

# COVID-19: An Overview of Trade-Related Measures to Address Access to Medical Goods

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As the coronavirus (COVID-19) pandemic continues, government officials around the world have raised questions and concerns about how to ensure that their countries have adequate access to, and supplies of, medical goods, including personal protective equipment (e.g., masks, gloves, garments), medical equipment (e.g., ventilators), and pharmaceuticals. This Sidebar presents an overview of some of the trade-related measures taken by the United States and its trading partners in their efforts to address these concerns, including: (1) introducing export restrictions; (2) reducing or eliminating tariffs; (3) revising import procedures; and (4) prioritizing domestic production. It then discusses possible legal challenges to each of these measures, as well as avenues for congressional action or oversight.

## Method One: Introducing Export Restrictions

Several of the United States' trading partners have imposed [export restrictions](#) on certain medical goods to meet their domestic supply needs. For example, the European Union (EU) introduced [export authorization](#) measures that prohibit the export of personal protective equipment (e.g., masks, protective glasses, and garments) from the EU without prior regulatory approval. India [restricted](#) exports of twenty-six pharmaceutical components, as well as medicines and vitamins made from them, accounting for approximately [ten percent](#) of India's pharmaceutical exports. To date, the United States has not [supported](#) its trading partners' use of export restrictions to address potential supply shortages.

The World Trade Organization's (WTO's) international trade regime generally prohibits [quantitative restrictions](#) on the export of goods, whether in the form of export bans, licensing requirements, or other measures having similar restrictive effects. In light of this general rule, the export restrictions described above may arguably cause some to raise concerns. At the same time, however, three exceptions may apply. First, the general prohibition [does not cover](#) export restrictions "temporarily applied to prevent or relieve critical shortages of ... products essential to the exporting contracting party." Second, the WTO regime [permits](#) its Members to implement measures contrary to their general obligations if the measures are "necessary to protect human, animal or plant life or health" or "essential to the acquisition or distribution of products in general or local short supply." Any potentially WTO-inconsistent measures must also meet other conditions, including that their application not create "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." Measures taken to address the

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acquisition or distribution of products in short supply must also be time-limited and conform to the principle that all WTO Members “are entitled to an equitable share of the international supply of such products.” Third, the WTO **does not prevent** any Member from implementing measures “that it considers necessary for the protection of its essential security interests . . . in time of war or other emergency in international relations.”

It is uncertain whether the export restrictions imposed by WTO Members (or any future restrictions that may be imposed by other WTO Members, including the United States) to address concerns about shortages of medical supplies are WTO-inconsistent and, if so, fall within one of the exceptions, as this precise issue has not yet been litigated before the WTO’s Dispute Settlement Body. However, in a joint study, the WTO and World Health Organization (WHO) **indicated** that some trade-restrictive measures used to address widespread infectious diseases are “unlikely to conflict with WTO rules,” provided that they are time-limited and crafted to minimize trade disruptions. Nonetheless, the WHO has **advised** against export restrictions to address COVID-19, instead recommending that countries incentivize increased domestic production of the needed products (discussed below). The WTO Director-General has also **stressed** that “maintaining open trade and investment flows will be critical to protect jobs, prevent supply chain breakdown, and ensure that vital products do not become unaffordable for consumers.”

## Method Two: Reducing or Eliminating Tariffs

Since the onset of the COVID-19 pandemic, the cost of a number of medical goods has increased dramatically. For example, the **cost** of surgical masks has increased 600% and the cost of medical gowns has doubled.

To alleviate the financial pressure on firms and other entities that must buy these products, the United States has **removed** some tariffs on certain medical goods from China imposed under **Section 301** of the Trade Act of 1974. However, some commentators remain **concerned** that the remaining Section 301 tariffs imposed by the Trump Administration may impair the United States’ ability to respond to COVID-19. Some Members of Congress have urged the Administration to **remove** or suspend tariffs on a number of products from China to alleviate the economic impact from COVID-19, including by reducing the cost for firms to purchase medical supplies.

Congress could potentially remove or eliminate tariffs, as it possesses **constitutional authority** to “lay and collect . . . Duties” (i.e., tariffs). Alternatively, the President could “authorize the Secretary of the Treasury to permit . . . the importation free of duty of food, clothing, and medical, surgical, and other supplies for use in emergency relief work” under **Section 318** of the Tariff Act of 1930, after a declaration that “an emergency . . . exist[s] by reason of a state of war, or otherwise.” The scope of Section 318 may raise the question of whether its broad delegation of authority may violate the non-delegation doctrine, which prohibits the transfer of legislative functions to the Executive without an “**intelligible principle**” to limit the Executive’s discretion when implementing such functions. However, a recent **challenge** to another trade statute that grants the President broad authority to restrict imports may suggest otherwise. Specifically, the U.S. Court of Appeals for the Federal Circuit **upheld the constitutionality** of **Section 232 of the Trade Expansion Act of 1962**, which permits the President to restrict imports if he determines they are entering the United States “in such quantities or under such circumstances as to threaten the national security.” As of the time of writing, no court has considered the legality of Section 318.

