

THE (NEW) ROLE OF THE WTO IN VACCINE DISTRIBUTION AND EQUITY*

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ABSTRACT

COVID-19, as a global pandemic, elicited a global response. States, inter-governmental organisations (IGOs), non-governmental organisations (NGOs), and multinational corporations alike formed new partnerships or leveraged existing partnerships with a view to effectively, efficiently, and economically comprehend, respond to, and (hopefully) eradicate the COVID-19 pandemic. Central to these partnerships was the recognition of the role of trade in keeping markets open and supplies moving. Without the delivery of food, medicines, masks, and vaccines through commerce, the response to the pandemic would not have been as rapid as it was. Thus, the multilateral trading system, embodied by the World Trade Organisation (WTO), proved more important than ever during the pandemic. Basic WTO principles—transparency, non-discrimination, the prohibition against border restrictions, and particularly the WTO monitoring system, which enhanced its responses to new and

* This article was written in March 2022 and updated in June 2022 after the 12th WTO Ministerial Conference. It highlights the responses to the COVID-19 pandemic from its onset in March 2020 up to June 2020 and it gives detail on the role the WTO played in vaccine distribution and equity at the time.

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extraordinary needs of WTO Members—helped governments coordinate their actions to contain the pandemic and mitigate trade and global supply chain disruptions on essential goods. Yet, despite all this, inequity and inequality coloured states' responses to the pandemic. Specifically, vaccine inequity and inequality riddled vaccine distribution thus limiting the access of developing and least-developed countries to much needed jabs. This article considers the (new) role of the WTO, in part through cooperation with other stakeholders, in working at improving vaccine distribution/equity in response to the COVID-19 pandemic.

Keywords:

COVID-19, developing countries, least developed countries, pandemic preparedness, supply chains, TRIPS waiver, vaccines, vaccine equity, vaccine inequality.

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INTRODUCTION

“What has been discovered is that when it comes to medical supplies to fight the coronavirus, neither the unrestrained competition of the marketplace nor uncoordinated national government interventions are a satisfactory method to manage scarcity.”¹

The Coronavirus disease (COVID-19) proved to be one of the most deadly, contagious, and devastating diseases in the history of humanity, with its spread resulting in a pandemic. In over two years, states across the globe were in a crisis that put to test their resilience—possibly beyond any limits that governments, organisations, or even citizens were prepared for. The multiple facets of the crisis that states faced include but are not limited to: a pandemic-induced recession, trade-related obstacles that hampered the fight against COVID-19 (e.g., export restrictions, supply-chain bottlenecks, regulatory obstacles etc.), and, more recently, vaccine inequity and inequality.

Given the global crisis resulting from the pandemic, states the world over were quick to learn that in order to resolve the crisis, all hands needed to be on deck steering in the same direction—cooperation. In this regard, cooperation via intergovernmental organisations (IGOs) was at the heart of states’ responses to the pandemic. This is unsurprising to say the least. States created IGOs so that, among other things, IGOs could work together on specialized issues of interest to states, individually and collectively. Certainly, this is not new. IGOs’ institutional, normative, and executive actions bring in a unique and essential *plus-value* to the global reaction called for by crises such as COVID-19. During the pandemic, IGOs such as the World Health Organisation (WHO), the International Monetary Fund (IMF), the World Bank (WB), and the World Trade Organisation (WTO), served as forums where states discussed and refined their pandemic responses. As such, these IGOs were central forums for

1. Alan Wolff, Deputy Dir.-Gen., WTO, *The World Under Fire: The Role of the WTO in a Global Response to the Covid-19 Pandemic* (Apr. 20, 2020), https://www.wto.org/english/news_e/news20_e/ddgaw_20apr20_e.htm#:~:text=%E2%80%9CWhat%20has%20been%20discovered%20is,manage%20scarcity%2C%E2%80%9D%20he%20declared.

the coordination of a cooperation-oriented response to the pandemic.

