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Marceau, Gabrielle Zoe; Garg, Shivani

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The Role of the WTO in the Global Response to the COVID-19 Pandemic

Gabrielle Marceau

Associate Professor at UNIGE and Senior Counsellor at the WTO

Shivani Garg

Masters' candidate at Sciences Po

Abstract

The WTO and international trade have proven more important than ever during the COVID-19 pandemic. Indeed, without the delivery of food, medicines, masks and vaccines through commerce, the pandemic could not be contained. The WTO basic principles - transparency, non-discrimination, the prohibition against border restrictions, disciplines on subsidies to industrial and agriculture products, to name a few, and in particular the WTO monitoring system have helped countries collaborating and coordinating their actions to contain the pandemic and mitigate trade and global supply chain disruptions on essential goods. In addition, during this crisis, the WTO Secretariat and its Director-General assumed enhanced responsibilities to assist Members with their extraordinary needs. The WTO became the global forum for Members' coordination of border and internal trade-related actions, for the debate on intellectual property and the request for waiving patent protections on vaccines, while playing an active role in stimulating the expansion of vaccine production capacity in developing countries. This article contends that the response of the WTO has augmented and legitimized its role as a global governance forum.

Keywords

WTO – transparency – coordination – essential goods – trade policy review mechanism – intellectual property – vaccines – waiver of patent protections.

1 Introduction

The COVID-19 pandemic triggered a health and survival crisis with severe economic, social, and security consequences of a universal magnitude. International trade is key to sustainably solve this crisis. Without the delivery of food, medicines, and vaccines delivered to a global population through commerce, the pandemic cannot be contained. Hence, the public health emergency cannot be effectively addressed without resilient, robust, and well-diversified supply chains operating in a predictable trading environment.¹

Basic principles of the World Trade Organization (WTO) are crucial to guarantying access to essential goods to all Members during a pandemic: transparency, non-discrimination, the prohibition against border restrictions, disciplines on subsidies to industrial and agriculture products, to name a few. In addition, the invention, development, and production of vaccines and medicines soften the economic and social impact of the pandemic, which involves the distribution of patents and intellectual property rights. Countries attempted to address some of the problems stemming from the COVID-19 pandemic bilaterally, through regional collaboration, and multilaterally via international organizations such as the WTO.

The role of the WTO during the current pandemic is not limited to assisting its Members with their usual problems. As the world emerges from the current crisis, the WTO, its Secretariat, and its Director-General assumed enhanced responsibilities to assist its Members and their COVID-19 needs. The WTO plays an increasingly active role in assisting Members in their coordination of policy responses to the current crisis.

This article discusses the role and importance of international trade and the WTO in response to the current pandemic. Firstly, it introduces the main disciplines of the WTO system that are particularly relevant during the pandemic (Part I). The article further examines the WTO's efforts to improve the

1 WTO, *COVID-19 and Beyond: Trade and Health* (24 November 2020), Communication from Australia, Brazil, Canada, Chile, the European Union, Japan, Kenya, Republic of Korea, Mexico, New Zealand, Norway, Singapore and Switzerland, WTO Doc. WT/GC/223, para 4 [hereinafter WT/GC/223 (*COVID-19 and Beyond: Trade and Health*)]; WTO, *Draft General Council Declaration - COVID-19 and Beyond: Trade and Health*, Revised communication from Australia; Brazil; Brunei Darussalam; Canada; Chile; China; the European Union; Hong Kong, China; Iceland; Japan; Kenya; Republic of Korea; Mexico; Republic of Moldova; Montenegro; New Zealand; North Macedonia; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; the United Kingdom; Uruguay and Vanuatu, JOB/GC/251/Rev.2 [hereinafter JOB/GC/251/Rev.2 (*Draft General Council Declaration - COVID-19 and Beyond: Trade and Health*)]. This includes the first version of this draft communication dated 18 February 2021, which was revised on 22 April 2021 and 19 May 2021.

transparency and monitoring of COVID-19 related measures. Such efforts facilitate the collaboration between governments to curtail the spread of the virus and to protect their people, economy, and security (Part II). Lastly, the WTO has become the global forum for the debate concerning the waiver of patent protections on vaccines, while recognizing the need to expand vaccine production capacity in developing countries (Part III).

2 Trade Measures Taken in Response to the Pandemic

Since the World Health Organization declared the outbreak of COVID-19 as a pandemic on 11 March 2020, governments adopted various trade measures that affect the access to essential goods, such as masks, respirators, oxygen, vaccines, medical goods, food, and agricultural goods.² Those measures include tariffs, export restrictions, licenses, certifications, labelling, technical requirements, tax schemes, subsidies, facilitation measures for customs investment, health services, and intellectual property (IP) related measures. These measures are covered by WTO disciplines that facilitate the flow of essential goods and services whilst recognizing the fundamental rights of States to protect their people and societies.

2.1 *Tariffs, quotas and restrictions, and other border measures*

The initial months of the lockdown were characterised by a panic-induced increase in export restrictions, especially in medical products.³ For instance, Argentina imposed export licensing measures for ventilators in March 2020,⁴

2 See also the definition of “essential medical goods necessary to combat the COVID-19 pandemic” suggested in the Communication from the Ottawa Group to the WTO, *COVID-19 and Beyond: Trade and Health*, dated 24 November 2020 (WTO Doc. WT/GC/223), which in Footnote 1 states that “Members are free to decide what constitutes an essential medical good based on national circumstances. It is understood, however, that such essential goods would include pharmaceutical products, medical devices as well as any other products required by the medical sector to fight the COVID-19 pandemic. In particular, Members should take into consideration the indicative list of COVID-19 related goods, established by the WCO and WHO. See the 3rd edition of the list <www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/covid_19/hs-classification-reference_edition-3_en.pdf?la=en>, 15 June 2021.

3 ‘COVID-19: Measures affecting trade in goods’ (WTO, Web Page, 26 May 2021) <www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm>.

4 Permanent Delegation of Argentina to the WTO (14 April 2020) and Decreto Nos. 301/2020 (19 March 2020) 625/2020 (29 July 2020); and Ministerio de Desarrollo Productivo Resolución Nos. 140/2020 (6 April 2020) and 367/2020 (24 July 2020) <<http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335690/norma.htm>>.

and Australia imposed restrictions on non-commercial exports of personal protective equipment and sanitisers in December 2020.⁵ Some export restrictions are maintained by countries producing the vaccines in giving exclusive priority to their own people.⁶ In light of global shortages, the United States of America (US) and Brazil further imposed export restrictions on syringes, which impacts the implementation of mass vaccination programmes.⁷

WTO rules prohibit import and export quotas and other border restrictions unless they temporarily cover a domestic shortage of essential products. Article XI of GATT prohibits quantitative restrictions but provides a carve-out for *temporary* export restrictions needed to prevent *critical shortages of food-stuffs and other essential products*.⁸ This carve-out is particularly relevant in the context of COVID-19 measures and has been relied upon by several countries.⁹ Additionally, Article XX of the GATT provides general exceptions, allowing governments to pursue legitimate non-trade concerns (more long term) policy objectives, including measures “necessary to protect human, animal, or plant life or health” and “relating to the conservation of natural resources”.¹⁰

There have been suggestions to introduce provisions similar to Article 12 of the Agreement on Agriculture for essential goods - i.e., a requirement of notifying the duration of the planned export restriction to the WTO and consulting with affected countries. Several regional, plurilateral and bilateral statement exhort governments to limit export restrictions to instances where they are necessary, and to keep them “targeted, proportionate, transparent and temporary”, as suggested by the G20 COVID Declaration.¹¹

5 G/MA/QR/N/AUS/3/Add.1/Corr.1, 29 April 2020; G/MA/QR/N/AUS/4/Add.1, 18 June 2020; G/MA/QR/N/AUS/4/Add.2, 8 September 2020; G/MA/QR/N/AUS/5, 5 October 2020; and G/MA/QR/N/AUS/4/Add.3, 18 December 2020.

6 WTO, Information Note: *Trade in Medical Goods in the Context of Tackling COVID-19* (3 April 2020) <www.wto.org/english/news_e/news20_e/rese_03apr20_e.pdf>, 07 June 2021; For views on impact of such measures, see Simon J. Evenett, ‘Flawed prescription: Export curbs on medical goods won’t tackle shortages’ in Richard E. Baldwin and Simon J. Evenett (eds), *COVID-19 and Trade Policy: Why Turning Inward Won’t Work*, (Centre for Economic Policy Research, London 2019) 56. For more information on such measures, see WTO, *COVID-19: Measures affecting trade in goods*, above n 4.

7 Everstream Analytics, *Global Syringe Shortage Jeopardises Mass Vaccination Campaigns* (2 June 2021) <<https://www.everstream.ai/risk-center/global-syringe-shortage-report/>>.

8 Article XI:2 (a), of the General Agreement on Tariffs and Trade 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1867 UNTS. 187; 33 ILM 1153 (1994) [hereinafter GATT 1994/ GATT].

9 G/MA/QR/N/ALB/1/Add.1, G/MA/QR/N/AUS/3/Add.1, G/MA/QR/N/BGD/1. G/MA/QR/N/COL/1.

10 Article XX(b) and (g), GATT 1994.

11 Similar wording can be found in: Joint ministerial statement on action plans to facilitate the flow of goods and services, WT/GC/214; G20 Trade and investment ministerial meeting,

With respect to tariffs, applied import tariffs are required by GATT/WTO rules to not exceed their negotiated bound level as inscribed in the Schedules of Commitments.¹² For almost one-third of WTO Members, the average bound tariff on medical goods exceeds 50 percent. Some Members apply tariffs as high as 65 percent on some of these products.¹³ However, WTO Members are not obliged to impose tariffs at bound levels; applied tariffs can be set at a level below the binding rate on a voluntary, non-discriminatory basis (Most Favoured Nation principle).

Given the specialisation of production, many countries import medical goods, which are indispensable to combat and contain the COVID-19 health crisis.¹⁴ Therefore, import tariffs and export restrictions limit consumer access to such goods. As early as April 2020, New Zealand and Singapore proposed to eliminate tariffs and export restrictions on medical products and to negotiate the further removal of non-tariff barriers on these products.¹⁵ New Zealand is also pursuing this proposal in the context of the Asia-Pacific Economic Cooperation (APEC) forum.

In the specialized markets of finished vaccines and their ingredients, coordinated export and import policies can also help enhance access to such medical goods.¹⁶ The implementation of such coordination requires transparency of

Ministerial statement, WT/GC/216; June 2020 statement of the Ottawa Group: Focusing action on COVID-19, WT/GC/217; WTO, General Council Committee on Agriculture, Special Session, *Covid-19 Initiative: Protecting Global Food Security Through Open Trade* (26 June 2020), Communication On Behalf of Members of the Cairns Group, WTO Doc. WT/GC/218, G/AG/31, TN/AG/44 [hereinafter 'Communication from Cairns Group']; African group statement on the implications of COVID-19, WT/GC/219, TN/C/20, <African group statement on the implications of COVID-19> 15 June 2021; Statement on COVID-19 and the multilateral trading system by ministers responsible for the WTO (revision), WT/GC/212/Rev.2.; JOB/GC/251/Rev.2 (*Draft General Council Declaration - COVID-19 and Beyond: Trade and Health*), Statement on COVID-19 and the multilateral trading system by ministers responsible for the WTO (revision), 15 June 2021.

12 Article II, GATT 1994.

13 World Trade Organization, International Trade Centre, United Nations Conference on Trade and Development, *World Tariff Profiles 2020* (WTO, Geneva, 2020), pp. 1, 225–26.; James Bacchus, *Reviving the WTO Five Priorities for Liberalization*, Policy Analysis, CATO Institute (23 February 2021), <www.cato.org/policy-analysis/reviving-wto-five-priorities-liberalization>.

