



Bennett  
Jones

# RETHINKING TRADE IN MEDICINES AND MEDICAL SUPPLIES

QUEEN'S INSTITUTE  
ON TRADE POLICY

November 23-27, 2020

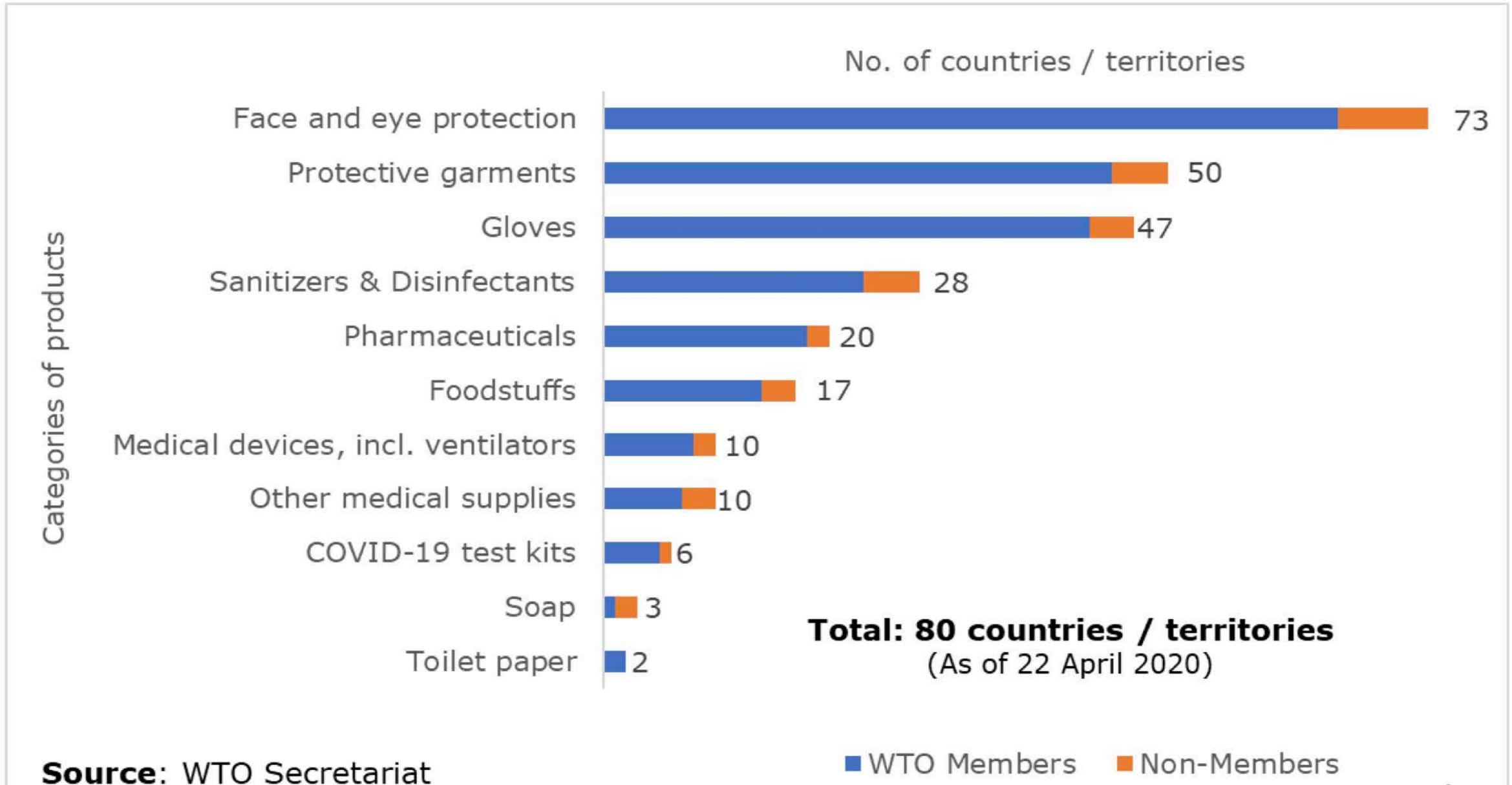
Valerie Hughes  
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# This presentation will address the following three questions:

- Are export restrictions on medical supplies/products legal?
- Are new rules needed?
- If so, what form should these new rules take?