The pandemic, however, necessitated more than traditional cooperation between states within IGOs. New and enhanced collaborations between IGOs, and between IGOs and other public and private entities developed during the pandemic in order to respond to unprecedented global needs. What unfolded was the demonstration of IGOs' adaptability to new realities—often never envisaged before—and conscientious response to the extraordinary needs called for by the pandemic. This adaptability and response is especially apparent in international trade. During the COVID-19 pandemic, this flexibility in international trade proved more important than ever. Without the delivery of food, medicines, masks, and vaccines through commerce, the response to the pandemic would not have been as rapid as it was. Yet, in spite of this, inequity and inequality coloured states' responses to the pandemic. Specifically, vaccine inequity and inequality riddled vaccine distribution, which limited the access of developing and least-developed countries to much needed jabs.

By March 2022, when South Africa, India, the USA, and the EU were negotiating a possible compromise to the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) waiver debate that would be shared with the larger WTO Membership (as shall be discussed later), 63% of the world had received at least one dose of the COVID-19 vaccine.² A cursory glance at this statistic may give one a sense of cautious comfort or security. Such comfort or security, however, would be ill-informed. A critical look at the data reveals that the share of people who had received at least one dose of the vaccine by that time was 76% in upper-middle-income countries; 72% in high-income countries; 47% in lower-middle-income countries; and 11% in low-income countries.³ This disparity was accounted for by citing, among

2. See *Coronavirus (COVID-19) Vaccinations*, OUR WORLD IN DATA, <https://ourworldindata.org/covid-vaccinations> (last visited Mar. 13, 2022) (showing that 63% of the world was vaccinated as of March 2022); Ashleigh Furlong, *Compromise Reached on COVID-19 Vaccine Intellectual Property Rights Waiver*, POLITICO (Mar. 15, 2022), <https://www.politico.eu/article/compromisereachedoncovid19vaccineintellectualpropertyrightswaiver/>.

3. *Global Dashboard for Vaccine Equity*, UNDP DATA FUTURES PLATFORM, <https://data.undp.org/vaccine-equity/> (last visited Mar. 13, 2022).

other reasons: stockpiling by rich countries which already had more vaccines than they needed,⁴ country-specific challenges such as cost and financing capacity, and distribution-related obstacles (e.g., inadequate or non-existent essential storage equipment such as a cold chain, inadequate personnel, and vaccine hesitancy).⁵

Given this reality, the WTO began to undertake certain actions to assist and encourage the production and distribution, and thus the trade of, vaccines. Through meetings and collective engagements that involved associations, manufacturers, producers, and distributors of vaccines and essential medical suppliers, the WTO worked to ramp-up vaccine production and distribution. In this context, WTO Members and the WTO Secretariat set up partnership lines with other IGOs, non-governmental organizations (NGOs), and the private sector, which were used to, among other things, advocate for vaccine equity.

Consequently, this article considers the (new) role of the WTO, in part through cooperation with other stakeholders, in improving vaccine distribution/equity, that developed in order to respond to the needs of the COVID pandemic. First, the article reviews trade-related responses to the pandemic, such as early export restrictions, and how they may have informed the efforts to improve vaccine distribution equity. Second, we consider the (new) role of the WTO in vaccine distribution and equity. Specifically, we highlight the various efforts undertaken at the WTO, at times in cooperation with other stakeholders, to not only ramp-up vaccine production but also to guarantee vaccine equity. Third, the article highlights what can be learnt from the

4. Chad Bown & Thomas Bollyky, *The World Needs a COVID-19 Vaccine Investment and Trade Agreement*, PETERSON INST. FOR INT'L ECON. (Oct. 13, 2021, 12:30 PM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/world-needs-covid-19-vaccine-investment-and-trade-agreement> (claiming that an “equitable vaccine sharing scheme” requires increasing production targets to overcome the vaccine stockpiling by rich, vaccine producing countries such as India, the US, EU, UK, and China).

5. Amanda Glassman et al., *COVID-19 Vaccine Development and Rollout in Historical Perspective* (Ctr. for Glob. Dev., Working Paper No. 607, 2022), <https://www.cgdev.org/publication/covid-19-vaccine-development-and-rollout-historical-perspective>.

experiences drawn during the pandemic in preparation for future pandemics before offering a conclusion.