14 Evenett, 'Flawed prescription: Export curbs on medical goods won't tackle shortages', above n 7, 56.

15 Bacchus, above n 14; Canada and Singapore, *Response to the COVID-19 Pandemic: Ensuring the Free Flow of Trade in Essential Goods for Combating the Covid-19 Pandemic*, WTO Doc. G/C/W/777 (16 April 2020).

16 Simon Evenett, L Alan Winters, *A trade bargain to secure supplies of medical goods* (4 May 2020), <www.voxeu.org/article/trade-bargain-secure-supplies-medical-goods>, Coordinated export-import policies further secure access to medical goods. Evenett proposes a bargain

relevant measures. These are discussed in the next section on the WTO trade policy review mechanism and its other governance support.

2.2 *Internal (domestic) measures, technical regulations, conformity assessment procedures, mutual recognition and regulatory cooperation*

The Agreement on Technical Barriers to Trade (TBT Agreement), as well as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), are extremely relevant in the context of the pandemic. The former deals with labelling requirements, certification assessment procedures and technical standards of goods. The SPS Agreement safeguards countries' sovereign right to maintain their desired levels of health protection, while providing against unnecessary barriers to trade. A large portion of the trade measures notified to the WTO in light of the COVID-19 pandemic fall under the TBT and SPS measures.¹⁷ For example, Brazil adopted rules under the TBT Agreement to conduct clinical trials, standards and regulations covering a wide range of medical goods including personal protective equipment, medical equipment and supplies, and medicines.¹⁸ Under the SPS Agreement, Brazil has provided flexibility to control authorities to use electronic versions of phytosanitary certificates.¹⁹

In the wake of the COVID-19 pandemic, steps have been taken to digitalise, simplify and streamline certification procedures, implement mutual

between trading partners, such that importing countries agree to eliminate their import tariffs in return for a guarantee from exporting countries against arbitrary imposition of export restrictions on the entire supply of medicines and medical products. For a few years, exporting countries can retain qualified rights to introduce temporary restrictions, after which they must be "proportionate to the situation they seek to solve, explicitly justified and notified to partners, time-limited and not reduce the flow of exports to any partner in any month by more than 50% of the customary value".

17 'WTO members' notifications on COVID-19' (WTO, Web Page 2021) <www.wto.org/english/tratop_e/covid19_e/notifications_e.htm>.

18 Permanent Delegation of Brazil to the WTO (1 May 2020) and Resolução Ministério da Economia/Secretaria-Executiva da Câmara de Comércio Exterior Nos. 17/2020 (17 March 2020), 22/2020 (25 March 2020), 28/2020 (1 April 2020), 31/2020 (7 April 2020), 32/2020 (16 April 2020), 33/2020, 34/2020 (29 April 2020), 44/2020 (14 May 2020), 51/2020 and 52/2020 (17 June 2020), 67/2020 (10 July 2020), 75/2020 (25 August 2020), 89/2020, 90/2020 (16 September 2020), 103/2020 (20 October 2020), 104/2020 (20 October 2020), 118/2020 (11 November 2020), 133/2020 (24 December 2020), 144 (6 January 2021), 146 (15 January 2021), 162 (22 February 2021), 182 (29 March 2021). Details can be found at <www.wto.org/english/tratop_e/covid19_e/covid_details_by_country_e.htm?country=BRA#tbtEnq>, 26 May 2021.

19 WTO, Committee on Sanitary and Phytosanitary Measures (SPS Committee), Brazil, Notification of Emergency Measures (9 April 2020), WTO Doc. G/SPS/N/BRA/1642.

recognition agreements, and cooperate with regulators in order to facilitate international trade. Establishing these as permanent measures will accelerate and enhance the efficiency of international trade, especially for essentials such as food and medicines.

As further discussed in the next section, a large part of measures notified under the WTO COVID-19 transparency scheme facilitates international trade, allowing WTO Members to adapt to the pandemic in areas covered by the TBT and SPS Agreements. These include digitalisation measures, in which customs authorities agree to accept electronic documents instead of traditional paper trails. Several countries undertook measures to streamline certification procedures and simplify technical regulations or ease labelling requirements.²⁰ Other countries also negotiated facilitation and recognition agreements with others and are relying on regulatory cooperation to ensure quicker access to essential goods. For example, Brazil notified that it would accept information directly from other regulators participating in the Pharmaceutical Inspection Co-operation Scheme.²¹

2.3 *Subsidies and domestic support packages*

Governments around the world enacted a range of domestic support measures to aid workers, families, hospitals, business and other social actors, which were negatively impacted by governmental restrictions during the pandemic. The measures range from stimulus packages, to grants and loans for certain industries.²² These measures are not always notified to the WTO. Some countries took the opportunity to incentivise structural changes within markets

20 See, for example, the notification by Canada: "In light of the unprecedented demand and urgent need for products that can help limit the spread of COVID-19, Health Canada is facilitating access to products that may not fully meet current regulatory requirements, as an interim measure", WTO Doc. G/TBT/N/CAN/609, 14 April 2020.

21 See the notification by Brazil: "Resolution – RDC number 346, 1 March 2020 – previously notified through G/TBT/N/BRA/984 – which establishes extraordinary and temporary criteria and procedure for Good Manufacture Practice Guidelines for market authorization and post-market registration amendments of Active Pharmaceutical Ingredients, medicines, and healthcare products due to the international public health emergency of the new coronavirus (COVID-19), was changed by the Resolution – RDC number 419, 1 September 2020", WTO Doc. G/TBT/N/BRA/984/Add.2, 19 October 2020, as previously notified by document G/TBT/N/BRA/984 on 18 March 2020 and by document G/TBT/N/BRA/984/Add.1 on 15 June 2020.

22 The unemployment and social net benefits are not covered by the WTO rules.

including the transition to renewable energies,²³ digitalisation,²⁴ and the adoption of agricultural support measures. Similar measures were adopted in response to the Global Financial Crisis in 2007–08. In that occasion, governments not only provided bailouts for banks and insurance companies that were directly affected by the crisis, but also subsidised farmers and manufacturers.²⁵

WTO rules on subsidies are found within the Agreement on Subsidies and Countervailing Measures (SCM Agreement) as well as in the Agreement on Agriculture. The latter provides specific rules on agricultural support measures, in which countries further agreed to eliminate agricultural export subsidies at the Nairobi Ministerial Conference in 2015.²⁶

It is challenging to establish a causal link between pandemic-related support measures and their impact on other states, given the other contributing factors such as the pandemic itself and the lockdown measures implemented by governments. The SCM Agreement, albeit in a limited manner, accounts for such situations by providing latitude to countries since it states that a finding of ‘serious prejudice’ shall not arise where natural disasters (which arguably includes pandemics) substantially affect exports from the complaining Member.²⁷ The duration of such support programmes and the response of the affected markets would be relevant in the assessment of their consistency with WTO law.

2.4 *Intellectual property*

Intellectual property rights, especially patent and protection of trade secrets and know-how, have a significant impact on the development and manufacturing

23 Such as South Africa. See South African National Energy Association (SANEA) (2020): *South African Energy Risk Report 2020*, <www.cdn.ymaws.com/southafricanenergyassociation.site-ym.com/resource/collection/84FAE3E8-C92B-4B0C-804B-E746D39948D7/SANEA_Annual_Risk_Report_-_Web_Ver20.16.pdf>, 30 May 2021.

24 KPMG (2020): ‘China: Government and institution measures in response to Covid-19’ (KPMG, Web Page, 17 June 2020) <www.home.kpmg/xx/en/home/insights/2020/04/china-government-and-institution-measures-in-response-to-covid.html>.

25 Simon J. Evenett, ‘What’s next for protectionism? Watch out for state largesse, especially export incentives in Richard E. Baldwin and Simon J. Evenett (eds), *COVID-19 and Trade Policy: Why Turning Inward Won’t Work*, above n 7.

26 WTO, *Export Competition*, Ministerial Decision of 19 December 2015, WTO Doc.WT/MIN(15)/45, WT/L/980), 2.

27 Article 6.7 (c), Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14, which states that displacement or impediment resulting in serious prejudice will not arise where “natural disasters, strikes, transport disruptions or [an] other *force majeure*” event takes place during the relevant period.

of medicines and vaccines that are necessary to combat the current pandemic. Protection of IP rights under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is required to be carried out in a “manner conducive to social and economic welfare”,²⁸ and accordingly, allows governments to “adopt measures necessary to protect public health” as long as those are TRIPS-consistent.²⁹

As an example of IP measures adopted in the context of the pandemic, Singapore notified the WTO of procedural flexibilities (extension of deadlines, alternative filing modes and service of documents) as well as making copyrighted software relating to a contact tracing solution for COVID-19 freely available under an open-source license.³⁰

Most relevant for the current pandemic is that the flexibility provided by Article 31 of TRIPS, which allows governments to grant compulsory or government-usable licences for patented products. In the aftermath of the pandemic, several countries made changes to their domestic laws to facilitate the issuance of compulsory licenses for COVID-19 related medicines, technologies, and vaccines.³¹

28 Article 7, Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

29 Article 8 TRIPS.

30 Alternative Filing Modes and Service of Documents, Practice Direction No. 3 of 2020, <<https://www.ipos.gov.sg/docs/default-source/resources-library/registries-practice-direction-no-03-of-2020.pdf>>; Introduction of Amendments to Subsidiary Legislation in Response to Covid-19, Circular No. 3/2020, dated 2 June 2020, <www.ipos.gov.sg/docs/default-source/resources-library/patents/circulars/2020-circular-no-3---introduction-of-amendments-to-subsidiary-legislation-in-response-to-covid-19.pdf>; Jason Bay, Joel Kek, Alvin Tan, Chai Sheng Hau, Lai Yongquan, Janice Tan, Tang Anh Quy, *BlueTrace: A privacy-preserving protocol for community-driven contact tracing across borders*, <www.bluetrace.io/static/bluetrace_whitepaper-938063656596c104632def38eb33b3c.pdf>; See for details of measures related to IP rights, WTO, *COVID-19: Measures regarding trade-related intellectual property rights*, <www.wto.org/english/tratop_e/covid19_e/trade_related_ip_measure_e.htm>. IP measures on this webpage are considered at TRIPS Council meetings.

31 Canada, *Bill C-13, An Act respecting certain measures in response to COVID-19*, 25 March 2020, <www.parl.ca/DocumentViewer/en/43-1/bill/C-13/royal-assent>, 30 May 2021; Germany, *Law to protect the population in the event of an epidemic situation of national concern*, 27 March 2020, <www.bgbl.de/xaver/bgbl/start.xav#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl12080587.pdf%27%5D_1588850035945>; WTO, *COVID-19: Measures regarding trade-related intellectual property rights*, <www.wto.org/english/tratop_e/covid19_e/trade_related_ip_measure_e.htm>.

So far, Hungary,³² Israel³³ and the Russian Federation³⁴ have issued compulsory licenses.

The consideration of a proposed waiver of WTO Members' obligations to protect and enforce certain IP rights under TRIPS is discussed in further detail in part III on the role of the WTO in providing equitable access to vaccines.