The impact of tariffs on access to medical goods has long been of interest to WTO Members, even in the absence of immediate public health crises. In 2006, they committed to **negotiating** the elimination of tariffs and non-tariff barriers on a number of healthcare-related goods. These negotiations remain ongoing.

## Method Three: Revising Import Procedures

Most countries regulate the importation of medical goods for public health and safety reasons. For instance, in the United States, U.S. Customs and Border Protection (CBP) would need to approve the importation of medical devices and pharmaceutical products. CBP may assess, at the port of entry, whether the products to be imported satisfy customs rules, such as [entry documentation](#), and comply with other U.S. laws and regulations, including the U.S. [Food and Drug Administration's](#) governing statutes. Failure to satisfy these requirements can lead to delays in processing and release of products into the United States, or in some circumstances, to [seizure](#) of the goods.

To address procedural issues that could potentially delay access to medical goods, some countries have taken steps to streamline their customs procedures. China created a “[green lane](#)” system, which prioritizes the inspection and review of imported medical goods with the goal of reducing regulatory processing time before the goods may be released for use. Similarly, the EU recently introduced [guidelines](#), instructing its Member States to create “green lanes” for freight transport to ensure access to “essential products,” including medicines and medical equipment.

Thus far, the United States has seemingly not publicly proposed amending its customs or other regulatory procedures in response to the COVID-19 pandemic. However, CBP has [congressional authorization](#) to “develop and implement screening and targeting capabilities, including ... prioritizing of passengers and cargo.” Thus, CBP may be able to create a “green lane” system, similar to those described above, to reduce processing times for medical goods. Given that the creation of such a system may require CBP to complete a [rulemaking process](#), it may not be feasible to implement this type of system to address COVID-19 (although CBP may be able to create a new regulation that would apply to any future emergencies). Congress could, however, consider using its constitutional authority to “regulate Commerce with foreign Nations” to more quickly implement new customs prioritization procedures.

## Method Four: Prioritizing Domestic Production

As an alternative to reliance on cross-border supply chains, the United States and some of its trading partners have sought to prioritize domestic production of necessary goods, either by requiring manufacturers to complete orders of medical goods before orders of non-medical goods, or by imposing increased production requirements on these manufacturers. This reflects, at least in part, growing concern about supply chain security, as many countries import more health-related products than they export—as of 2010, only 24 countries out of 139 [surveyed](#) were net exporters of such products.

On March 18, 2020, President Trump issued an [Executive Order](#) authorizing the Secretary of Health and Human Services to use the Executive Branch’s authority under the [Defense Production Act](#) to address potential shortages in health and medical resources needed to respond to COVID-19. This [Act](#) permits the President, or agency to whom he delegates responsibility, to require that certain contracts or orders “take priority” over others, as well as to require companies to fulfill production orders “necessary or appropriate to promote the national defense.” The Act also [allows](#) the President to incentivize domestic production and ensure that essential products and their components “are available from reliable sources,” such as by restricting the suppliers, whether foreign or domestic, from whom manufacturers can obtain materials. While the Act does not envision a large role for Congress in its implementation (except with regard to [wage and price controls](#)), Congress may consider enhancing its oversight or authorization role. Additionally, to the extent that some Members of Congress may have questions as to the scope of “national defense,” Congress could consider amending the Act to clarify whether it applies to COVID-19 or any other future public health emergencies.

Other countries have also implemented or are considering similar measures. For example, Germany and Italy placed additional [orders](#) for ventilators and other health-related products, and Italy has [directed](#) its military to assist the country's only domestic producer of ventilators to quadruple production. The United Kingdom is also [assessing](#) options for increasing domestic production of medical supplies. Such measures seemingly align with the [WHO's suggestion](#) that "Governments should develop incentives for industry to ramp up production." Such measures may be permitted under the WTO regime, provided they are not unlawful subsidies (e.g., subsidies that harm the industries of other WTO Members) under the WTO's [Agreement on Subsidies and Countervailing Measures](#), or, if the measures are potentially WTO-inconsistent, provided that they fall within an exception (e.g., the public health or essential security exceptions described above).

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