs on hand sanitisers.

This is despite the fact that developing countries suffer from more severe shortages of essential medical supplies. Developing countries may not have industries that can mass produce medical supplies in a short period, or may have only a limited capacity that falls behind actual demand. Higher customs duties constitute an important source of government revenue in these countries due to the lack of well-developed systems of direct and indirect taxation.<sup>18</sup>

Such tariff requirements of both developing and developed countries have remained in force during the COVID-19 pandemic and have significantly delayed or prevented the delivery of essential medical supplies, endangering the life and health of people that are exposed to the virus. The following measures are proposed to reduce tariff barriers to the minimum so that essential medical supplies can easily access the markets in which these goods are in urgent need.

#### **➤ Measure A1 proposes to reduce import tariffs on essential medical supplies to a minimum.**

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<sup>15</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, 3rd edn (CUP 2013), pp. 425–426.

<sup>16</sup> WTO, *Trade in Medical Goods in the Context of Tackling COVID-19*, p.6.

<sup>17</sup> WTO, *Trade in Medical Goods in the Context of Tackling COVID-19*, p.8. The average applied tariff is 17% for hand soap, 5% for hand sanitizers and 9.1% for face masks.

<sup>18</sup> See simple average duties on all products, in WTO/ITC/UNCTAD, *World Tariff Profiles 2012*, (WTO Publications 2012) <[https://www.wto.org/english/res\\_e/booksp\\_e/tariff\\_profiles12\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/tariff_profiles12_e.pdf)>, accessed 22 June 2020.

The basic idea of Measure A1 is for countries suffering from the medical crisis to reduce import tariffs to a minimum so that the cost of selected essential medical supplies will be reduced, thus stimulating the import of these supplies.

The premise for the application of this measure is that import tariffs constitute obstacles to the import of essential medical supplies. As discussed previously, the obstacles may be fully compatible with WTO rules in normal trade conditions. However, the outbreak of a medical crisis renders import tariffs problematic, because they delay the delivery of medical supplies for which there is a critical need.

During the COVID-19 pandemic, countries have responded quickly to temporarily eliminate import tariffs on selected essential medical supplies.<sup>19</sup> However, even with a rapid response, it still takes up to one month for countries to introduce measures eliminating import tariffs on certain medical supplies. This one-month gap has caused significant damage to human health, the result of which is evident from death tolls in the first 30 days.<sup>20</sup> Also, as the pandemic spreads quickly and easily, the number of infected people has increased rapidly, and the diffusion continues in the incubation period of around 2 to 14 days. Thus, a several-day delay aggravates the situation. Therefore, for this measure to produce the best possible results, the reduction of import tariffs must *occur simultaneously and immediately* after the outbreak of a medical crisis.

Moreover, the ‘minimum’ criterion depends on the different emergencies in different countries. In a global medical crisis such as COVID-19, the fact that the virus is highly infectious and widely spread suggests that import tariffs on essential medical supplies should be reduced to zero. The same zero-tariff should be applied to other diseases with high fatality rates.

In the case of a regional medical crisis, the ‘minimum’ import tariff varies significantly between countries. Influential factors include the nature of the disease (how infectious, lethal or curable it is), the severity of the medical crisis (e.g. how fast the disease spreads), the country’s ability to mass produce the required medical supplies in a short period, as well as humanitarian support from international and regional (health) organisations and countries outside the disaster area. In any case, it is for each country to decide the necessary ‘minimum’ import tariff that could meet its need to fight the medical crisis it is facing.

Furthermore, the reduction of import tariffs on essential medical goods should *apply to all importers*, regardless of whether the importer is a public health agency, a hospital, a private company or an individual citizen. There are many problems in the prioritised treatment of public

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<sup>19</sup> See e.g. Azerbaijan, Brazil, Canada, Ecuador, European Union, Fiji, India, Indonesia, Japan, Korea, New Zealand, Nigeria, Panama, Paraguay, Peru, Serbia, Switzerland and Turkey. See WTO, *COVID-19: Trade and Trade-related measures*, 12 June 2020, <

[https://www.wto.org/english/tratop\\_e/covid19\\_e/trade\\_related\\_goods\\_measure\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm)>, accessed 27 June 2020.