2.5 *Government procurement*

During the current pandemic, countries needed to expedite the procurement of medicines, medical equipment and supplies, as well as prioritise their own domestic requirements. Efficient public procurement obtained critical status to save lives and minimize the suffering of people, while constituting a significant share of public expenditure.³⁵

The WTO Agreement on Government Procurement (GPA)³⁶ sets minimum binding standards for transparent, non-discriminatory, fair and open public procurement procedures, which apply to medicines, pharmaceutical products, and health services depending on the market access commitments of individual GPA Parties.³⁷ The GPA incorporates important flexibilities preserving the

32 "Based on the ground of the Hungarian Patent Act (Act No. XXXIII of 1995 on the Protection of Inventions by Patents) and Article 31 of the TRIPS Agreement, the Hungarian Intellectual Property Office issued three compulsory licenses for domestic use of Remdesivir." WTO, *COVID-19: Measures regarding trade-related intellectual property rights*, above n 32. For more information, see <www.sztnh.gov.hu/en>.

33 "On 18 March 2020, Israel's Minister of Health issued a permit allowing the government to import generic versions of lapinovir/ritonavir from India for the purpose of treating COVID-19 patients." Subsequently, the drug manufacturer, AbbVie voluntarily relinquished six patents related to drugs Kaletra as well as Norvir (ritonavir). WTO, *COVID-19: Measures regarding trade-related intellectual property rights*, *supra* note 32. For more information, see (in Hebrew) <<http://freepdfhosting.com/645a6a5b51.pdf>>.

34 "Based on the ground of national security pursuant to Article 1360 of the Civil Code, the Russian Federation issued an Order granting a compulsory license with regards to a number of patents related to Remdesivir until the end of 2021 with the aim of supplying the population of the Russian Federation. Entry into force: 1/12/2020." WTO, *COVID-19: Measures regarding trade-related intellectual property rights*, above n 32. For more information, see (in Russian) <www.publication.pravo.gov.ru/Document/View/0001202101050003>.

35 Robert D. Anderson and Anna Caroline Müller, 'Keeping Markets Open While ensuring Due Flexibility for Governments in a Time of Economic and Public Health Crisis: The Role of the WTO Agreement on Government Procurement (GPA)' (2020) 29(4) *Public Procurement Law Review* 184–198.

36 For additional info, see <www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm>.

37 WTO Secretariat, *Information Note: How wto Members Have Used Trade Measures to Expedite Access to Covid-19 Critical Medical Goods and Services*, 18 September 2020, <www.wto.org/english/tratop_e/covid19_e/services_report_16092020_e.pdf>.

discretion of governments to respond to public health crises and to act decisively and promptly in the interests of their citizens.³⁸

Several WTO Members undertook measures to modify their domestic regulations for emergency government procurement activities or issued guidance to their procuring entities regarding the availability of existing flexibilities under their domestic legal frameworks.³⁹ For example, the Republic of Moldova introduced a new legislation on public procurement by public utility sectors, further expanded the application of an e-procurement system, and launched its updated open contracting portal for public procurement.⁴⁰ Additionally, Hong Kong, China *inter alia* directed government departments to provide advance payments to contractors to facilitate their cash flow under on-going and new public works contracts.⁴¹

3 Crucial Role of Transparency and the Trade Policy Review Mechanism (TPRM)⁴²

3.1 *Transparency related provisions in the WTO*

The pandemic crisis called for transparency considering the surge of trade measures including export restrictions and other health related emergency actions taken by member states.

³⁸ Article III:2 of the Revised Agreement on Government Procurement, 30 March 2012, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1915 U.N.T.S. 103 [hereinafter GPA], permits exceptions for measures necessary for the protection of human life and health, Article XI:4 of the GPA allows a procuring entity to reduce applicable time periods from the baseline minimum time period for tendering, Article XIII:1(d) of GPA authorizes procuring entities, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, not to apply to particular procurements a number of the transparency and procedural measures of the GPA.

³⁹ WTO Secretariat, *Information Note: How WTO Members Have Used Trade Measures to Expedite Access to Covid-19 Critical Medical Goods and Services*, *supra* note 38, p. 12. For additional procurement measures undertaken by Parties to GPA and observers to tackle the pandemic, see *Note by Secretariat: Compilation of Information Provided by GPA Parties and Observers on their COVID-19-related Government Procurement Measures* (3 July 2020), WTO Doc. GPA/S/2.

⁴⁰ WTO, Committee on Government Procurement, *Minutes of the Formal Meeting of 21 July 2020*, WTO Doc. GPA/M/79, paras 3.1–3.3.

⁴¹ WTO, *Note by Secretariat: Compilation of Information Provided by GPA Parties and Observers on Their Covid-19-Related Government Procurement Measures*, above n 40.

⁴² We benefitted greatly from exchanges with Antonia Diakantoni for the preparation of this section of the paper.

Transparency is a fundamental feature of the multilateral trading system,⁴³ one that is of utmost importance for trade to flow smoothly and efficiently. In order to organize and carry out business, traders need to know of all applicable rules, and this requires transparency and the prompt notification of trade measures. Transparency leads to better decision-making by alerting the public of the potential costs and benefits of trade policies and by informing trading partners of potentially harmful policy changes. The concept of transparency⁴⁴ refers both to sharing information and to generating agreed interpretations of the information. The WTO Transparency COVID-19 note outlines the general scope of the WTO transparency principle:

“The WTO Agreements promote international transparency in trade measures, as they require that members formally notify the WTO Secretariat (in one of the three official languages – English, French and Spanish) of all laws and regulations affecting trade.

(...)

In many areas of trade, WTO members are required to establish or maintain one or more “Enquiry Points” to answer reasonable enquiries of governments, traders, and other interested parties and provide relevant documents and information. In emergency situations, such as the COVID-19 pandemic, access to information on import or export measures, customs procedures, quantitative and other restrictions, product requirements and certification procedures can be crucial, as it can minimize or avoid delays or rejections at customs points, thereby helping medical goods and other essential items to transit in time for use. Enquiry Points can be especially helpful in emergency situations because they provide an open channel of communication and allow up-to-date information to flow to traders.”⁴⁵

43 For a comprehensive overview of all transparency provisions in the WTO Agreements and a discussion on the importance of transparency, see WTO, *COVID-19 and World Trade*, <www.wto.org/english/tratop_e/covid19_e/covid19_e.htm>.

44 The WTO Glossary defines transparency as the “Degree to which trade policies and practices, and the process by which they are established, are open and predictable.” <www.wto.org/english/thewto_e/glossary_e/transparency_e.htm#:~:text=Degree%20to%20which%20trade%20policies,established%2C%20are%20open%20and%20predictable>. It refers to a number of interrelated actions, including how: a rule or a policy is developed domestically; the rule is enforced or a policy is implemented; the rule is published; the other Members of the WTO are notified of the new rule or a policy action; a notification is discussed in Geneva; and the results of the Geneva process are published.

45 WTO, Information Note: Transparency – Why it Matters at Times of Crisis (7 April 2020), <www.wto.org/english/tratop_e/covid19_e/transparency_report_e.pdf>.

GATT Article X requires WTO Members to publish domestically and in their own language(s) “all new or modified laws, regulations and guidelines on any matter affecting trade, and make that information publicly available in such a way as to allow both domestic stakeholders and other members to become acquainted with those rules”. These notifications may be discussed by WTO Members during meetings of specialized committees. The enhanced transparency obligations exist in the WTO multilateral agreements. For example, under the SPS Agreement, Members are obligated to notify proposed regulations (laws, decrees or ordinances) or amendments to regulations taken for food safety, to protect animal and plant health from diseases and pest risks, or to protect humans from diseases carried by animals.⁴⁶

At the heart of the WTO transparency effort lies the WTO Trade Policy Review Mechanism (TPRM) under which the regular reviews of Members’ trade policies and the WTO’s Trade Monitoring Exercise are conducted. The Trade Monitoring Exercise was created in response to the global financial crisis in early 2009 and provides every six months a snapshot of the latest developments in international trade and trade-policy making. Due to the delay in notifying measures to the WTO, the Trade Monitoring Reports also cover implemented measures, which frequently have not yet been notified to the WTO. The Trade Monitoring Reports are directed by the Director-General of the WTO and are first and foremost a transparency exercise, i.e., a trusted tool to monitor and report on trade measures.

At the beginning of the pandemic, it became urgent that all Members were informed of actions taken by other governments. Transparency becomes more

46 Article 7 and Annex B, Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1867 U.N.T.S. 493 [hereinafter SPS Agreement]. In this regard, in 2008, the Committee on SPS Measures adopted the Recommended Procedures for Implementing the Transparency Provisions of the SPS Agreement (Article 7), recommending that Members also notify measures which are based on the relevant international standards, and provide a broad interpretation of effects on trade. Except during emergencies, such measures are required to be notified “well before the entry into force of the relevant measure”. For the interpretation of this phrase, reliance may be placed on the recommended procedures which stipulate a minimum period of sixty days for comments on notifications before adoption of the concerned measure. During emergencies, the notification requirement is relaxed, and Members can even notify immediately after adoption of the measures along with an explanation of the reasons for the emergency action. Additionally, in order to achieve greater transparency, the SPS Agreement involves publication of regulations, the establishment of a national enquiry point to answer reasonable questions from other Members, and the identification of a single central government authority to be responsible for the notification requirements of the SPS Agreement. From 2008 onwards, the Secretariat, on request by the Committee on Sanitary and Phytosanitary Measures, has prepared an annual overview of the level of implementation of the transparency obligations contained in the SPS Agreement.

crucial in times of crises as accurate and timely information facilitates mutual trust amongst countries and avoids the disproportionate reaction of other countries. Thereby, it reduces the risk of further disruptions in trade flows, and simultaneously allows countries to learn from each other's experiences.⁴⁷

The WTO DG requests information directly from WTO Members and Observers twice a year to launch the monitoring cycle and prepare the Trade Monitoring Reports. During such an emergency, this function was expanded to also include measures related to the pandemic. In its request of information on 24 March 2020, DG Azevêdo encouraged Members to additionally provide the Secretariat with information on measures and support programme which has been taken in the context of the current COVID-19 crisis, recalling that the WHO adopted a similar approach in response to the measures taken to control the H1N1 (swine flu) health emergency, as did the WTO Members during the 2008 Financial crisis. The WTO DG encouraged Members to communicate and notify the Secretariat in a timely fashion of measures taken in response to the pandemic.

Following the DG's Transparency Call,⁴⁸ WTO Members communicated their COVID-19 related trade measures to the WTO Secretariat.⁴⁹ The Trade Monitoring Exercise therefore closely monitors such measures taken by WTO Members in response to the crisis. Enhancing transparency and promoting accountability through the existing platform of the trade monitoring exercise was key at that juncture to provide further transparency of such measures and a forum for a continuous peer review to its membership.

Similar to the 2008 financial crisis, the COVID-19 crisis saw an unprecedented amount of trade measures being taken by countries. However, Members' responses to the pandemic are different and more comprehensive compared to those implemented during the global financial crisis, as they seek to address the broad economic and social disruption caused by it. The TPRM system of the WTO was employed to facilitate transparency, understanding, predictability, and collaboration.

To better explain the maturity of today's TPRM and its enhanced role during the COVID-19 pandemic, the origins of the mechanism are reviewed.

47 Robert Wolfe, 'Exposing governments swimming naked in the COVID-19 crisis with trade policy transparency (and why WTO reform matters more than ever)' in Richard Baldwin and Simon Evenett (eds), *COVID-19 and Trade Policy: Why Turning Inward Won't Work* (CEPR Press, 2020)167.

48 WTO, *DG Azevêdo requests WTO members to share information on trade measures related to COVID-19*, <www.wto.org/english/news_e/news20_e/dgra_24mar20_e.htm>.

49 WTO, *WTO members' notifications on COVID-19*, above n 18 (As of 15 September 2020, WTO Members had submitted a total of 241 notifications related to COVID-19); Communication from Cairns Group.