II. TRADE-RELATED RESPONSES TO THE PANDEMIC

At the onset of the pandemic, in the midst of all the confusion and unpreparedness and perhaps in an effort by governments to mitigate the effects of COVID-19, export restrictions—mainly targeting health-related products—were imposed by 80 countries and separate customs territories (this includes 72 WTO Members⁶ and eight non-WTO Members).⁷ In fact, in April/May 2020, shortly after the WHO declared COVID-19 a pandemic in March,⁸ export restriction measures targeting medical products and Personal Protective Equipment (PPE) peaked.⁹ Notably, the WTO rules do not explicitly bar the adoption of export restriction measures in some instances.¹⁰ In fact, Article XI:2 of the General Agreement on Tariffs and Trade (GATT) provides for instances whereby a Member may impose export restrictions or prohibitions including “...to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.”¹¹ Additionally, Article XX GATT allows for measures that deviate from WTO obligations provided that such measures are not *applied arbitrarily or unjustifiably discriminatorily* and are not ‘a *disguised restriction* on international trade.’¹² Particularly, Article XX(g) allows Members to take measures relating to the

6. 46 WTO Members if countries in the EU are not counted individually. See WTO Secretariat, *Export Prohibitions and Restrictions*, at 6–7, (Apr. 23, 2020), https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf.

7. *Id.*

8. See Dir. Gen. Tedros Adhanom Ghebreyesus, WHO, Director-General’s Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—11-march-2020> (characterizing COVID-19 as a pandemic at a WHO media briefing on March 11, 2020).

9. Simon Evenett et al., *Trade Policy Responses to the COVID-19 Pandemic Crisis: Evidence from a New Data Set*, 45 THE WORLD ECON. 342, 347–48 (2021).

10. See WTO Secretariat, *supra* note 6, at 4.

11. General Agreement on Tariffs and Trade, art. XI:2 § a, Apr. 15, 1994, 55 U.N.T.S. 194 [hereinafter GATT]. Note, however, the general rule in art. XI:1 GATT is that quantitative restrictions are prohibited.

12. *Id.*, art. XX, Chapeau at 37.

conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.¹³ Moreover, Article XX(j) extends protection to a measure adopted by a Member when the measure is essential to the acquisition or distribution of products in general or local short supply.¹⁴ Hence, as noted by former Deputy Director General (DDG) Alan Wolff, given these flexibilities in WTO rules, governments decide for themselves whether to limit their exports in global crises.¹⁵

At the time, when governments rushed to impose export restrictions and prohibitions, there was a high demand for essential products but a low supply worldwide.¹⁶ These measures, therefore, were adopted in times of fear and with self-sufficiency in mind. Their effect was quite disruptive as they led to domino effects with worldwide production of urgently needed goods being endangered.¹⁷

The initial knee-jerk reaction of self-preservation was gradually replaced with a combined effort by states to work together to protect the health of their populations and economies. Thus, collective engagement by WTO Members during the COVID-19 pandemic, through cooperation, helped maintain the connectivity of Global Value Chains (GVCs) and reduce shocks of the pandemic on economies.

Particularly, Members utilised WTO basic principles – transparency, non-discrimination, the prohibition against border restrictions, and particularly the WTO monitoring systems – to take action to contain the pandemic and mitigate trade and global supply chain disruptions on essential goods.¹⁸ To illustrate this, we shall consider four actions that were taken by Members:

13. *Id.*, art. XX(g) at 38.

14. *Id.*, art. XX(j).

15. See Alan Wolff, Deputy Dir. Gen., WTO, Supply Shortage in Medical Devices During the Corona-Crisis: Is the Solution Stockpiling and Less International Trade?, (Sept. 4 2020), at https://www.wto.org/english/news_e/news20_e/ddgaw_04sep20_e.htm.