<sup>20</sup> See COVID-19 death statistics, at WHO, *Coronavirus Disease (COVID-19) Situation Report—161*, 29 June 2020, <[https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200629-covid-19-sitrep-161.pdf?sfvrsn=74fde64e\\_2#%5B%7B%22num%22%3A39%2C%22gen%22%3A0%7D%2C%7B%22name%22%3A%22XYZ%22%7D%2C%2C842%2C0%5D](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200629-covid-19-sitrep-161.pdf?sfvrsn=74fde64e_2#%5B%7B%22num%22%3A39%2C%22gen%22%3A0%7D%2C%7B%22name%22%3A%22XYZ%22%7D%2C%2C842%2C0%5D)>, accessed 1 July 2020.

health agencies or hospitals. Should the treatment extend to all public health agencies or just those that are ‘qualified or selected’? What is the criterion for this selection? Should the treatment extend to all hospitals, regardless of whether public or private, big or small, general or specialised? These new problems are unnecessary.

The need to safeguard sufficient medical supplies in hospitals and pharmacies could be better addressed by government procurement arrangements. Procurement measures during medical crises are fully compatible with WTO rules under the Agreement on Government Procurement (GPA).<sup>21</sup> Indeed, during crises, it is both efficient and effective for governments to purchase and to distribute life-saving medical supplies, which would also prevent stockpiling by wholesalers and resellers.

Besides, in case of a global and urgent medical crisis such as the COVID-19, countries capable of mass-producing medical supplies could also *extend the reduction of import tariffs to the inputs for the manufacture of these supplies*. This not only helps boost the production of medical supplies inside the country but also contributes to maintaining the flow of the medical supply chain.

Measures to reduce import tariffs is a starting point, from which countries should consider *making permanent zero duties* on all medical products, including medicines and medical equipment. Despite the significant decrease of tariffs on medical products over the last two decades, majority countries maintain import tariffs even on average well below ten per cent.<sup>22</sup> These import tariffs increase product prices, tax the sick and cause additional costs to the medical system. Thus, zero duties on medical products not only contribute to these problems, but also reduce the gap between international prices and domestic prices so that patients, intermediate dealers and manufacturers would all benefit.

➤ **Measure A2 proposes to reduce internal taxes and administrative fees to a minimum.**

Compared with import tariffs, the number of countries that adopted measures to *reduce or postpone internal taxes*, such as value-added tax (VAT), consumption tax and other interim goods taxes, in response to the COVID-19 is much lower.<sup>23</sup> Understandably, reducing import tariffs plays the main role in accelerating the delivery of essential medical supplies, while other internal taxes and administrative fees are optional.

In the case of an urgent global medical crisis such as COVID-19, *the need to provide relief on*

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<sup>21</sup> See full text, available at: <[https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm)>, accessed 23 July 2020. Article III of the GPA provides that GPA Parties may take procurement measures that are necessary to protect human life or health, provided that such measures do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

<sup>22</sup> Matthias Helble, ‘*More trade for better health? international trade and tariffs on health products.*’ (Social ence Electronic Publishing 2012)

<sup>23</sup> Argentina, Azerbaijan, Bangladesh, Brazil, Dominican Republic, El Salvador, European Union, Fiji, Indonesia, Mauritius, Nigeria, Paraguay, Russian Federation, Saint Kitts and Nevis, Ukraine and UK have provided certain imported medical products with VAT exemptions. See WTO, *COVID-19: Trade and Trade-related measures*.

*internal taxes and administrative fees is in direct proportion to the need to eliminate import tariffs.* Where import tariffs are reduced to zero to stimulate the import of life-saving medical supplies that are in severe shortage, internal taxes and administrative fees constitute unnecessary additional obstacles that impede the rapid delivery of these supplies.

Countries that are capable of mass-producing essential medical supplies in the case of a global pandemic such as COVID-19 also suffer from tremendous economic disruption as a result of the disease. To reduce the community transmission of the disease, cities even countries are locked down. Factories and stores are temporarily shut down. Economic activities are largely suspended, along with curtailed logistics. In the recovery stage, the cost of resuming production is fairly high. Hence, relieving the burden of internal taxes and administrative fees would encourage the production of essential medical supplies.