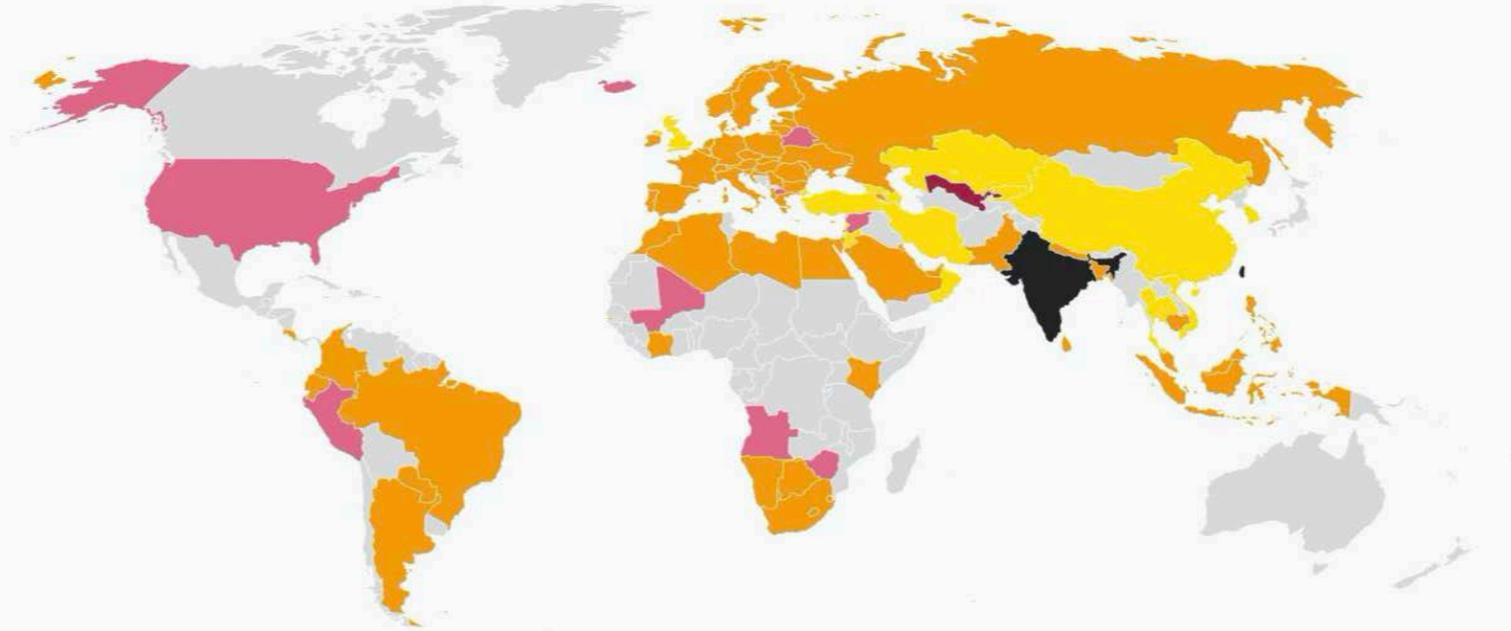
**Chart 1. Number of countries and separate customs territory introducing export prohibitions and restrictions as a result of COVID-19, by categories of products**



**Source:** WTO Secretariat

## Exports of medical supplies & medicines: 92 jurisdictions are reported executing a total of 215 export controls since the beginning of 2020

Updated on 16 October 2020



Source: Information collected by the Global Trade Alert team as part of a joint project with the European University Institute and the World Bank. Policy changes identified from official decrees, regulations, and announcements and from media reports. Some policy measures are announced to the press before implementing regulations are published. Information based on media reports is updated when an official state act is located. Date of first relevant policy information by a jurisdiction was used to prepare this map. The information collection methodology as well as the worksheet of information on policy change used to construct the latest version of this map can be downloaded from <https://www.globaltradealert.org/reports/54> (Please copy & paste this URL into your browser).