16. Evenett et al., *supra* note 9 at 6–7.

17. See Wolff, *supra* note 15, at 3.

18. See WTO, *What is the WTO: Overview*, https://www.wto.org/english/thewtoe/whatis_e/wto_dg_stat_e.htm#:~:text=The%20WTO's%20founding%20and%20guiding,the%20conductof%20its%20activities. (last visited Sept. 1, 2021).

- i. transparency initiatives through notifications and exchange of information;
- ii. regulatory approval and cooperation;
- iii. enhanced multilateralism in Members' response to the pandemic;
- iv. other trade facilitation measures.

A. Transparency Initiatives Through Notifications and Exchange of Information

A core feature of the multilateral trading system is the transparency obligations. So integral is it to the system that it appears in over ten Covered Agreements, and often features in the discussions within specialized committees.¹⁹ For example, one of the transparency obligations work by requiring that Members notify the WTO of all laws and regulations adopted within their territory that affect trade or make trade-related information public and easily accessible.²⁰ Such information may be useful in, or affect the decision-making of other Members, stakeholders and/or traders: thus, they would greatly benefit from prompt and adequate access to it. Whereas, ordinarily, (non-)compliance with the transparency requirement is critical in nature, the gravity of (non-)compliance increases exponentially in times of crises such as the pandemic where WTO Members, stakeholders, and/or traders need to avoid delays or rejections while trading in essential goods and services. When COVID-19 was declared a pandemic by the WHO, the WTO Director General (DG) at the time was Roberto Azevêdo.²¹ On August 31, 2020, he stepped down, and on March 1, 2021, Ngozi Okonjo-Iweala was appointed as the 7th DG of the WTO.²² Both DG Azevêdo and DG Ngozi played a role in formulating the WTO's response to the pandemic. This was somewhat reminiscent of DG Lamy's initial response to

19. See generally WTO Secretariat, *Technical Cooperation Handbook on Notification Requirements*, WTO (Nov. 21, 2021), https://www.wto.org/english/tratop_e/handbook_on_notifications_complete_e.pdf.

20. *Id.* at 4.

21. See WTO, Roberto Azevêdo, *WTO Director-General 2013 to 2020* (2022), https://www.wto.org/english/thewto_e/dg_e/ra_e.htm.

22. See WTO, *History Is Made: Ngozi Okonjo-Iweala Chosen as Director-General* (Feb. 15, 2021), https://www.wto.org/english/news_e/news21_e/dgno_15feb21_e.htm.

the 2008-2009 financial crisis. DG Lamy, whose background was in economics, led the WTO in managing the 2008-2009 financial crisis through calls for cooperation, convening meetings with trade finance experts with other IGOs and banks, and preparation of reports on the financial crisis trade-related matters.

DG Lamy relied on the Trade Policy Review Mechanism (TPRM), by availing investigation, analysis, and reports on trade-related measures adopted in response to the financial crisis to informal meetings of the Trade Policy Review Body (TPRB).²³ This informal mechanism served as an opportunity for data collection, exchange of information, and policy monitoring, thus serving as an important factual transparency tool for Members during the crisis. Similarly, during the pandemic, this exercise expanded—partly thanks to the digitalization of information sharing—thus fostering transparency. Throughout the pandemic, WTO Members submitted COVID-19-related trade measures they had adopted.²⁴ This proved extremely useful because the exchange of information provided an opportunity for Members to easily and promptly access information that was essential in mapping and coordinating their trade and health responses to the pandemic.

In fact, by July 2022, over 480 COVID-19-related notifications had been made to the WTO.²⁵ Additionally, the WTO made available a page on its website, dubbed “COVID-19 and world trade”, that was specifically dedicated to “...provide up-to-the-minute 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.”²⁶

23. See Joost Pauwelyn & Ayelet Berman, *Emergency Action by the WTO Director-General: Global Administrative Law and the WTO's Initial Response to the 2008–09 Financial Crisis*, 6 INT'L ORG. L. REV. 499, 499–504 (2009).

24. WTO, *WTO Members' Notificationson COVID-10*, https://www.wto.org/english/tratop_e/covid19_e/notifications_e.htm (last visited Jan 10, 2022).