If a medical crisis only affects some countries, or the disease is less contagious or less fatal, it may not always be necessary to provide relief from internal taxes and administrative fees. To start with, *only countries affected by the crisis* should consider reducing internal taxes and administrative fees. Moreover, *not all affected countries* need to provide such relief.

Affected countries should consider *several criteria* to decide whether and to what extent they should reduce internal taxes and administrative fees. First, affected countries must look at the total amount of internal taxes and administrative fees charged on imports of essential medical supplies. If that amount already constitutes a heavy burden on importers, for instance, exceeding the amount charged under import tariffs, reducing these charges alone may also become a considerable relief. Second, affected countries must consider the measure they adopted to reduce import tariffs. If affected countries see no need to reduce import tariffs, then there is likely no need to reduce internal taxes and administrative fees. The aim is to reduce the overall tax burden for producers and importers, and to lower the cost of supply. Third, affected countries should consider the severity of the medical crisis and the level of medical supplies. The more severe the medical crisis is, the greater the relief should be.

Based on the above considerations, countries could have several options for providing relief in internal taxes and administrative fees. The options include *total or partial exemption of internal taxes (and administrative fees) on the imports of selected medical supplies*,<sup>24</sup> *deferring the payment of the charges*,<sup>25</sup> *waiving interest charges for late payments*, *extending time-limits for the payment of internal taxes*<sup>26</sup> and *providing internal tax refunds*. In either event, countries should *publish details of the relief* on government websites and notify the WTO of the details, including but not limited to when the exemption begins and ends, what items enjoy the

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<sup>24</sup> See e.g. EU, in Commission Decision (EU) 2020/491 of 3 April 2020 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020 (2020) OJ L 103/1; or Brazil, Permanent Delegation of Brazil to the WTO (1 May 2020) and Decree Nos. 10.285 (20 March 2020) and 10.302 (1 April 2020).

<sup>25</sup> See e.g. Switzerland, which provided a temporary moratorium on default interest on late payments of customs duties, Ordinance 641.207.2 (20 March 2020); or Indonesia, which postponed the payment of excise duties on imports of certain goods, Permanent Delegation of Indonesia to the WTO (13 May 2020) and Regulation No. 30/PMK 04/2020 - Ministry of Finance.

<sup>26</sup> See e.g. Spain, Public information transmitted by the EU Delegation. Royal Decree-Law No. 11/2020.

exemption (preferably based on some commonly recognised classification system), the deadline for deferred payments and how to claim refunds.

Internal taxes take various forms, such as VAT, income tax, consumption tax, sales tax, excise tax, interim goods tax, internal industrial tax and anti-dumping duties. Countries seeking to exempt or to defer internal taxes should *exempt or defer all taxes related to certain essential medical products*. This should also include anti-dumping duties.<sup>27</sup> If the exemption or deferral only extends to part of the internal taxes, the measure may provide little benefit. Furthermore, if the internal taxes are exempted or deferred, the administrative fees accompanying the tax should also be exempted or deferred.

The internal taxes and administrative fees should be *reduced or eliminated only temporarily* during the medical crisis. These charges may recover when countries believe that the medical crisis is under control. Countries may introduce the relief with an initial period of several months and, if necessary, extend for longer.

## B. Non-tariff barriers

Alongside tariff barriers, a wide range of non-tariff barriers impede the delivery of essential medical supplies during medical crises. Compared with tariffs, non-tariff barriers are less transparent. Governments can support high levels of protection more easily through non-tariff barriers.<sup>28</sup> Non-tariff barriers restrict market access for certain medical supplies through, for example, technical barriers, customs formalities, administrative procedures and transport barriers.

### (i) Technical barriers

Many medical supplies are subject to requirements concerning their intrinsic and extrinsic characteristics and the manner in which they are produced. These requirements are adopted by governments as regulatory measures to ensure that medical supplies are compatible with the protection of life and health, the protection of the environment, the protection of consumers, and the protection of many other legitimate societal interests.<sup>29</sup> These measures could either be implemented as mandatory rules by regulatory bodies or be accepted by standardisation bodies and become generally applicable in business activities.