3.2 *Trade policy reviews (TPR) and trade monitoring reports*

The broader concept of transparency underpinning the present TPRM can be traced back to the ad hoc surveillance schemes established under the GATT and the negotiations to establish a more comprehensive multilateral surveillance mechanism during the Uruguay Round.

In 1989,⁵⁰ the GATT Council undertook an overview of developments in the international trading environment, assisted by an annual report of the Director-General. The report set out major GATT activities and highlighted significant policy issues affecting the multilateral trading system. The first report was discussed at a special meeting of the Council on 11 December 1989. These two aspects of major activities and policies affecting the multilateral trading system are still included in the Trade Monitoring Reports, as discussed hereafter.

The TPRM resulted from the Uruguay Round and was provisionally established at the Montreal Mid-Term Review in December 1988. Annex 3 to the Marrakesh Agreement placed the TPRM on a permanent footing as one of the WTO's basic functions. Furthermore, the mandate of the TPRM was broadened to cover services trade and intellectual property when the WTO entered into force in 1995.⁵¹

All WTO Members are subject to review under the TPRM. Annex 3 of the Marrakesh Agreement mandates that the four Members with the largest shares of world trade (currently the European Union, the United States, Japan and China) should be reviewed every two years, the next 16 every four years, and others be reviewed every six years. A longer period may be fixed for least-developed country Members. In July 2017, Annex 3 was amended and these review cycles are now set to three, five and seven years respectively, beginning on 1 January 2019.

3.2.1 The Original functions of the TPRM

As expressed in Annex 3 of the Marrakesh Agreement, the objectives of the TPRM, include facilitating the smooth functioning of the multilateral trading system by enhancing the transparency of Members' trade policies. The implementation of the TPRM resulted in a richer and more symmetric information environment for the trade policy-making of the Members.⁵² Under the Trade

⁵⁰ Part I.F of the Contracting Parties Decision of 12 April 1989 (BISD 36S/403).

⁵¹ WTO, *Overseeing national trade policies: the TPRM*, <www.wto.org/english/tratop_e/tp_r_e/tp_int_e.htm>.

⁵² Judith Goldstein, 'Trade Liberalization and Domestic Politics' in Amrita Narlikar, Martin Daunton, Robert M. Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012) 182.

Policy Review Mechanism, Members are encouraged to enhance transparency through country-specific trade policy reviews and regular monitoring and reporting on the implementation of trade and trade-related measures.

The first function of the TPRM is to review national trade policies. The scope of review is limited to matters covered by WTO Agreements.⁵³

The second function consists of annual overviews of developments in international trade and WTO major activities and highlights of main policy issues. In addition to individual reports for WTO Members, Part G of Annex 3 of the WTO Agreement provides for the Trade Policy Review Body (TPRB) to undertake, “an annual overview of developments in the international trading environment which are having an impact on the multilateral trading system” as part of the TPRM. The overview is assisted by an annual report by the Director-General setting out WTO activities and the significant policy issues affect the trading system.

The third function provides for additional regular reporting by Members to the TPRB to achieve the highest possible degree of transparency as set out in paragraph D of Annex 3.⁵⁴ The Secretariat further provides technical assistance on the request of developing country Members, in particular to the least-developed country Members. Information contained in reports should be coordinated with the notifications made under provisions of the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements.⁵⁵

53 In the preparation of the report, the Secretariat seeks the cooperation of the Member, but retains the sole responsibility for the facts presented and views expressed. The report consists of detailed chapters examining the trade policies and practices of the Member and describing trade policymaking institutions and the macroeconomic situation; these chapters are preceded by the Secretariat's Summary, which presents the Secretariat's perspective on the Member's trade policies. The concerned Member also provides a section (i.e., a policy statement) where it reviews the same situations and outlines the objectives and direction of its trade policies, with a forward-looking perspective. The Secretariat report and the Member's policy statement are published after the review meeting, along with the text of the Concluding Remarks by the Chairman of the Trade Policy Review Board delivered at the conclusion of the meeting. WTO, *Overseeing national trade policies: the TPRM*, above n 52.

54 Sam Laird and Raymundo Valdes, 'The Trade Policy Review Mechanism' in Amrita Narlikar, Martin Daunton, Robert M. Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012) ch 21, 825: “Full reports shall describe the trade policies and practices pursued by the Member or Members concerned, based on an agreed format to be decided upon by the TPRB... Members shall provide brief reports when there are any significant changes in their trade policies; an annual update of statistical information will be provided according to the agreed format.”

55 Annex 3 to the Agreement Establishing the WTO, Part D.

3.3 *Changes brought about by the 2008 financial crisis*

Upon the onset of the financial crisis in 2008, DG Lamy (previously a banker) set up an internal Task Force on the Financial Crisis within the WTO Secretariat, which prepared reports on trade-related developments associated with the financial crisis.⁵⁶ The initial work of the Task Force was purely internal. However, at a meeting of the Heads-of-Delegation and subsequently at the General Council meeting, the DG was encouraged to report in writing to the membership on the work of the Secretariat Task Force.⁵⁷ The first of such trade monitoring reports was circulated to WTO Members in January 2009 and was followed by a second and more comprehensive report at the end of March 2009, making the inception of the so-called WTO-wide trade monitoring reports. The DG's Annual Report became a vehicle to launch the Trade Monitoring Reports and found its mandate under the TPRM.⁵⁸

During the financial crisis, G-20 leaders agreed that "we will notify promptly the WTO of any such measures and we call on the WTO, together with other international bodies, within their respective mandates, to monitor and report publicly on our adherence to these undertakings on a quarterly basis."⁵⁹ This call marked the inception of the G20 trade monitoring reports.

Since 2008, the WTO Secretariat prepared four Trade Monitoring Reports every year: two for the full WTO membership and two for the G20 economies. The annual report for the full membership is called "Overview of developments in the International Trading Environment". It is typically circulated by November or December every year and covers 12 months. Instead, the mid-year report for the full membership is called "Report of the TPRB from the

⁵⁶ Marceau, Gabrielle, 'Editorial: IGOs in crisis? Or new opportunities to demonstrate responsibility?' (2011) 8 *International Organizations Law Review* 1–13. Joost Pauwelyn and Ayelet Berman, 'Emergency Action by the WTO Director-General: Global Administrative Law and the WTO's Initial Response to the 2008–09 Financial Crisis' (2009) 6 *International Organizations Law Review* 499–512.

⁵⁷ Peter Pedersen, Antonia Diakantoni, Carlos Perez del Castillo, Amaliia Mkhitarian, *WTO Trade Monitoring Ten Years on Lessons Learned and Challenges Ahead*, Staff Working Paper ERSD-2018-07, World Trade Organization, Economic Research and Statistics Division, (15 May 2018) 4.

⁵⁸ Paragraph G of the Trade Policy Review Mechanism states "An annual overview of developments in the international trading environment which are having an impact on the multilateral trading system shall also be undertaken by the [Trade Policy Review Body]. The overview is to be assisted by an annual report by the Director-General setting out major activities of the WTO and highlighting significant policy issues affecting the trading system." Trade Policy Review Mechanism as amended by the General Council by way of WTO Doc. WT/L/1014 (revision, effective as of 1 January 2019), Marrakesh Agreement Establishing the World Trade Organization, Annex 3.

⁵⁹ G20 Summit Declaration, *The Global Plan for Recovery and Reform*, London, 2 April 2009.

Director General on Trade-related developments” and is circulated generally in July, covering usually seven months.⁶⁰ Therefore, the TPRM general mandate and the existing DG annual report were employed to ‘house’ the new TPRM report in 2009.

In the post financial crisis G-20 reports, the WTO Director-General’s Reports, and more broadly the trade monitoring reports, started setting out details on implementation of the WTO Agreements and suggestions on the way forward on particular issues.⁶¹ The reports have evolved over the years to incorporate new topics for consideration at the multilateral level,⁶² including more broad trade-related discussions and developments at the WTO.⁶³ The WTO-wide annual trade monitoring report is presented by the DG before the TPRG.⁶⁴

The appreciation and acceptance of the enhanced form of the DG Report set out by Pascal Lamy, to respond to the 2008 financial crisis, suggests that Members are prepared to accept a fair amount of independence and initiative on the part of the Director General and the Secretariat for such activities, at least in times of crisis. It may be that Members trust that those initiatives are issued to their advantage and to the benefit of the system.⁶⁵

3.4 *Changes brought about during the COVID crisis*

Following the WTO DG’s call for governments to inform the WTO of all their trade related COVID measures, the annual Trade Monitoring Reports describes the impact of the pandemic in the trading environment and outlines

60 WTO Staff Working Paper - The report on G20 trade measures is circulated together with a report on G20 investment measures prepared by the OECD and UNCTAD. These reports are generally circulated a couple of weeks before the WTO-wide version and cover approximately six months.

61 See for example WT/TPR/OV/1.

62 See for example in the report presented at the General Council meeting set out above, the DG proposed with regard to investment and competition policies that it might be worthwhile to consider whether multilateral negotiations in the WTO would be preferable, and in the long run more valuable, to a number of simultaneous separate negotiations among several regional groups.

63 See for example WT/L/108, 6 December 1995.

64 See for example WT/GC/M/9, 22 February 1996 – Minutes of meeting of the General Council on 13 and 15 December 1995.

65 Richard Blackhurst, ‘The Role of the Director General and the Secretariat by Richard Blackhurst in The Oxford Handbook on the World Trade Organization’ in Amrita Narlikar, Martin Daunton, Robert M. Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012) ch 7; Joost Pauwelyn and Ayelet Berman, ‘Emergency Action by the WTO Director-General: Global Administrative Law and the WTO’s Initial Response to the 2008–09 Financial Crisis’ (2009) 6 *International Organizations Law Review*, 499–512.

the measures taken in response to COVID-19 and coordinated a dedicated WTO web page, discussed hereafter.

The Secretariat integrated in its regular reporting, the monitoring of trade and trade-related measures and policies triggered by COVID-19, including the identification, registering, tracking and publishing of the COVID-19 related measures online.⁶⁶ In addition, the Secretariat took a further step by creating a COVID-19 webpage which provides real time, online trade-related information including relevant notifications by WTO Members, the impact the virus has had on exports and imports and how WTO activities have been affected by the pandemic.⁶⁷ It also continued the task of identifying un-notified measures from various sources, verifying them, and updating them with the concerned Members' agreement on the particular website designated to COVID-19 measures.⁶⁸ To date, the WTO COVID-19 website lists more than 300 measures on trade in goods (excluding TBT/SPS, non-trade remedies), 102 measures on trade in services, 62 measures relating to IP rights, and 641 measures concerning economic support (subsidies).⁶⁹

In addition to compiling COVID-19 related measures, the WTO Secretariat produced analytical information notes and dedicated COVID-19 websites.⁷⁰ For instance, info-graphics prepared by the WTO Secretariat provide an overview of the relevant trade issues in the different stages of the development

66 That was an initiative of the Secretariat which enjoyed support from WTO Members which is evident from the Communication from Cairns Group, Annex, para. 12 wherein the Cairns Group requested continuation of such initiative.

67 'COVID-19 and World Trade' (WTO, Web Page 2021) <www.wto.org/english/tratop_e/covid19_e/covid19_e.htm#communications>.

68 See 'COVID 19: Measures Affecting Trade in Goods' (WTO, Web Page 2021) <www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm>; 'COVID-19: Support measures' (WTO, Web Page 2021) <www.wto.org/english/tratop_e/covid19_e/trade_related_support_measures_e.htm>; 'COVID-19: Measures affecting trade in services' (WTO, Web Page 2021) <www.wto.org/english/tratop_e/covid19_e/trade_related_services_measure_e.htm>; 'COVID-19: Measures regarding trade-related intellectual property rights' (WTO, Web Page 2021) <www.wto.org/english/tratop_e/covid19_e/trade_related_ip_measure_e.htm>.