25. *Id.*

26. *Id.*; see also WTO, *COVID-19: Measures Affecting Trade in Goods*, https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm (last visited Oct 13, 2021) (listing trade and trade-related measures taken in the context of the COVID-19 pandemic that the WTO Secretariat maintains).

B. Regulatory Approval and Cooperation

Members of the TBT Committee have previously observed that mutual understanding of regulatory systems is greatly enhanced by regulatory cooperation, which builds confidence between trading partners.²⁷ Notably, WTO Members have recognized regulatory cooperation to be effective in disseminating good regulatory practice across borders.²⁸ Under WTO law, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Technical Barriers to Trade Agreement (TBT Agreement), provide for the use of equivalence and mutual recognition as a way of facilitating trade.²⁹

During the pandemic, given the shared appreciation by Members of the urgency in ensuring that essential products flowed smoothly across territories, Members adopted improved regulatory approval procedures and cooperation.³⁰ For example, Members adopted temporary measures with a view to hasten or reduce conformity checks without jeopardizing the quality of

27. WTO & OECD, *Facilitating Trade Through Regulatory Cooperation: The Case of the WTO's TBT/SPS Agreements and Committees*, 14 (2019), https://www.wto.org/english/res_e/booksp_e/tbtsp19_e.pdf.

28. See Committee on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995*, 10-11, WTO Doc. G/TBT/1/Rev.14, (Sept. 24, 2019) (explaining that the exchange of information and experiences between Members has enabled the Members to identify elements to make the regulatory cooperation more effective).

29. See Agreement on the Application of Sanitary and Phytosanitary Measures art. 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement] (explaining that the equivalence is met if the exporting Member meets the importing Member's appropriate level of protection and the Member's mutual recognition of this assists in creating trade agreements); see also Agreement on Technical Barriers to Trade art. 6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A 1868 U.N.T.S. 120 [hereinafter TBT Agreement] (indicating that Members can have equivalent conformity assessment procedures, but when there is a difference Members negotiate trade agreements that display the mutual recognition to facilitate the particular trade).

30. See Trade Policy Review Body, *Overview of Development in the International Trading Environment: Annual Report by the Director General*, 32, 57, 73, WTO Doc. WT/TPR/OV/24, (Nov. 22, 2021) (explaining that Members implemented emergency measures to ensure the supply chains of medical supplies, in particular COVID-19 vaccines, were not disrupted).

goods.³¹ Relatedly, Members also adopted temporary flexibilities in relation to compliance with technical regulations that apply to essential goods.³² Similarly, essential goods were subject to accelerated regulatory assessments, and equivalence and mutual recognition took precedence.³³ These measures were adopted to reduce unnecessary obstacles to trade all whilst maintaining distinct national regulatory requirements to facilitate efficient movement of products across territories.³⁴

C. Enhanced Multilateralism in Members' Response to the Pandemic

Prior to the twelfth Ministerial Conference (MC12), Members were working towards a multilateral response to the pandemic.³⁵ At MC12, which took place in June 2022,³⁶ Members successfully concluded the unprecedented Geneva package³⁷ which includes,

31. The implementation of remote conformity assessment procedures when on-site inspections are not possible. *See id.* at 21, 33–34, 57, 73, 80 (indicating that the quality requirement was the second highest priority).

32. *See* WTO, *How WTO Members Have Used Trade Measures To Expedite Access to COVID-19 Critical Medical Goods and Services* 7 (Sept. 18, 2020), https://www.wto.org/english/tratop_e/covid19_e/services_report_16092020_e.pdf.

33. *Id.* at 8 (explaining that equivalence and mutual recognition accelerated the trade of essential medical goods between Members).

34. *See id.* at 6–8 (highlighting that Members have removed unnecessary obstacles by suspending secondary elements of procedures such as accepting assessments from trusted regulators, accepting copies of documents instead of originals, and being flexible with compliance with technical regulations whilst not undermining the primary objective of health and safety protection).