The different regulatory requirements imposed by different countries on certain medical supplies bring difficulties in market access and can constitute formidable barriers for exporters to enter the market. Furthermore, the administrative procedures to verify whether certain

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<sup>27</sup> See e.g. Argentina temporarily suspended anti-dumping duties on imports of hypodermic syringes of plastic, disposable, sterile, with or without needles from China (investigation initiated on 15 September 2009 and definitive duty imposed on 15 March 2011). Permanent Delegation of Argentina to the WTO (14 April 2020) and Resolución No. 114/2020 Ministerio de Desarrollo Productivo (20 March 2020), <<https://www.boletinoficial.gob.ar/detalleAviso/primera/227095/20200321?busqueda=1>>, accessed 25 June 2020.

<sup>28</sup> WTO Secretariat, *Market Access: Unfinished Business*, Special Studies Series 6 (WTO Publications 2001), p.9.

<sup>29</sup> Peter Van den Bossche and Werner Zdouc, 'The Law and Policy of the World Trade Organization', p.884.

medical supplies meet the standards laid down in the importing country also cause obstructions and delay the delivery of medical supplies in times of crisis.

To date, many such regulatory measures are not disputed under WTO rules and the technical barriers to trade (TBT) agreement.<sup>30</sup> These measures abide by MFN treatment and national treatment obligations,<sup>31</sup> refrain from creating unnecessary obstacles to international trade<sup>32</sup> and base technical barriers on international standards.<sup>33</sup> They fulfil societal needs and address safety concerns. However, due to the severity and urgency of medical crises, these measures inevitably slow down the trade of essential medical supplies and undermine global response capacity.

➤ **Measure B1 proposes to temporarily remove technical barriers, including applications, permits and licensing, for essential medical supplies that pose minimum risks to human health.**

After the outbreak of the COVID-19 pandemic, some countries introduced measures to alleviate technical barriers on certain essential medical supplies.<sup>34</sup> Argentina removed personal protective equipment from the list with non-automatic import licensing requirements.<sup>35</sup> Brazil temporarily eliminated import licensing requirements on syringes and vacuum plastic tubes for blood collection.<sup>36</sup> Indonesia eliminated import certification requirements on imported masks and personal protective equipment.<sup>37</sup> Singapore provided a temporary relaxation of import licensing requirements for hand sanitisers, masks, thermometers and protective gear.<sup>38</sup>

The above measures show that reducing technical barriers, particular licensing requirements for certain essential medical supplies, seems to be a feasible response to a medical crisis. Like tariff barriers, measures reducing non-tariff barriers should be adopted based on the severity of the medical crisis, infectiousness, spreading scope and fatality rate of the disease, as well as the different conditions of the countries affected by the medical crisis. Once a country affected by the medical crisis sees the necessity to adopt such measures, they should adopt the measures with limitations.

First, affected countries should reduce or eliminate import licensing requirements for *medical*

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<sup>30</sup> See full text available at: < [https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm)>, accessed 22 July 2020.

<sup>31</sup> See Article 2.1 and Article 5.1.1 of the TBT agreement.

<sup>32</sup> See Article 2.2 of the TBT agreement.

<sup>33</sup> See Article 2.4 of the TBT agreement.

<sup>34</sup> These countries are Argentina, Brazil, China, Japan, Indonesia, and Singapore. See WTO, *COVID-19: Trade and Trade-related measures*, at <[https://www.wto.org/english/tratop\\_e/covid19\\_e/trade\\_related\\_goods\\_measure\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm)>, accessed 2 July 2020.

<sup>35</sup> Permanent Delegation of Argentina to the WTO (14 April 2020) and Disposición No. 5/2020 Subsecretaría de Política y Gestión Comercial - Ministerio de Desarrollo Productivo (18 March 2020), < <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335690/norma.htm>>, accessed 25 June 2020.

<sup>36</sup> Permanent Delegation of Brazil to the WTO (1 May 2020) and Secex Portaria No. 18/2020 (20 March 2020)

<sup>37</sup> Permanent Delegation of Indonesia to the WTO (1 April 2020) and Ministry of Trade Regulation No. 28.

<sup>38</sup> Permanent Delegation of Singapore to the WTO (24 April 2020).