69 *Ibid.* On a review of the measures on trade in goods, it can be seen that a substantial number of countries have implemented temporary export restrictions and elimination of import tariffs on medical supplies and equipment, while others have also introduced measures aimed at securing food security (ie, export bans on certain food products). With regard to trade in services, the measures included those relating to financial services and screening of foreign investment, and for IP rights, accelerated examination of patent applications pertaining to COVID-19 relief, and granting extensions for deadlines for IP matters. Economic support measures are understandably more diverse, and range from agriculture support policies to those aimed at small and medium-sized enterprises.

70 See WTO, *Transparency — why it matters at times of crisis*, <www.wto-ilibrary.org/economic-research-and-trade-policy-analysis/>

and distribution of a COVID-19 vaccine.⁷¹ These efforts help in raising awareness and fostering a discussion on the role of trade rules in dealing with the pandemic.⁷²

Moreover, when informally notified of trade measures by countries, the Secretariat took the initiative of helping countries submit a formal notification to the Committee under the relevant agreement. This is a testament to the active role *suo moto* adopted by the Secretariat.

The active transparency approach developed by the Secretariat during the pandemic led to enhanced transparency, which would ideally be maintained in the near future as well. A stronger mandate for trade policy monitoring under the TPRM and for the Secretariat's expertise and assistance could also help in this regard. In early May 2021, the United Nations Conference on Trade and Development (UNCTAD) unveiled a new portal to enhance policymakers' understanding of the pandemic's wide-ranging impact on trade and development, in order to assist them in designing suitable recovery policies.⁷³

The WTO thus helped ensure transparency with regard to pandemic-related measures and monitored Members' trade responses to the pandemic, which contributed to governmental protection of their people and the mitigation of the economic shock.⁷⁴ This has strengthened the WTO's role as a global governance forum and is much appreciated by WTO Members:

"We commend the work of the WTO Secretariat resulting in an extensive database of measures related to COVID-19 and a range of dedicated

the-evolution-of-services-trade-policy-since-the-great-recession_ba44f0d7-en>; 'E-commerce, trade and the COVID-19 pandemic' (WTO, Web Page 2021) <www.wto.org/english/tratop_e/covid19_e/ecommerce_report_e.pdf>.

71 'WTO maps out trade issues related to COVID-19 vaccine rollout' (WTO, Web Page 20 November 2020), <www.wto.org/english/news_e/news20_e/covid_20nov20_e.htm>.

72 WTO, *Enhancing the Role of the World Trade Organization in the Global Effort Toward the Production and Distribution of Covid-19 Vaccines and Other Medical Products*, Revised Communication from Australia, Brazil, Canada, Chile, Colombia, Ecuador, New Zealand, Norway, Thailand, Turkey and Uruguay, WTO Doc. WTO/GC/230/Rev.2 [hereinafter WTO/GC/230/Rev.2 (*Enhancing the Role of the World Trade Organization in the Global Effort Toward the Production and Distribution of Covid-19 Vaccines and Other Medical Products*)]. This includes the first version of this communication dated 9 March 2021, which was revised on 23 March 2021, 12 April 2021 and by way of an addendum on 20 May 2021.

73 United Nations Conference on Trade and Development, *Impact of the COVID-19 pandemic on trade and development*, <<https://unctad.org/programme/covid-19-response/impact-on-trade-and-development-2021>>, 26 May 2021.

74 Urvi Tembey, *WTO and its role in reducing the economic shock of the pandemic* (11 February 2021), <www.orfonline.org/expert-speak/wto-its-role-reducing-economic-shock-pandemic/>; WT/GC/223 (*COVID-19 and Beyond: Trade and Health*); JOB/GC/251/Rev.2 (*Draft General Council Declaration - COVID-19 and Beyond: Trade and Health*).

studies and reports allowing them to have a comprehensive and accessible overview of the situation. The WTO Secretariat is encouraged to continue that work, focusing on the causes and effects of the disruptions in the supply chains of essential goods and drawing on research of other international organizations.”⁷⁵

3.5 *The Capacity of the WTO to adapt and evolve in responding to the crisis and the needs of WTO members*

The role and importance of the TPRM continues to grow and to adapt to new challenges since its creation by the WTO. During the pandemic, the WTO trade monitoring exercise has expanded its functioning to respond to the needs and requests from WTO Members for more and better transparency and information. In doing so, the WTO offered a specialised platform for Members to exchange and learn from each other on trade related measures taken in response to COVID-19. The active role of the WTO Secretariat during the current crisis has been commended by WTO Members with calls to focus on the disruptions in the supply chains of essential goods and draw on the experience of other international organizations, as earlier noted.⁷⁶

Even before the pandemic, there had been suggestions for an enhanced analytical role for the WTO Secretariat in independent information gathering.⁷⁷ It had been proposed that the WTO Secretariat undertake independent information gathering from public sources in order to complement the existing notification system. This would help in mapping a more complete picture of all trade responses undertaken by various countries (not just during the pandemic but also more generally).⁷⁸ For example, the Committee on Market Access has already provided for a more proactive role of the Secretariat in collecting data if Members have ‘significant gaps’ in their submissions to the Integrated Data Base,⁷⁹ and a similar approach can be taken in other Committees too. The call for such an enhanced role of the WTO Secretariat has become more expansive.⁸⁰

75 JOB/GC/251/Rev.2 (*Draft General Council Declaration - COVID-19 and Beyond: Trade and Health*), para. 5.

76 WT/GC/223 (*COVID-19 and Beyond: Trade and Health*); JOB/GC/251/Rev.2 (*Draft General Council Declaration - COVID-19 and Beyond: Trade and Health*).

77 WTO, Canada, *Strengthening and Modernizing the WTO: Discussion Paper* (21 September 2018), JOB/GC/201.

78 WTO, Canada, *Strengthening the Deliberative Function of the WTO: Discussion Paper* (14 December 2018), JOB/GC/211.

79 WTO, Committee on Market Access, *Framework to Enhance IDB Notifications Compliance* (adopted on 13 July 2009), G/MA/239.

80 This is evident from the proposals submitted to the WTO General Council such as, WT/GC/230/Rev.2 (*Enhancing the Role of the World Trade Organization in the Global Effort Toward*

4 The Role of the WTO in Facilitating Access to Essential Goods

In November 2020, the European Union (EU) along with the members of the Ottawa group submitted a draft Declaration on the Trade and Health Initiative⁸¹ concerning trade facilitation and commitments on export restrictive measures. The initiative forms the basic premise of a COVID-19 policy response that “WTO membership should build on not only in a response to the current crisis but also in anticipation of any future emergency”.⁸² Subsequently, on 18 February 2021, Australia, Brazil, Canada, Chile, the EU, Japan, Kenya, Republic of Korea, Mexico, New Zealand, Norway, Singapore, and Switzerland⁸³ put forward a Draft Declaration entitled “COVID-19 and beyond: Trade and Health”.⁸⁴ This proposal addresses export restrictions, import tariffs, customs procedure, technical regulation, transparency, and the cooperation with IGOs concerning the production and trade of essential goods.

On the same date, Colombia, Costa Rica, Ecuador, Panama and Paraguay submitted a communication to limit export restrictions on COVID-19 vaccines.⁸⁵ This communication was made in response to the EU’s decision to implement a “Transparency and Authorization Mechanism for Exports of COVID-19 Vaccines”, which allows it to adopt export restrictions on COVID-19 vaccines.

On 9 March 2021, of Australia, Canada, Chile, Colombia, New Zealand, Norway and Turkey sought to enhance the role of the WTO (and specifically, the Director General and its Secretariat) and its resources to accelerate the global distribution of COVID-19 vaccines.⁸⁶ These countries requested the WTO DG to engage with the manufacturers of vaccines and other COVID-19-related medical products:

the Production and Distribution of Covid-19 Vaccines and Other Medical Products) and JOB/GC/251/Rev.2 (*Draft General Council Declaration - COVID-19 and Beyond: Trade and Health*).

81 WT/GC/223 (*COVID-19 and Beyond: Trade and Health*).

82 The basic premise of WT/GC/223 (*COVID-19 and Beyond: Trade and Health*) as stated in WTO, *Urgent Trade Policy Responses to the COVID-19 Crisis* (4 June 2021), Communication from the EU to the WTO General Council, WTO Doc. WT/GC/231.

83 Later, other WTO Members agreed to co-sponsor this proposal.

84 JOB/GC/251/Rev.2 (*Draft General Council Declaration - COVID-19 and Beyond: Trade and Health*).

85 WTO, Call to Prevent Export Restrictions on Covid-19 Vaccines (18 February 2021), Communication from Colombia, Costa Rica, Ecuador, Panama and Paraguay, WTO Doc. WT/GC/W/818.

86 WTO/GC/230/Rev.2 (*Enhancing the Role of the World Trade Organization in the Global Effort Toward the Production and Distribution of Covid-19 Vaccines and Other Medical Products*), para 1.2.

“The co-sponsors of this communication therefore earnestly encourage the Director-General to promptly convene and hold discussions with both vaccine developers and vaccine manufacturers, as well as developers and manufacturers of other COVID-19-related medical products, in coordination with the World Health Organization and other relevant organizations, toward:

- helping to ensure that any unused or underutilized capacity for the production of affordable, safe and effective vaccines, at any stage in the process, is promptly identified and used as fully as it is technically possible, with a view to a net increase in global production of COVID-19 vaccines, and provided that this is not to the detriment of the production of other essential vaccines;
- promptly facilitating and promoting the creation of mutually beneficial licensing partnerships between vaccine developers and vaccine manufacturers, including for the collaborative and prompt transfer of expertise, know-how and technology;
- promptly identifying and addressing, in a consensus-based manner, any trade-related impediments to the utilization of production capacity and the scaling up of vaccine production, as well as to the production and distribution of other COVID-19-related medical products, recalling the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility to protect public health and, in particular, to promote access to medicines for all; and
- promoting, through similar approaches, the broad availability of other essential COVID-19-related medical products, such as diagnostics, therapeutics, equipment and devices.”⁸⁷

On 4 June 2021, the EU submitted a holistic proposal for a “global trade initiative for equitable access to COVID-19 vaccines and therapeutics” which accounts for trade facilitation and commitments on export restrictive measures, the expansion of vaccine production, and the facilitation of TRIPS Agreement flexibilities relating to compulsory licences.⁸⁸ On the same day, the EU submitted a communication to the TRIPS Council, seeking to facilitate concurrence on specific matters relating to compulsory licensing (EU IP Proposal).⁸⁹ The EU sought to augment the responsibility to include preparing reports on the

⁸⁷ Ibid, para 1.3.

⁸⁸ WTO, *Urgent Trade Policy Responses to the COVID-19 Crisis* (4 June 2021), Communication from the EU to the WTO General Council, WTO Doc. WT/GC/231, para 1.6.

⁸⁹ WTO, *Urgent Trade Policy Responses to the COVID-19 Crisis: Intellectual Property* (4 June 2021) Communication from the EU to the TRIPS Council, WTO Doc. IP/C/W/680.

progress achieved in phasing out export restrictions and fulfilling the commitment to avoid disruption of the vaccine and therapeutics supply chain.⁹⁰

This responsibility of the WTO in facilitating the increase of vaccine production is novel and best encapsulated in the words of the WTO DG: “vaccine policy is economic policy because the global economic recovery cannot be sustained unless we find a way to get equitable access to vaccines, therapeutics and diagnostics.”⁹¹ The necessary collaborations with governments, IGOs, and the private sector is directly linked to enhancing production capacity.