# TOP EXPORTERS OF MEDICAL PRODUCTS (2019)

EXPORTING COUNTRY	PERCENT MEDICAL PRODUCTS TO THE WORLD
Germany	14
US	12
Switzerland	9
Canada	(17 <sup>th</sup> on the list)

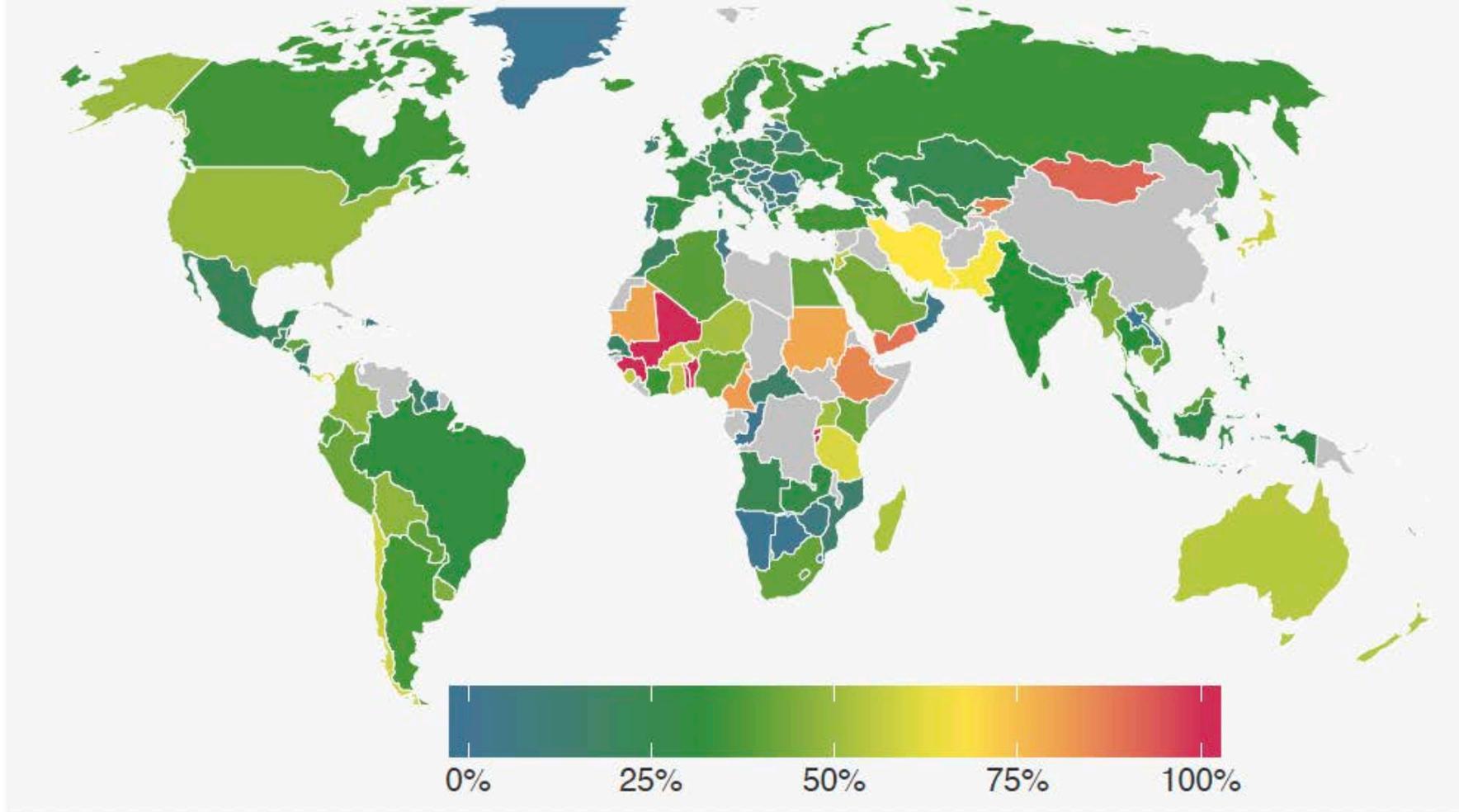
**Facemasks:** **China** is biggest exporter at 25%

**Ventilators:** more than **50% exported by 4 countries**

- Singapore 18%
- US 16%
- Netherlands 10%
- China 10%



## Average share of each nation's PPE imports that came from China from 2015 to 2018



Source: Global Trade Alert.

# TOP IMPORTERS OF MEDICAL PRODUCTS (2019)

- US: 19% total world imports of medical goods
- Germany: 9%
- China: 6%

US from Ireland	17 %
US from Germany	12 %
US from Switzerland	9 %
US from China	8 %
US from Mexico	6%

China from Germany	20 %
China from US	19 %
China from Japan	10 %
China from France	6 %
China from Italy	4%



# CANADA'S MEDICAL PRODUCTS IMPORTS

CANADA'S IMPORTS OF FACE MASKS FROM:	2019	2020
US	53%	3.3%
CHINA	26.4%	90.7%



# THE 3M CONTROVERSY



**Donald J. Trump**  @realDonaldTrump · Apr 2

...