*supplies that pose minimum risks to human health.* Notably, countries that adopt measures to remove licensing requirements during the COVID-19 pandemic have concentrated mainly on personal protective equipment. Medical supplies, such as masks, hand sanitisers and gloves, are not in themselves chemically or biologically dangerous and are not for surgical or treatment use. These products pose minimum risks to human health. Thus, eliminating import licensing requirements on these products speeds up their delivery without causing specific concerns to health issues.

However, licensing requirements remain *necessary and indispensable* for medical products that *contain dangerous chemical or biological ingredients* or that *are for surgical or treatment use*. Medical supplies such as reagents, alcohol and disinfectants generally have a higher product standard both nationally and internationally. Removing import licensing requirements on these goods would increase the risk of emerging counterfeits and unqualified products, which are likely to harm human health and increase product liability cases. Hence, these medical supplies should not be exempted from import licensing requirements in a medical crisis with a highly infectious or fatal disease.

Moreover, even if certain medical supplies are temporarily exempted from import licensing requirements, importers still need to *notify the authorities* of their intention to import and to provide all relevant information on imported goods, such as the brand, active ingredients, quantitative particulars of the active ingredients, the intended use, the expiry date, and other appropriate cautionary labelling requirements. This information ensures that standards will not be lowered.

Another benefit of this notification is to *trace responsibility* on products that turn out to be faulty or that incur any form of liability. The primary task in a medical crisis is to keep the emergency under control. Removing licensing requirements attracts the import of sufficient essential medical supplies and fulfils this primary task. However, it is reasonable to assume that there will be exporters or manufacturers that see this measure as an opportunity to lower costs and to increase profits.

Removing import licensing requirements does not exempt importers of counterfeits or faulty products of legal liabilities. It simply shifts from ex-ante examination to ex-post review. Countries that remove licensing requirements should balance between the severity of the medical crisis and the risk of type II errors. This is also why countries should exempt licensing requirements on medical supplies that pose only a minimal risk to human health.

Furthermore, governments should *disclose information* about imported essential medical supplies that are exempted from import licensing requirements, and preferably *publish all relevant information* on government websites. Publishing this information assures consumers of safe use. Moreover, when counterfeits and faulty products lead to lawsuits, the courts hearing the cases could also rely on published information to make judgements. When the court finds that certain importers are responsible for counterfeits or faulty products, the court should not only publish the judgement on the judicial website but also inform customs so that customs

officials could *mark these importers in red* and warn consumers. Alternatively, customs officials, once informed of the misconduct of importers, could *impose penalties* on them or could *refuse to give them exemptions*.

For essential medical supplies whose import licensing requirements cannot be exempted, governments are recommended to *examine import licences in a paperless way* (i.e. by digitizing processes to the extent possible) and, if possible, to *simplify the procedures and the materials* required for import licence applications, in particular for importers who have no history of non-compliance. Medical supplies that are more important for saving human lives (e.g. respirators) and fighting a medical crisis can generally not have their licensing requirements exempted due to the greater risks caused by counterfeits and faulty products. In this case, governments should *prioritise the issuance and regulatory approval* of imports of these medical supplies. Accordingly, the *payment of fees and charges* associated with the issuance of these licences and the permits and certificates required for essential medical supplies could also *be exempted or deferred* during the medical crisis.

Concerns may arise from the exemption of import licensing requirements if the countries that import and export essential medical supplies, such as personal protective equipment, do not have similar standards. Importing countries may only wish to import from countries that have similar or higher standards, and they may only recognise certificates or systems of conformity for medical supplies from countries with similar or higher standards. As a result, they may refuse to import medical supplies or refuse to exempt the licensing requirements of medical supplies from countries with lower standards. Without valid regional trade agreements, this may vitiate the non-discriminatory principle and MFN treatment under WTO rules.

(ii) Customs formalities and administrative procedures

Customs formalities and administrative procedures contribute significantly to the delay of essential medical supplies at borders. Indeed, complicated documentation requirements and tedious processing procedures may incur costs that exceed customs duties.<sup>39</sup> The COVID-19 pandemic has aggravated the problem, as border officers are required to reduce physical interaction as much as possible. Lack of sufficient human resources and the inconvenience of communication at work prolongs the processing procedures and further slows down the delivery of essential medical.