4.1 *The essential role of collaborations in facilitating access to vaccines*

Since February 2021, WTO Members requested the WTO to intensify its collaboration with all relevant actors to address the challenges of the pandemic. In a communication to the General Council, a group of Members put forward a proposal to that effect:

“Given the need to enhance pandemic preparedness and respond to current and future pandemics, the WTO Director-General is strongly encouraged to intensify cooperation with other relevant international organizations such as the World Health Organization, the World Customs Organization, the World Intellectual Property Organization, the Organization for Economic Cooperation and Development, the United Nations as well as the G20 with the aim of improving the analytical capacity of WTO Members to monitor market developments in trade and production of essential medical goods. This would enhance WTO Members’ preparedness for a health crisis and contribute to the creation of an early warning mechanism in the event of critical shortages of essential medical goods.”⁹²

Vaccine-manufacturing capacity is highly concentrated in industrialized countries.⁹³ Furthermore, strong trade interdependencies persist in the manufacturing of goods essential for producing, distributing, and administering

90 Ibid read with WTO, *Urgent Trade Policy Responses to the COVID-19 Crisis*, *supra* note 89.

91 WTO, DG Okonjo-Iweala underlines urgent need to address equitable access to vaccines, <www.wto.org/english/news_e/news21_e/gc_05may21_e.htm>, 26 May 2021.

92 JOB/GC/251/Rev.2 (*Draft General Council Declaration - COVID-19 and Beyond: Trade and Health*).

93 CEPI, *Manufacturing Survey Results Analysis*, <www.cepi.net/wp-content/uploads/2020/08/CEPI_Survey-of-global-drug-substance-and-drug-product-landscape-June-2020_-RELEASED-1.pdf>.

vaccines.⁹⁴ For example, the Pfizer vaccine requires 280 materials and components sourced from 19 countries.⁹⁵

International collaboration and leveraging synergies between IGOs facilitate not only data sharing and capacity building,⁹⁶ but also the on-ground delivery of vaccines. The World Customs Organization (WCO) and WTO have coordinated to facilitate cross-border deliveries, instituting green lane mechanisms.⁹⁷ The WCO Secretariat, International Civil Aviation Organization (ICAO) Secretariat and the involved stakeholders are coordinating on “flexibility of the export, transit and import processes in air cargo operations, including robust risk management mechanisms”, to ensure efficient deliveries.⁹⁸

Several innovative forms of collaborations in the supply of vaccines include the support of Merck to rival Johnson & Johnson for the US government’s funding, and the QUAD deal between India, Japan, US and Australia for supplying vaccines across South-East Asia.⁹⁹ Not only the production, but also the distribution of vaccines requires collaboration. In particular, UPS collaborated with COVAX by providing infrastructure and expertise for vaccine delivery.¹⁰⁰

To date, the global demand for vaccines exceeds its supply and will continue to do so for a considerable period of time. Therefore, the WTO and further IGO

94 OECD, *Policy Responses to Coronavirus (COVID-19): Using trade to fight COVID-19: Manufacturing and distributing vaccines* (11 February 2021), <www.oecd.org/coronavirus/policy-responses/using-trade-to-fight-covid-19-manufacturing-and-distributing-vaccines-dc0d37fc/>.

95 Albert Bourla, Chairman and Chief Executive Officer, Pfizer, *Candid Conversation With Our Colleagues About the Drivers of COVID-19 Access and Availability* (7 May 2021), <www.linkedin.com/pulse/today-i-sent-letter-have-candid-conversation-our-drivers-bourla/?trackingId=d3cDOIWvR4SufMQpxVeLbw%3D%3D>.

96 Rome Declaration, 2021 adopted by the G20 at the Global Health Summit in Rome on 21 May 2021, <www.global-health-summit.europa.eu/rome-declaration_en>.

97 ‘WTO Trade Facilitation Committee: WCO stands ready to coordinate with the WTO on collection of COVID-19 practices’ (WCO, Web Page 3 February 2021), <www.wcoomd.org/en/media/newsroom/2021/february/wto-trade-facilitation-committee.aspx>.

98 ICAO and WCO, *Joint Statement on the global transportation and distribution of COVID-19 vaccines and associated medical supplies* (2 February 2021), <www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/natural-disaster/covid_19_vaccine/t-on-the-global-transportation-and-distribution-of-covid_19-vaccines-and-associated-medical-supplies_en.pdf?la=en>.

99 Demetri Sevastopulo, Amy Kazmin and Jamie Smyth, ‘US and Asia allies launch major vaccine drive to counter China’ (*Financial Times*, 12 March 2021) <www.ft.com/content/bcf5ff42-ac7f-4533-8fc2-b3e50a5e13ba>.

100 See ‘UPS supports equitable distribution of COVID-19 vaccines worldwide’ (UPS, Web Page 3 March 2021), <<https://about.ups.com/us/en/social-impact/the-ups-foundation/health-humanitarian-relief/ups-supports-equitable-distribution-of-covid-19-vaccines-worldwide.html>>. See also ‘Delivering what matters: Equitable vaccine access globally’ (UPS, Web Page 28 April 2021) <<https://about.ups.com/us/en/social-impact/the-ups-foundation/health-humanitarian-relief/delivering-what-matters--equitable-vaccine-access-globally.html>>.

leaderships call for enhanced cooperation in vaccine allocation.¹⁰¹ A notable effort is the COVAX pooled procurement initiative aimed at distributing COVID-19 vaccines to low- and middle-income countries. COVAX,¹⁰² co-led by the Coalition for Epidemic Preparedness Innovations (CEPI), Gavi and the WHO, is one of the three pillars of the WHO's Access to COVID-19 Tools (ACT) Accelerator.¹⁰³ COVAX has arrangements (with differing levels of 'firmness') in place to distribute nearly 3.6 billion doses of the COVID-19 vaccine candidates by the end of 2022, on behalf of 190 participating economies.¹⁰⁴

To address the inequitable access of vaccines, the COVAX Supply Chain and Manufacturing Taskforce, spearheaded by the co-leads of COVAX (CEPI, WHO, Gavi, and UNICEF) are in partnership with the Bill & Melinda Gates Foundation, International Federation of Pharmaceutical Manufacturers and Associations, Developing Countries Vaccine Manufacturers' Network, and Biotechnology Innovation Organization.¹⁰⁵ In early May 2021, the WTO DG announced that the WTO Secretariat would join this Task Force.¹⁰⁶ The WTO's role is to facilitate notifications and transparency, trade monitoring, the sharing

¹⁰¹ Ngozi Okonjo-Iweala, *Trade in the Time of Pandemics* (28 January 2021), <www.thinkglobalhealth.org/article/trade-time-pandemics>; WTO deputies call on Members to ensure vaccines available to all, Inside US Trade; United Nations Security Council, *Secretary-General Calls Vaccine Equity Biggest Moral Test for Global Community, as Security Council Considers Equitable Availability of Doses* (17 February 2021), <www.un.org/press/en/2021/sc14438.doc.htm>.

¹⁰² See <www.who.int/initiatives/act-accelerator/covax>.

¹⁰³ Mark Eccleston-Turner and Harry Upton, 'International Collaboration to Ensure Equitable Access to Vaccines for COVID-19: The ACT-Accelerator and the COVAX Facility' *The Milbank Quarterly* 1.

¹⁰⁴ 'COVAX gets a boost from Moderna deal, Sweden's donation of Covid vaccines' (CNBC, 3 May 2021) <www.cnn.com/2021/05/03/covax-gets-a-boost-from-moderna-deal-swedens-donation-of-covid-vaccines.html>.

¹⁰⁵ Gavi, the Vaccine Alliance, *COVAX Manufacturing Task Force to Tackle Vaccine Supply Challenges*, <<https://www.gavi.org/vaccineswork/covax-manufacturing-task-force-tackle-vaccine-supply.htm>>. The proposed focus areas of the Task Force are: (a) immediate goal – address shortages of raw materials needed to manufacture vaccines and ensure that there are no export restrictions on these materials; (b) mid-term goal – expand the manufacturing of approved vaccines and encourage more manufacturers to strike voluntary licensing deals; and (c) long-term goal – expand basic manufacturing capacities in low- and middle-income countries and regions. COVAX Supply Chain & Manufacturing Taskforce, *Presentation dated 12 May 2021*, <www.media.tghn.org/medialibrary/2021/05/20210512_COVAX-Supply-Chain-Manufacturing-Taskforce-ACT-A-Introduction.pdf>.

¹⁰⁶ Madeleine Hoecklin and Elaine Ruth Fletcher, *Global COVID-19 Vaccine Task Force Lays Out Plans to Scale Up Production and Fill US\$18.5 Billion Gap* (12 May 2021), <www.healthpolicy-watch.news/global-covid-19-vaccine-task-force-lays-out-plans/>.

of information, and ensuring the free flow of medical goods. In addition, the WTO DG is to attend the Task Force's leadership team meetings and the WTO staff will participate at working group level.

On 1 June 2021, the leaders of the International Monetary Fund (IMF), World Bank Group, WHO and WTO issued a remarkable call to governmental actions to expedite a global recovery from the COVID-19 pandemic.¹⁰⁷ The joint statement draws on a recent IMF staff analysis, which concluded that investment of USD 50 billion (towards increasing manufacturing capacity, supply, trade flows, and delivery), is needed to accelerate the equitable distribution of vaccines and health tools.¹⁰⁸ This investment would further boost economic growth around the world.¹⁰⁹

On 4 June 2021, the Health Ministers of G7 affirmed their financial commitment to research, manufacture, and equitably distribute safe COVID-19 diagnostics, therapeutics and vaccines (including, COVAX).¹¹⁰ This was followed by the Summit Communiqué and a Health Declaration on 13 June 2021, wherein the G7 leaders re-pledged their support to the ACT, committed to boost the supply of vaccines and raw materials by terminating dispensable trade restrictive measures, accelerating manufacturing capacity across all continents (in particular support African efforts to establish regional manufacturing hubs), and encouraging new partnerships based on voluntary licensing and technology transfers.¹¹¹ The leaders also committed to sharing at least 870 million doses over the course of a year with the aim of delivering at least half of the doses by the end of 2021, which are primarily channelled through COVAX.¹¹²

¹⁰⁷ 'New \$50 billion health, trade and finance roadmap to end the pandemic and secure a global recovery' (WTO, Web Page 1 June 2021), <www.wto.org/english/news_e/news21_e/igo_01jun21_e.htm>.

¹⁰⁸ IMF, Staff Discussion Note by Ruchir Agarwal and Gita Gopinath, *A Proposal to End the COVID-19 Pandemic* (May 2021), SDN/2021/004. See also World Bank Group, Ruchir Agarwal and Tristan Reed, *How to End the COVID-19 Pandemic by March 2022* (April 2021), Policy Research Working Paper 9632, <www.documents1.worldbank.org/curated/en/181611618494084337/pdf/How-to-End-the-COVID-19-Pandemic-by-March-2022.pdf>.

¹⁰⁹ WTO, *New \$50 billion health, trade and finance roadmap to end the pandemic and secure a global recovery*, above n 108.

¹¹⁰ G7, *G7 Health Ministers' Meeting, communique*, Oxford, 4 June, 2021, <www.g7uk.org/g7-health-ministers-meeting-communique-oxford-4-june-2>.