We hit 3M hard today after seeing what they were doing with their Masks. "P Act" all the way. Big surprise to many in government as to what they were doing - will have a big price to pay!

 37.6K

 44.3K

 185.8K



OTTAWA — Prime Minister Justin Trudeau said Friday it would be a "mistake" for the U.S. to limit exports of medical supplies to Canada in the midst of the coronavirus pandemic.



# ARE EXPORT RESTRICTIONS ON MEDICAL SUPPLIES LEGAL?



# THE RULES: QUANTITATIVE RESTRICTIONS ARE PROHIBITED

## ***Article XI\** GATT 1994**

### *General Elimination of Quantitative Restrictions*

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.



# THE PROHIBITION IS BROADLY WORDED

- No prohibitions or restrictions
- Whether made effective through quotas, export licences or other measures
  - Covers export bans and quantity limits on exports
  - Also covers “other measures”
    - Measure has a “limiting effect” on quantity being exported
      - Do not need evidence of export volume falling
      - Demonstrate through design of the measure
- Does not cover export taxes (but countries have not resorted to these in response to pandemic)



## Article 2.11: Import and Export Restrictions

1. Except as otherwise provided in this Agreement, **no Party shall adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of the GATT 1994**, including its interpretative notes, and to this end Article XI of the GATT 1994 and its interpretative notes are incorporated into and made a part of this Agreement, *mutatis mutandis*.

# OTHER TRADE AGREEMENTS

## CPTPP

### Article 2.10: Import and Export Restrictions

1. Unless otherwise provided in this Agreement, no Party shall adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of GATT 1994 and its interpretative notes, and to this end Article XI of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, *mutatis mutandis*.

## CETA

### Article 2.11 – Import and export restrictions

1. Except as otherwise provided in this Agreement, a Party shall not adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of the GATT 1994. To this end Article XI of the GATT 1994 is incorporated into and made a part of this Agreement.



# THE CARVE OUT

## *Article XI\* GATT 1994*

### *General Elimination of Quantitative Restrictions*

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
2. The provisions of paragraph 1 of this Article shall not extend to the following:
  - (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;



# THE CARVE OUT

A carve out – not an exception

Burden of proof: claimant must prove carve out conditions not met

*China– Raw Materials ( dispute brought by US, EU, Mexico)*

- “**temporarily applied**”: failed because measure of more than 10 years
- To relieve **critical shortages**: deficiencies in quantity that are crucial, situation of decisive importance, turning point (failed because 16-year reserve not critical)
- Of **products essential** to the exporting country = absolutely indispensable (bauxite)

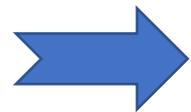


# NON-DISCRIMINATORY ADMINISTRATION OF QUANTITATIVE RESTRICTIONS

## *Article XIII\** GATT 1994

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions\* to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:



allocate ventilator exports between WTO Members as close as possible to relative shares exported before pandemic

\*Article XIII:5: the principles of this Article shall also extend to export restrictions



# WTO GENERAL EXCEPTIONS: ARTICLE XX GATT 1994

## General Exceptions

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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

(j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this subparagraph not later than 30 June 1960.

[For **services**: GATS Article XIV]



# ARTICLE XX(b) GATT 1994: necessary to protect human life/health

What does the defending Member have to establish to justify the inconsistent measure?

“**Necessary**”: a weighing and balancing exercise:

- 1) importance of the health objective pursued
- 2) contribution made by the measure to achieving the objective
  - material contribution
  - genuine **relationship** of ends and means between the object pursued and the measure at issue
- 3) trade restrictiveness of the measure

Very important **value** + low **impact** + very significant **contribution** = necessary

*Brazil—Retreated Tyres (dispute brought by EU)*



# ARTICLE XX(j): essential to the acquisition or distribution of products in general or local short supply

- “essential” = absolutely **indispensable** or necessary;
  - weighing and balancing exercise
- “general or local short supply”:
  - does not say “critical” like Art. XI:2(a)
  - **currently** in short supply
  - determined with reference to domestic *and* foreign supply
    - Is **international supply** table and accessible?
    - **reliability of supply chains**?
    - lack of sufficient domestic capacity to manufacture solar cells in India – did not justify support measure

*India—Solar Cells* (dispute brought by US)

*EU—Third Energy Package* (dispute brought by Russia)



## ARTICLE XX(j): proviso

*“Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist”*

- do not divert excessive share of supply to individual Members
- no exclusive distribution agreements?