➤ **Measure B2 proposes to simplify customs formalities and expedite administrative procedures.**

Customs formalities and administrative procedures stifle trade at borders and are generally problematic even without a medical crisis. The COVID-19 pandemic provides the opportunity for governments to consider simplifying customs formalities and expediting administrative procedures, which may be continued after the crisis.

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<sup>39</sup> Peter Van den Bossche and Werner Zdouc, 'The Law and Policy of the World Trade Organization', p.511.

First, *using digitised processing systems* minimises physical interactions and plays an important role in coping with infectious disease. Although medical supplies still need to be moved physically, applications, clearance operations, information exchange and submission of required documents, including sanitary and phytosanitary certificates, should be possible through a digitised system and platform, in place of physical copies.<sup>40</sup> Where practically possible, *a single customs declaration document* in electronic form should be used to complete all the formalities required for moving the goods through customs procedures.

The world is now in the digital age, in which traders make safe transactions and conduct e-commerce rapidly, remotely and securely. Using a digitised processing system for customs formalities and administrative procedures offers a platform in which the whole process of customs clearance is transparent and traceable with less manpower. More efficient customs procedures encourage both small and large firms to participate in trade and are particularly helpful to small and medium-sized firms. The digitised processing system should be maintained after the pandemic.

Second, governments may *provide fast track*, such as ‘green lanes’,<sup>41</sup> for the rapid clearance of essential medical supplies. Fast track ensures that essential medical supplies go through all border controls, including any checks and health screening of transport workers, within a limited time. Fast track should *apply non-discriminately* to all forms of transportation—land, sea and air—and to all freight vehicles, regardless of trains or ships, heavy or light vehicles.

The normal function of fast track depends heavily on *coordinated border management* (CBM).<sup>42</sup> Under CBM, border control agencies, both regional and international, work together to streamline the process and to improve efficiencies in managing trade and travel flows for essential medical supplies. Due to time scarcity, the urgency of providing essential medical supplies, and the shortage of manpower and competencies to conduct necessary border controls, it is highly recommended that border agencies *share information and resources* so that clearance procedures can take place concurrently instead of consecutively.

Where practically possible, neighbouring countries could *build a common facility* in which border agencies of both countries work side by side to exercise a single border control. In that case, legal and policy issues are agreed or avoided, and the overall costs of border controls are reduced. If a common facility cannot be achieved, governments may provide the legal basis for their neighbouring country’s customs officials to perform their duties on their behalf. In this case, essential medical supplies are released for export and import in one series of checks,

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<sup>40</sup> See e.g. China, where MOFCOM guided and encouraged enterprises to apply for import and export licenses paperlessly. Permanent Delegation of China to the WTO (27 April 2020). <<http://www.mofcom.gov.cn/article/ae/ai/202002/20200202934222.shtml>>, accessed 27 June 2020.

<sup>41</sup> See e.g. EU, Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services, (2020), OJ C 96/1.

<sup>42</sup> The EU calls it ‘Integrated Border Management’, the World Bank calls it ‘Collaborative Border Management’, and the Organization for Security and Co-operation in Europe (OSCE) calls it ‘Comprehensive Border Management’. See Mariya Polner, ‘Coordinated Border Management: from Theory to Practice’ (2011) *World Customs Journal* 5(2): 52.

providing the same results as a common facility.

Fast track should be allowed after the crisis, as it is *a flexible regulatory measure* to cope with any subsequent emergencies. During a medical crisis, fast track targets essential medical supplies while during other crises it could apply to other essential goods, like agricultural products. Even in the absence of any crisis, governments could use fast track to facilitate trade in certain goods to fulfil policy needs.

Third, governments are suggested to *provide a single window* to handle customs formalities and administrative procedures for selected essential medical supplies. This allows governments to *prioritise urgent customs clearance* for essential medical supplies to combat the medical crisis. This measure is flexible for future medical crises in which governments determine other medical supplies as essential.

Moreover, enterprises can *complete all* customs formalities and administrative procedures in a single window, including sanitary approval, licensing approval and other approvals for imported medical supplies. Such ‘one-stop’ processing streamlines procedures, reduces costs and increases efficiency. As all the customs formalities and administrative procedures are dealt with in a single window, that window should also be responsible for disputes arising from clearances and approvals.