35. *See* WTO, *MC12 Briefing Note—Trade and Health: WTO Response to the COVID-19 Pandemic*, https://www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bftrade_and_health_e.htm (last visited Sept. 5, 2022).

36. MC12 took place from 12 to 17 June 2022 at the WTO Headquarters in Geneva, Switzerland. The Conference was co-hosted by Kazakhstan and chaired by Mr Timur Suleimenov, Deputy Chief of Staff of Kazakhstan's President. Kazakhstan was originally scheduled to host MC12 in June 2020 but the conference was postponed due to the COVID-19 pandemic. *Twelfth WTO Ministerial Conference*, WTO, https://www.wto.org/english/thewto_e/minism_e/mc12_e/mc12_e.htm (last visited Sept. 20, 2022).

37. *Id.* The “Geneva package” adopted by members includes: an outcome document (WT/MIN(22)/24); a package on WTO response to emergencies, comprising: (i) a Ministerial Declaration on the Emergency Response to Food Insecurity (WT/MIN(22)/28), (ii) a Ministerial Decision on World Food Programme (WFP) Food Purchases Exemptions from Export Prohibitions or Restrictions (WT/MIN(22)/29), (iii) a Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics

among other items, a Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics³⁸ and a Ministerial Decision on the Agreement on Trade-related Aspects of Intellectual Property Rights.³⁹ Through the Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics, Members encouraged the use of the experiences drawn from the pandemic in order to support increased resilience for COVID-19 and future pandemics.⁴⁰ Members recognized the role of the multilateral trading system in supporting the expansion and diversification of production of essential goods and related services needed in the fight against COVID-19 and future pandemics given that global recovery was highly divergent across the Membership, and that there were evolving challenges posed by the pandemic, in particular related to the possible spread of new variants of COVID-19, and uneven paces of vaccination.⁴¹ Moreover, Members were keen to note the importance of ensuring that any emergency trade measures designed to tackle COVID-19 be a targeted, proportionate, transparent, temporary form, and should not create unnecessary barriers to trade or unnecessary disruptions in supply chains.⁴² Related to this, Members undertook to exercise due restraint in applying export restrictions—particularly on goods and inputs necessary to protect life and health.⁴³ Members also underlined the critical role of services in ensuring resilience during COVID-19 and future pandemics and acknowledged the importance of facilitating trade in services, including health services and ICT services, during

(WT/MIN(22)/31), and (iv) a Ministerial Decision on the Agreement on Trade-related Aspects of Intellectual Property Rights (WT/MIN(22)/30); a Decision on the E-commerce Moratorium and Work Programme (WT/MIN(22)/32); and an Agreement on Fisheries Subsidies (WT/MIN(22)/33).

38. WTO, *Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics* (June 17, 2022), WTO Doc. WT/ MIN(22)/31, WT/L/1142.

39. WTO, *Ministerial Decision on the Agreement on Trade-related Aspects of Intellectual Property Rights* (June 22, 2022), WTO Doc. WT/ MIN(22)/30, WT/L/1141.

40. WTO, *supra* note 38, ¶ 1.

41. *Id.* ¶ 3–4.

42. *Id.* ¶ 7.

43. *Id.* ¶ 8.

COVID-19 and future pandemics.⁴⁴ Finally, Members took note of the work undertaken by the WTO Secretariat, including their collaboration with other international organisations—as shall be discussed in the next section.⁴⁵

The Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics was a culmination of work conducted in line with one of the core functions of the WTO as a permanent forum for negotiations among its Members.

D. Other Trade Facilitation Measures

Other than transparency initiatives, regulatory approvals and cooperation, and enhanced multilateralism in Members' response to the pandemic, Members adopted other trade facilitative measures. These included expediting custom and transit procedures by cutting the red tape for essential goods,⁴⁶ relaxing some trade-related IP restrictions,⁴⁷ establishing new (temporary) rules on telemedicine, and supplying essential medicines and equipment like ventilators.⁴⁸ Moreover, with a view to increase access to and production of COVID-19 vaccines within their territories, Members applied or developed innovative patent pooling activities in relation to COVID-19 vaccines.⁴⁹ Similarly, the WTO, at times in cooperation with other stakeholders, was active in efforts aimed at not only ramping up

44. *Id.* ¶ 17.