# ARTICLE XX: chapeau

## General Exceptions

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[For **services**: GATS Article XIV]

# WTO SECURITY EXCEPTIONS: ARTICLE XXI

Nothing in this Agreement shall be construed

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(iii) taken in time of war or other emergency in international relations

- apply in good faith
- not implausible that the respondent implemented the measures for the protection of its essential security interests arising out of that emergency

*Russia—Traffic in Transit* (dispute brought by Ukraine)

*Saudi Arabia—IP Rights* (dispute brought by Qatar)

For **services**: GATS Article XIV***bis***



# DO THE RULES DISCIPLINE EXPORT RESTRAINTS OF MEDICAL PRODUCTS?

Pursue a challenge under WTO dispute settlement mechanism?

- Could take 2 years or more
- No guarantee of success
- What do you win if you win?
  - nullification and impairment?

WTO Appellate Body not functioning

Alternative Interim Appeal Arrangement (MPIA): limited participation



# DO WE NEED NEW RULES?



# WTO PAST SUCCESS IN COORDINATING THE LOWERING/ REMOVAL OF TARIFFS

- **Agreement on Pharmaceutical Products (“Pharma Agreement”)**: into force 1995 and 4 subsequent reviews adding products (now 10,000)
  - Canada; EU; Japan; Macao, China; Norway; Switzerland; US
- **1996 Information Technology Agreement (ITA)**
  - 82 Members eliminated tariffs on most IT products including medical
- **2015 Expansion of ITA**
  - 52 WTO Members; average tariff of all participants on all medical equipment is 0.4% compared to 4.1% for Members that do not participate



# CALLS FOR NEW INTERNATIONAL AGREEMENT

- **EU Concept Paper** on Trade in Healthcare Products (June 2020)
  - Tariff elimination
  - Discipline **export restrictions**
    - Limited in time and scope
    - Least trade restrictive
    - Targeted
    - Temporary
    - Proportionate
    - Equitable share of supply
- WTO DDG Wolff Remarks for G20 Summit:
  - “as new vaccines ... start to be rolled out, barriers at borders must be reduced, with an **international understanding limiting the use of export restrictions ...**”



# OTTAWA GROUP ACTION PLAN ON COVID-19 (June 2020)

## Initiative on Medical Supplies (Action item 5):

- **examine if current trade rules** (including tariff and non-tariff measures, trade facilitation) **should be adapted or built upon or if new ones** should be developed to guide collaborative policy responses to deal with similar future crises
- Ministers instructed officials to:
- identify steps Members could take to **facilitate trade in medical supplies** to help ensure world is better positioned to deal with future health emergencies and to **help ensure that versatile, diversified and resilient supply chains exist** that allow all members access to vital medical supplies
- include analysis of the **objectives and effects of policies affecting trade of medical supplies** in response to the current pandemic



# OTTAWA GROUP MEETING: NOVEMBER 2020

- agreed on an initiative **calling on the WTO Members to work toward enhanced global rules to facilitate trade in essential medical goods**
- members called for immediate action in response to the coronavirus crisis such as exercising **restraint in using export restrictions**, implementing trade-facilitating measures in the area of customs and services, as well as improving transparency
- The communication will be submitted this week to the WTO Secretariat before being presented to the **WTO General Council** for discussion.
- it will be used to prepare the 12th Ministerial Conference of the WTO due to be held in 2021.



# MULTILATERAL, PLURILATERAL OR CRITICAL MASS AGREEMENT?

## Multilateral:

- 164 Members negotiate and need consensus to conclude a text
- WTO amendment procedure followed by instruments of acceptance

## Plurilateral:

- Interested members negotiate/conclude agreement
- Parties request Membership to add their agreement to “Annex 4” – consensus required

## Critical Mass

- Interested Members negotiate/agree on a text
- Obligations can be recorded in different types of instruments – legal value?
- DSU would not apply (not in Appendix 1)





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**Thank you!**



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EXTRA SLIDES FOR INFORMATION FOLLOW