Admittedly, ‘one-stop’ processing has potential problems. To ensure the efficacy of a single window, governments should either train individual officers to process different services, or they should establish approval processes that involve different officers responsible for different services. While the former has the risk of concentrating power on a single officer leading to internal corruption, the latter may not be very efficient. Therefore, governments should be cautious about applying ‘one-stop’ processing *to a wider category of goods*.

Besides, even though ‘one-stop’ processing generally fits into the administrative framework of customs procedures, governments need to provide *operational manuals* to guide declarants, importers, customs brokers and any interested persons.

### (iii) Transport barriers

Transport services play a key role in delivering essential medical supplies and in maintaining the medical supply chain during a medical crisis. It is crucial to keep vehicles and vessels moving, ports open and trade flowing, while ensuring all necessary border controls.<sup>43</sup>

➤ **Measure B3 proposes that carriers of all modes of transport should be able to rapidly provide life-saving services.**

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<sup>43</sup> UNCTAD, *COVID-19: A 10-point action plan to strengthen international trade and transport facilitation in times of pandemic*.

<[https://unctad.org/en/PublicationsLibrary/presspb2020d3\\_en.pdf](https://unctad.org/en/PublicationsLibrary/presspb2020d3_en.pdf)>, accessed 3 June 2020.

Priority must be given to the delivery of essential medical supplies. The *fast track* proposed in **Measure B2** would help to expedite the movement of selected medical supplies through land, sea and air.<sup>44</sup>

Governments may recognise certain transport companies as *essential services carriers* and *open fast track* for them so that they can deliver selected essential medical supplies (and also other essential goods) during the medical crisis. The fast track ensures that their conveyances, shipping and last-mile delivery are uninterrupted; customs formalities and administrative procedures of the fast track are reduced to a minimum; and their staff, crew, freight forwarders and customs brokers, who are indispensable in delivering the goods, are *exempted from local 14-day quarantine* requirements, insofar as the person does not interact with the public in the performance of their job and has no symptoms of coronavirus.<sup>45</sup>

As ‘essential services carriers’ are given priorities in the delivery of essential medical supplies, they are required to undertake *special responsibility* for this priority. Thus, it is for each ‘essential services carrier’ to decide which categories of individuals are indispensable for the delivery and to ensure that the standard for transport services has not been lowered. Moreover, when ‘essential services carriers’ fail to fulfil the special responsibility (e.g. infected persons running transport systems infect others and cause further damage) the carriers should be fully *responsible for the harmful results*. Furthermore, if any misconduct by these carriers is found by government officials, governments may *impose penalties, disqualify* them as ‘essential services carriers’ and *close the fast track* for their delivery services.

It should be noted that as the medical crisis causes staff shortages in the public and private sectors, it requires sacrifices to ensure the delivery of essential medical supplies and the operation of fast track. For example, the manufacturing and delivery of other non-essential commodities can be delayed. Accordingly, governments should *reduce the additional costs* incurred by delayed transport and *reimburse* carriers for extra expenses.

(iv) Transparency

A lack of information concerning regulatory measures and procedures for fighting the medical crisis undermines national policy responses and constitutes an important barrier to the sufficiency of essential medical supplies in times of crisis. Governments should implement rules and procedures to ensure a high level of transparency regarding the measures taken in response to any medical crisis.

➤ **Measure B4 proposes that governments should publish measures taken in response to a medical crisis and notify the measures to the WTO.**

First, *measures* eliminating import tariffs, reducing other taxes and fees, minimising non-tariff

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<sup>44</sup> See e.g. Singapore, WTO documents G/C/W/777, G/C/W/779 and G/MA/W/151, 16 April 2020.

<sup>45</sup> World Customs Organization, The Private Sector Consultative Group outlines solutions to humanitarian, government and business needs amidst the COVID-19 pandemic.

barriers, simplifying customs formalities, expediting administrative procedures and facilitating transport services should *be made public* on governments' official websites.

Where practically possible, governments should publish these measures in as much detail as possible. These could include a list of targeted medical supplies with a commonly recognised classification reference (preferably provided by WHO), the extent of reduction of tariffs and other taxes and fees, and an operation manual of one-stop services. This would help enterprises to better understand the measures and improve their certainty and efficacy.