¹¹¹ G7, *Carbis Bay G7 Summit Communiqué: Our Shared Agenda for Global Action to Build Back Better* (13 June 2021), <www.consilium.europa.eu/media/50361/carbis-bay-g7-summit-communique.pdf>, 14 June 2021; G7, *G7 Carbis Bay Health Declaration* (13 June 2021), <www.consilium.europa.eu/media/50362/g7-carbis-bay-health-declaration-pdf-389kb-4-pages.pdf>.

¹¹² Ibid.

In addition, at the Summit, the US indicated that it might “be in a position to provide another billion” doses over the next two years.¹¹³

4.2 *Waiving of IP rights because of the pandemic – discussions at the WTO*

Some suggest that waiving IP rights is needed to ramp up production in order to address the inequitable distribution of vaccines.¹¹⁴ For them, waiving the protection of patents and undisclosed information – including trade secrets and clinical trial data – is fundamental to the development of medicines and vaccines and their production. Sharing IP and clinical data facilitates research and development, and thereby would accelerate the development and distribution of vaccines.

The proposal for a temporary waiver of specific TRIPS obligations for COVID-19 related products was submitted by India and South Africa to the WTO in October 2020.¹¹⁵ The rationale is to diversify and scale up production, instead of having manufacturing concentrated in the hands of a small number of patent holders. The proponents see the waiver as a means to swiftly provide access to vaccines to those countries with insufficient manufacturing capacity. Consequently, they proposed “a waiver from the implementation, application and enforcement of Sections 1, 4, 5, and 7 of Part II of the TRIPS in relation to prevention, containment or treatment of COVID-19.”¹¹⁶ The proposal sparked a complex debate. Others questioned whether waiving IP rights would lead to the production of more vaccines, as it would deter innovation and the transfer of technology/know-how.¹¹⁷

113 Taylor Pager, ‘Biden vows to continue to provide vaccines to world’s poorest nations, hints U.S. may make another donation’ (*Washington Post*, 13 June 2021) <www.washingtonpost.com/politics/2021/06/13/g7-summit-live-updates/>.

114 Prabhath Ranjan, *The Case for Waiving Intellectual Property Protection for Covid-19 Vaccines*, ORF Issue Brief No. 456, April 2021, Observer Research Foundation; Gregg Gonsalves and Gavin Yamey, ‘The COVID-19 Vaccine Patent Waiver: A Crucial Step Towards A “People’s Vaccine”’ (2021) 373 *BMJ Global Health*, 1249; Salla Sariola, ‘Intellectual Property Rights Need to be Subverted to Ensure Global Vaccine Access’ (2021) *BMJ Global Health*.

115 WTO, India and South Africa, *Waiver from Certain Provisions of the TRIPS Agreement for The Prevention, Containment and Treatment of COVID-19*, WTO Doc. IP/C/W/669/R (2 October 2020).

116 Ibid.

117 WTO, Council for Trade-Related Aspects of Intellectual Property Rights: *Minutes of Meeting held on 23 February 2021*, WTO Doc. IP/C/M/97/Add.1, Statement by Switzerland, paras 247 – 296; WTO, Council for Trade-Related Aspects of Intellectual Property Rights: *Minutes of Meeting held on 15–16 October and 10 December 2020, Statement by Japan*, paras 1065 – 1070 and 1289, and Statement by Norway, para 1078.

Taking the discussions at the TRIPS Council into account, a revised proposal was submitted in May 2021 (Revised Waiver Proposal). It incorporates three key changes – (a) the preambular text was fine-tuned to reflect the aforementioned rationale of the waiver; (b) the scope is limited to “health products and technologies including diagnostics, therapeutics, vaccines, medical devices, personal protective equipment, their materials or components, and their methods and means of manufacture for the prevention, treatment or containment of COVID-19”; and (c) a proposal to limit the operation of the waiver to three years, which would be extended unless decided otherwise by the General Council.¹¹⁸

In a communication dated 5 May 2021, the US issued a statement supporting the waiver of IP protections for COVID-19 vaccines and agreeing to “actively participate in text-based negotiations” about such waiver.¹¹⁹ This position is more limited in scope than the waiver sought by India and South Africa as it does not cover diagnostics, treatments, ventilators, respirators, syringes and refrigerators maintaining low temperatures during storage and transport of doses.¹²⁰ Other countries like New Zealand¹²¹ were prompted to voice their support for text-based negotiations even though they initially opposed the motion. However, most EU countries have criticised the US for creating roadblocks to distribution of vaccines by restricting the export of vaccines¹²² and vaccine ingredients while focussing on waiver of IP protections.¹²³

118 WTO, *Waiver from Certain Provisions of the TRIPS Agreement for The Prevention, Containment and Treatment of Covid-19* (Revised Decision Text), Communication from Communication from The African Group, The Plurinational State of Bolivia, Egypt, Eswatini, Fiji, India, Indonesia, Kenya, The LDC Group, Maldives, Mozambique, Mongolia, Namibia, Pakistan, South Africa, Vanuatu, The Bolivarian Republic of Venezuela and Zimbabwe, WTO Doc. IP/C/W/669/Rev.1 (25 May 2021).

119 Office of the US Trade Representative, Statement from Ambassador Katherine Tai on the COVID-19 TRIPS Waiver (5 May 2021), <www.ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver>.

120 See WTO, India and South Africa, *Waiver from Certain Provisions of the TRIPS Agreement for The Prevention, Containment and Treatment of COVID-19*, above n 116, and Ibid.

121 Thomas Manch, *New Zealand to support effort to waive COVID-19 vaccine patents, after United States backs WTO bid* (Stuff, 6 May 2021) <www.stuff.co.nz/national/health/coronavirus/125048729/new-zealand-to-support-effort-to-waive-covid19-vaccine-patents-after-united-states-backs-wto-bid>.

122 Despite there being no formal export ban, it was contended that the US invoked the Defense Production Act of 1950 (Pub.L. 81-774)) to compel manufacturers to fulfil domestic contracts prior to other orders. For contra view, see Chad P. Bown and Chris Rogers, *The US did not ban exports of vaccine supplies, but further help is necessary*. (7 June 2021) <www.piie.com/blogs/trade-and-investment-policy-watch/us-did-not-ban-exports-vaccine-supplies-more-help-needed>.

123 David M. Herszenhorn and Rym Momtaz, ‘EU pushes back on Biden plan to waive coronavirus vaccine patents’ (*Politico*, 8 May 2021), <www.politico.eu/article/

The EU argued that a waiver of IP rights would not accelerate the production of a single vaccine in the short and medium term.¹²⁴ Germany and EU officials argued that production capacity¹²⁵ and quality control are the key impediments to enhancing access to vaccines, and not IP rights.¹²⁶ In its communication to the General Council dated 4 June 2021, the EU stated that it is open to examining other proposals on IPRs, “as long as they contribute towards the objectives of expanding production and facilitating equitable access to COVID-19 vaccines and therapeutics”.¹²⁷ However, the EU did not comment on the waiver and focused solely on compulsory licensing in its communication to the TRIPS Council of the same date.¹²⁸

The pharma industry objected to the proposal, insisting that the suspension of IP rights for vaccines will deter pharmaceutical companies to develop innovative solutions.¹²⁹ The top management of Pfizer stressed that the waiver will disrupt its supply chain;¹³⁰ whereas Moderna has committed not to enforce patents on its vaccine against other manufacturers during the pandemic.¹³¹ In addition, Moderna stated that the waiver would not impact the company as drugmakers interested in manufacturing vaccines would need to conduct clinical trials, apply for authorization, and scale up manufacturing, which could take 12 to 18 months.¹³²

eu-pushes-back-on-biden-plan-to-waive-patents-as-contest-escalates-in-global-vaccine-diplomacy/>.

124 Agence France Presse, ‘EU invites ‘concrete’ US plan on lifting vaccine patents’ (*France24*, 8 May 2021), <www.france24.com/en/live-news/20210508-eu-invites-concrete-us-plan-on-lifting-vaccine-patents>.

125 Jim Brunnsden and Sam Fleming, ‘EU trade chief pushes for more Covid jab production not patent waivers’ (*Financial Times*, 4 June 2021) <www.ft.com/content/1a446649-b665-46ab-8dfo-7ac54035c>.

126 Guy Chazan, Erika Solomon, Hannah Kuchler and Jim Brunnsden, ‘Angela Merkel rejects US move to waive patents on vaccines’ (*Financial Times*, 6 May 2021) <www.ft.com/content/76a05a85-b83c-4e36-b04d-7f44f63e57b0>.

127 WTO, *Urgent Trade Policy Responses to the COVID-19 Crisis*, above n 89.

128 WTO, *Urgent Trade Policy Responses to the COVID-19 Crisis: Intellectual Property*, above n 90.

129 Darcy Jimenez, ‘Covid-19 vaccine inequity: the debate over patent waivers intensifies’ (*Pharmaceutical Technology*, 13 May 2021) <www.pharmaceutical-technology.com/features/covid-19-vaccine-inequity-patent-waivers/>.

130 Bourla, above note 96.

131 Moderna, Statement by Moderna on Intellectual Property Matters during the COVID-19 Pandemic (8 October 2020), <www.investors.modernatx.com/news-releases/news-release-details/statement-moderna-intellectual-property-matters-during-covid-19>.

132 Noah Higgins-Dunn, ‘Moderna CEO says he’s not losing any sleep over Biden’s support for COVID-19 vaccine waiver’ (*Fierce Pharma*, 6 May 2021), <www.fiercepharma.com/pharma/moderna-ceo-says-he-s-not-losing-any-sleep-over-biden-s-endorsement-for-covid-19-ip-waiver>.

During the TRIPS Council meeting held on 8–9 June 2021, Members moved closer to text-based discussions, by examining both a recently revised version of the waiver and the EU IP Proposal.¹³³

To date, sufficient data evidences the inequitable distribution of vaccines. According to WHO estimates, as of 5 May 2021, 80% of the more than 1.1 billion doses of vaccine that had been administered went to high and upper middle-income countries, with just 0.3% administered in low-income countries.¹³⁴

Will the waiver provide the much-needed boost in vaccine production? In any case, many agree that waiving IP rights would not be sufficient. During her Vaccine Event in April, WTO DG stressed the urgency of ramping up vaccine production, while highlighting three constraints, which are: the scarcity of raw materials,¹³⁵ shortages of qualified and experienced personnel, and supply chain problems linked to export restrictions and prohibitions as well as excessive bureaucracy.¹³⁶ During the Global Health Summit held in May 2021, the G20 also recognised the need to diversify production capacity by building expertise and developing local and regional manufacturing capacities for low- and middle-income countries.¹³⁷ In order to expand production, the EU recommended licensing agreements, providing for sharing of knowhow, tiered pricing which involves a non-profit sale to the low-income countries, contract manufacturing, and new investments in manufacturing facilities in developing countries.¹³⁸

Additionally, it must be noted that patents and other IP rights cannot be waived by the WTO: a TRIPS waiver simply suspends the Members' obligations to enforce IP rights, but WTO Members must revise their domestic legal framework in order to implement the waiver. For example, US treaties are not necessarily 'self-executing' and need to become enforceable through an Act of Congress. Proponents of the waiver argue that those WTO Members that

¹³³ 'Members approach text-based discussions for an urgent IP response to COVID-19' (WTO, 9 June 2021), www.wto.org/english/news_e/news21_e/trip_09jun21_e.htm.

¹³⁴ WHO Director-General's opening remarks at One Shared World event (5 May 2021), <www.who.int/director-general/speeches/detail/director-general-s-opening-remarks-at-one-shared-world-event>. See on a more optimistic note: Ruchir Agarwal and Tristan Reed, *How to End the COVID-19 Pandemic by March 2022*, above n 109.