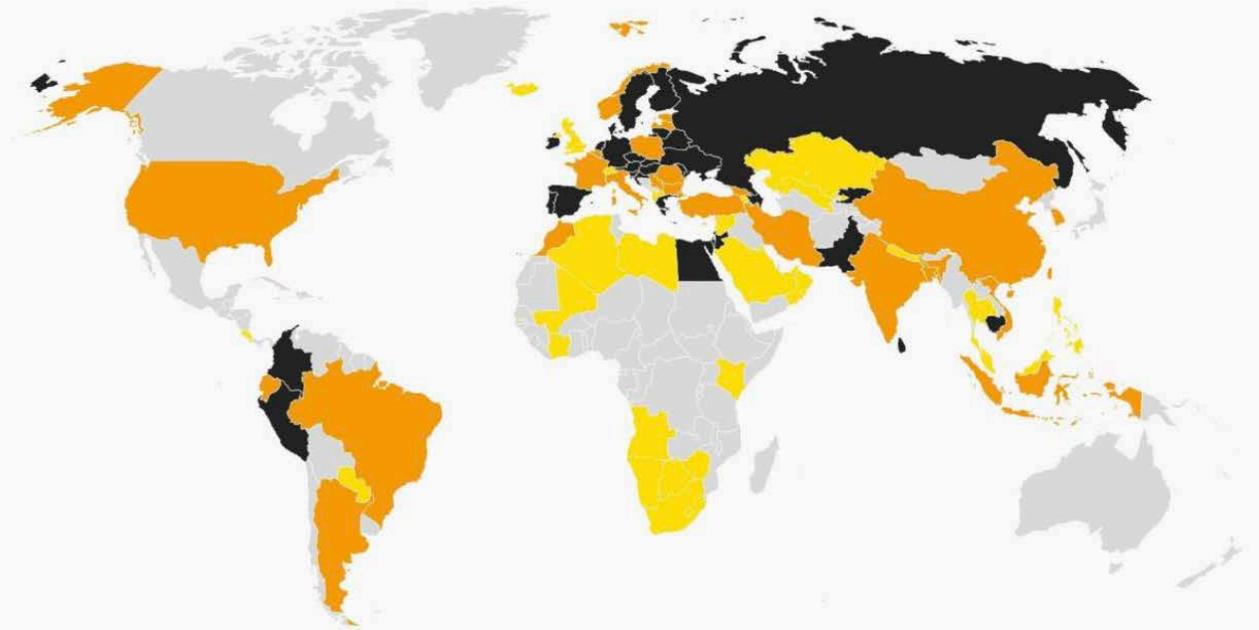
# MEDICAL PRODUCTS AND WORLD TRADE

- **Medicines** (pharmaceuticals)
- **Medical supplies** (consumables for hospital use including alcohol, syringes, gauze)
- **Medical equipment** and technology (microscopes, ventilators)
- **Personal protective products** (hand soap, sanitizer, face masks, protective spectacles)



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# TARIFFS ON PERSONAL PROTECTIVE PRODUCTS

- 29 Members apply an average tariff of 5% or less
- 47 Members apply an average tariff of 15% or more
  
- Hand soap: average = 17%
  - 72 Members apply duty of more than 15%
  - Dominica: 50 %
  - Egypt 56.7%



# TARIFFS ON PERSONAL PROTECTIVE PRODUCTS

- Face masks: average = 9.1%
  - Fifteen Members: more than 15%
  - About 1/3 of WTO Members: 10 to 15%
  - Ecuador: 19%
  - Bolivia and Venezuela: 20%
  - Brazil and Argentina: 17%
- Protective glasses and visors:
  - 23 duty-free
  - 29 have tariffs of more than 15%
  - Ecuador and Jordan have the highest: 30%
  - About half of Members: less than or equal to 7.5%



# TARIFFS ON MEDICAL PRODUCTS

Average tariff on medical products = 4.8%

- Medicines (Pharmaceuticals): average = 2.1%
- Medical supplies for hospital use (alcohol, syringes, gauze): average = 6.2%
- Medical equipment and technology (microscope, ventilator): average = 3.4%
- Personal protective products (hand soap, sanitizer, face masks, protective spectacles): average = 11.5%



# TARIFFS ON VENTILATORS AND RESPITRATORS

- Average tariff = 3.3%
- Brazil, Argentina, and Venezuela: 14%
- India: 10%
- China: 4%
- 67 Members: duty-free treatment (EU, US, Korea, Switzerland)

# US FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA)

- April 10: temporary rule banning exports of 5 types of PPE without explicit approval from FEMA
  - items designated as scarce: N95 masks, respirators, PPE surgical masks, gloves
- prevent [brokers, distributors ] from diverting these products overseas so as to ensure that these scarce or threatened PPE materials remain in the US for use in responding to the spread of COVID-19.
- FEMA will detain the shipment to determine whether to return for domestic use or allow export of part of all of shipment