Moreover, governments should publish medical crisis-related *state aid and subsidies*, and *bailouts for enterprises*. It is recommended that governments issue *guidelines on the review of foreign investments* to temporarily lower the threshold of investment for manufacturing medical supplies or other medical crisis-related goods. When the guidelines lead to excess production, the glut of goods could be used for export.

The publication requirement is in accordance with the WTO rules. Article X of the GATT 1994 requires that members publish their laws, regulations, judicial decisions, administrative rulings of general application and international agreements relating to trade matters.<sup>46</sup> This requirement ensures that members and other persons affected, or likely to be affected, by governmental measures should have a reasonable opportunity to acquire authentic information about the measures and adjust their activities accordingly.<sup>47</sup>

Second, members should *notify the WTO* of measures taken in response to the medical crisis. Detailed measures should be communicated to the central registry of notifications established under the responsibility of the WTO Secretariat so that the WTO Secretariat can gather all the measures taken by members and publish them on the WTO's official website.<sup>48</sup>

It is further recommended that the Goods Council and relevant committees *conduct policy reviews* on the measures taken by members in response to the medical crisis. The Goods Council should state the criterion, reasons, results and further concerns of the review, and allow members to question the legitimacy of the review procedures as well as the validity of results. The Goods Council has the responsibility to orient members affected by the crisis towards consistent trade policies and to contribute to the maximum efficacy of these policies.

Furthermore, governments may *establish enquiry points* to provide further information and relevant documents on the measures taken in response to the medical crisis. These points not only function to communicate trade laws and temporary trade policies to other members but also provide guidance and detailed information to any interested party. For example, when the

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<sup>46</sup> The laws, regulations, judicial decisions and administrative rulings may include the classification or valuation of products for customs purposes, rates of duties, taxes or other charges, and restrictions and prohibitions on imports. See Panel Report, *US – Countervailing and Anti-Dumping Measures (China)* (2014), WT/DS379/R, paras. 7.30–7.31.

<sup>47</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)* (2014), WT/DS379/AB/R, paras. 4.65–4.66.

<sup>48</sup> See e.g. WTO, *COVID-19: Trade and Trade-related measures*.

customs authority has decided to waive, reduce or defer the payment of import tariffs or other taxes and fees, enquiry points communicate these measures clearly to trade stakeholders, who may not fully understand the meaning of these measures and may face unexpected back duties following the crisis.

Publishing measures, notifying the WTO, and establishing enquiry points all contribute to transparency in response to the medical crisis. Transparency encourages the movement of essential medical supplies from where they are abundant to where they are lacking. In a global medical crisis, it encourages international cooperation between affected countries to work side by side to survive the crisis and maintain the global supply chain flow. In a regional medical crisis, it encourages international cooperation between affected countries and countries outside the disaster area to help affected countries keep the emergency under control and to provide protection to trade in the affected countries. Furthermore, transparency also gives confidence to citizens that the government is taking action to secure citizens in time of medical crisis.

#### **4. Final remarks**

All the measures recommended above are optional. When the supply of essential medical products is a priority, the regulatory requirements for them should be flexible. Governments should consider the most urgent need, their countries' unique situations, the regulatory environment, and the governments' capacity to handle the emergencies. Hence, it is for each member of the WTO to adopt detailed measures to ensure the sufficient supply of essential goods that are critical to deal with the emergency situation and to safeguard the security and health of its citizens.

In any event, as long as the pandemic progresses, the world economy can never truly recover. Thus, to have the emergency under control is the priority and the most pressing issue.

Every country should work together to ensure that sufficient essential medical supplies can move from where they are abundant to where they are lacking. This relies heavily on cooperation under the multilateral trading system. Countries must cooperate sincerely and remove any restrictions caused by national protectionism or geopolitics.

Import restrictions are a key part of such restrictions. Reducing import restrictions to minimum speeds up the delivery of essential goods that are in severe shortage. It also facilitates trade during the crisis, which keeps the global economy flowing and provides the basis for economic recovery. Reducing import restrictions alone is insufficient to ensure the delivery of essential goods and exporting governments should also reduce export restrictions on essential goods. This is a global task in which all countries should cooperate sincerely to ensure the safety of mankind and the prosperity of the world economy.

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