¹³⁵ For more information, see Chad P. Bown and Chris Rogers (7 June 2021), above n 119.

¹³⁶ 'DG calls on COVID-19 vaccine manufacturers to increase production in developing countries' (WTO, 9 March 2021 <www.wto.org/english/news_e/news21_e/dgno_09mar21_e.htm>).

¹³⁷ Rome Declaration, 2021, above n 97.

¹³⁸ WTO, *Urgent Trade Policy Responses to the COVID-19 Crisis*, above n 89.

believe that TRIPS flexibilities (such as, compulsory licensing)¹³⁹ are sufficient in responding to the pandemic, could refrain from implementing the waiver in their domestic legislations.¹⁴⁰ Such TRIPS flexibilities can play a critical role in increasing the domestic production of vaccines.¹⁴¹ The US¹⁴² and EU¹⁴³ recently recognised and endorsed the exercise of TRIPS flexibilities and compulsory licensing. Nevertheless, India stated before its domestic courts that compulsory licenses may not result in an immediate increase in production.¹⁴⁴

It is also likely that manufacturers in emerging economies will require technological assistance to produce vaccines. Therefore, a waiver of IP rights would only work in conjunction with additional arrangements to incentivise and fund the transfer of technology and knowhow, and to facilitate the supply of equipment and raw materials.¹⁴⁵

To this end, the WHO launched the COVID-19 mRNA vaccine technology transfer hub¹⁴⁶ to transfer a comprehensive technology package and provide

139 See further Hans Morten Haugen, 'Does TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) prevent COVID-19 vaccines as a global public good?' *The Journal of World Intellectual Property*.

140 WTO, *Waiver from Certain Provisions of the TRIPS Agreement for The Prevention, Containment and Treatment of Covid-19 – Responses to Questions* (14 January 2021), Communication from The Plurinational State of Bolivia, Eswatini, India, Kenya, Mozambique, Mongolia, Pakistan, South Africa, The Bolivarian Republic of Venezuela And Zimbabwe.

141 For more details, see WTO, Council for Trade-Related Aspects of Intellectual Property Rights: Minutes of Meeting held on 15–16 October and 10 December 2020, above n 118, Statement by the EU, paras 1038 – 1041, Statement by Norway, paras. 1076 – 1079, Statement by Australia, para. 1124 – 1125, Médecins Sans Frontières, *Médecins Sans Frontières Comments on the WHA74 Local Production Resolution Final Negotiation Text* (28 April 2021 version), <www.msfaccess.org/sites/default/files/2021-05/COVID_BriefDoc_Comments-WHA74_Local_Production_Resolution_MSF_ENG_May2021.pdf>, 26 May 2021. *For the opposing opinion*, see WTO, Council for Trade-Related Aspects of Intellectual Property Rights: Minutes of Meeting held on 15–16 October and 10 December 2020, *supra* note 118, Statement by South Africa, para 870, Statement by Pakistan, para. 920, Statement by Turkey, para 954.

142 Office of the United States Trade Representative, 2021 *Special 301 Report* 34 <[www.ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20\(final\).pdf](http://www.ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20(final).pdf)>.

143 WTO, *Urgent Trade Policy Responses to the COVID-19 Crisis*, above n 89.

144 Prahars Gour, *Centre Sees No Compulsion to Issue Compulsory Licenses for Covid Drugs* (10 May 2021), <www.spicyip.com/2021/05/centre-under-no-compulsion-to-issue-compulsory-licenses-for-covid-19-treatments.html>.

145 Gareth Lacobucci, 'Covid-19: How will a waiver on vaccine patents affect global supply?' (2021) *BMJ* 373; Farasat Bokhari, 'US-backed vaccine patent waiver: pros and cons explained' (*The Conversation*, 6 May 2021), <www.theconversation.com/us-backed-vaccine-patent-waiver-pros-and-cons-explained-160480>; Kiran Stacey, 'Biden urged to oblige US vaccine makers to share technology' (*Financial Times*, 15 May 2021), <www.ft.com/content/9408223f-0a6c-43b7-9f67-c7e4697005c2>.

146 This has been supported by the G20 in the Rome Declaration, 2021, above n 97.

appropriate training to interested manufacturers in low- and middle-income countries in April 2021.¹⁴⁷ The WHO also stressed that the technology ought to be either free of IP constraints in such countries, or that IP rights are made available to the technology hub “through non-exclusive licenses to produce, export and distribute the COVID-19 vaccine” (including through the COVAX facility).¹⁴⁸

More recently, the WHO decided to ‘reboot’ its IP sharing scheme, i.e., C-TAP.¹⁴⁹ In an open letter published on 27 May 2021, WHO DG, Tedros Adhanom Ghebreyesus, and Costa Rican President, Carlos Alvarado Quesada, called on WHO member states to engage with vaccine manufacturers to encourage IP sharing and tech transfer through the C-TAP scheme.¹⁵⁰ Crucially, C-TAP *would offer companies compensation through royalties* and is now also backed by Spain. The WHO estimates that if vaccine manufacturers adhered to the scheme, a greater number of shots would be available by the end of next year. It would also use a blueprint deployed to manufacture and distribute drugs for HIV, hepatitis C and tuberculosis, and make less economically developed nations less dependent on foreign aid and multinational companies. The WHO reiterated that “[t]he single most important priority of the global community is to stop the pandemic in its tracks, to halt its rapid transmission and reverse the trend of consequential global distress. We know that this goal is only achievable when everyone, everywhere, can access the health technologies they need for COVID-19 detection, prevention, treatment and response.”¹⁵¹ And we can add, until there is recovery from the pandemic, there cannot be sustainable economic recovery.

¹⁴⁷ WHO, ‘Establishment of a COVID-19 mRNA vaccine technology transfer hub to scale up global manufacturing’ (WHO, 16 April 2021) <www.who.int/news-room/articles-detail/establishment-of-a-covid-19-mrna-vaccine-technology-transfer-hub-to-scale-up-global-manufacturing>.

¹⁴⁸ *Ibid.*

¹⁴⁹ Donato Paolo Mancini, ‘WHO reboots IP sharing scheme for Covid shots, drugs and tests’ (*Financial Times*, 27 May 2021) <www.ft.com/content/66a4b785-183a-48c6-9557-8621496d7c08>.

¹⁵⁰ ‘The President of the Republic of Costa Rica and the Director-General of the World Health Organization call once again on all WHO Member States to actively support the COVID-19 Technology Access Pool (C-TAP): Open letter to all WHO Member States’ (WHO, 27 May 2021) <[www.who.int/news/item/27-05-2021-the-president-of-the-republic-of-costa-rica-and-the-director-general-of-the-world-health-organization-call-once-again-on-all-who-member-states-to-actively-support-the-covid-19-technology-access-pool-\(c-tap\)](http://www.who.int/news/item/27-05-2021-the-president-of-the-republic-of-costa-rica-and-the-director-general-of-the-world-health-organization-call-once-again-on-all-who-member-states-to-actively-support-the-covid-19-technology-access-pool-(c-tap))>.

¹⁵¹ *Ibid.*

5 Conclusion and Way Forward

The COVID-19 pandemic evidences that the WTO is the cornerstone of the international trading system: the institution can adapt to facilitate multilateral solutions and an effective global response to crises.

The WTO mitigated the challenges raised by the COVID-19 pandemic by minimising trade disruptions and adverse economic externalities with a focus on enhancing transparency. The WTO offers a multilateral platform for countries to coordinate their trade policies. By facilitating communication channels between countries, the WTO helps maintain the rule of law and reduces transaction costs of policy coordination.¹⁵² Additionally, the WTO became the focal point for multi-faceted debates involving matters traditionally outside the scope of the WTO (i.e., favouring coordination between manufacturers and producers of vaccines and declaring the need for equitable access to vaccines). Moreover, both the WTO Secretariat and the DG have adopted an active role in different aspects of the necessary global response to vaccine distribution inequity.¹⁵³

The WTO response augmented and legitimatised its role as a global governance forum. This conclusion is supported by various communications by Members including, a draft declaration co-sponsored by a growing number of WTO Members, which strongly encourages the WTO DG to enhance multilateral cooperation with other organizations (such as, WHO, WCO, OECD, UN, WIPO, G20) “with the aim of improving the analytical capacity of WTO Members to monitor market developments in trade and production of essential medical goods”.¹⁵⁴ Additionally, a smaller group of WTO Members, (including, Australia, Brazil and Canada) sought to enhance the WTO’s role in vaccine production. They called upon the WTO DG and Secretariat to increase vaccine production by facilitating licensing agreements, employing under-utilised

¹⁵² Tembey, above n 75.

¹⁵³ Bryce Baschuk, ‘WTO’s New Leader Puts Vaccine Nationalists on Notice’ (*Bloomberg*, 15 April 2021), <www.bloomberg.com/news/newsletters/2021-04-15/supply-chains-latest-new-wto-leader-combats-vaccine-nationalism>; Chair Summary following “COVID-19 and Vaccine Equity: What Can the WTO Contribute?” (WTO, 14 April 2021) <www.wto.org/english/news_e/spno_e/spno7_e.htm>; WTO, *DG calls on COVID-19 vaccine manufacturers to increase production in developing countries*, above n 137. ‘WTO paper explores role of trade policy in the rapid roll-out of COVID-19 vaccines’, (WTO, 22 December 2020) <www.wto.org/english/news_e/news20_e/trip_22dec20_e.htm>; WTO, *Developing And Delivering Covid-19 Vaccines Around The World*, <www.wto.org/english/tratop_e/covid19_e/vaccine_report_e.pdf>.

¹⁵⁴ JOB/GC/251/Rev.2 (*Draft General Council Declaration - COVID-19 and Beyond: Trade and Health*), Draft General Council Declaration, para 5.

vaccine production capacity, and addressing any further trade-related impediments.¹⁵⁵ While recognizing that these initiatives go beyond the discipline of trade, the EU supported the DG's efforts to address the challenges to an equitable access to COVID-19 vaccines and therapeutics, and emphasized that the WTO must play a central part in the global response to the current crisis.¹⁵⁶

Multilateral cooperation and solutions are the only mechanisms that allow countries to better prepare and develop coherent and effective policy responses to the COVID-19 pandemic and future health crises.¹⁵⁷

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¹⁵⁵ WT/GC/230/Rev.2 *Enhancing the Role of the World Trade Organization in the Global Effort Toward the Production and Distribution of Covid-19 Vaccines and Other Medical Products*.

¹⁵⁶ WTO, *Urgent Trade Policy Responses to the COVID-19 Crisis*, above n 89.

¹⁵⁷ WT/GC/223 (*COVID-19 and Beyond: Trade and Health*), para. 5; WTO, *Statement on COVID-19 and the Multilateral Trading System by Ministers Responsible for the WTO (revised)*, Joint ministerial statement from Afghanistan, Australia, Barbados, Benin, Cambodia, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Hong Kong, China, Iceland, Israel, Jamaica, Japan, Kenya, Republic of Korea, The State of Kuwait, Liechtenstein, Madagascar, Mauritania, Mauritius, Mexico, Republic of Moldova, Montenegro, Nepal, New Zealand, Nigeria, North Macedonia, Norway, Papua New Guinea, Peru, Qatar, Saint Lucia, Kingdom of Saudi Arabia, Seychelles, Singapore, Solomon Islands, Switzerland, Ukraine, United Arab Emirates, United Kingdom, Uruguay And Viet Nam, WT/GC/230/Rev.2 (*Enhancing the Role of the World Trade Organization in the Global Effort Toward the Production and Distribution of Covid-19 Vaccines and Other Medical Products*), para. 1.2.