45. *Id.* ¶ 27–28.

46. See WTO, *The TRIPS Agreement and COVID-19: Information Note*, 13 (Oct. 15, 2020), https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf.

47. See WTO, *supra* note 32.

48. See Press Releases, Indian Ministry of External Aff., India Offers Support for Africa to Fight the Omicron Variant (Nov. 29, 2021), https://www.mea.gov.in/press-releases.htm?dtl/34546/India_offers_support_for_Africa_to_fight_the_Omicron_variant.

49. See Ting-Wei (Alex) Chiang & Xiaoping Wu, *Innovation And Patenting Activities Of COVID-19 Vaccines In WTO Members: Analytical Review Of Medicines Patent Pool (MPP) COVID-19 Vaccines Patent Landscape (VAXPAL)*, WTO Staff Working Paper ERSD-2022-01 (Jan. 18, 2022), at 9–10, https://www.wto.org/english/res_e/reser_e/ersd202201_e.pdf (discussing activities that may help support practical assessments as to potential options within and beyond the current TRIPS framework to promote equitable access to COVID-19 vaccines).

vaccine production but also guaranteeing vaccine equity.⁵⁰ These efforts are highlighted in the next section.

III. THE (NEW) ROLE OF THE WTO IN VACCINE DISTRIBUTION AND EQUITY

The development of a preventive COVID-19 vaccine is without a doubt the most rapid development of a vaccine in history.⁵¹ Among other reasons, this is attributable to the unprecedented cooperation between states, IGOs, NGOs, and multinational corporations alike. Such cooperation saw heavy investment of resources—financial, technical, or otherwise—to expedite the production of a safe, quality vaccine with significant efficacy.⁵² Though the WHO only characterised COVID-19 as a pandemic on March 11, 2020, it had exactly one month prior indicated the possibility of the first vaccine being ready in 18 months.⁵³ Within 10 months of that prediction, however, the first vaccine—Pfizer/BioNtech—was approved for use by the United

50. See Dir. Gen. Ngozi Okonjo-Iweala, *Chair Summary following “COVID-19 and Vaccine Equity: What Can the WTO Contribute?”*, WTO (Apr. 14, 2021), https://www.wto.org/english/news_e/spno_e/spno7_e.htm (explaining the efforts to increase access and production of the COVID-19 vaccine).

51. Glassman et al., *supra* note 5, at 2.

52. See OECD, *Enhancing Public Trust in COVID-19 Vaccination: The Role of Governments* (May 10, 2021), https://read.oecd-ilibrary.org/view/?ref=1094_1094290-a0n03doefx&title=Enhancing-public-trust-in-COVID-19-vaccination-The-role-of-governments (discussing the unprecedented global cooperation necessary for the rapid development of the COVID-19 vaccine).

53. See Dir. Gen. Tedros Adhanom Ghebreyesus, WHO, WHO Director-General’s Remarks at the Media Briefing on 2019-Ncov on 11 February 2020 (Feb. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-remarks-at-the-media-briefing-on-2019-ncov-on-11-february-2020> (statement by WHO announcing a possible vaccine in 18 months on Feb. 11, 2020); Dir. Gen. Ghebreyesus, *supra* note 8 (statement by WHO characterizing COVID-19 as a pandemic).

Kingdom,⁵⁴ and later the European Union⁵⁵ and the USA.⁵⁶ By the end of 2020, the WHO had listed the Pfizer/BioNtech vaccine for emergency use.⁵⁷ As of June 2022, nine vaccines had obtained Emergency Use Listing (EUL) from the WHO, with more than five others pending assessment.⁵⁸

The manufacture of the COVID-19 vaccine was underpinned by globally integrated supply chains, thus making vaccine production dependent on efficiency and efficacy in the flow of goods within the supply chains.⁵⁹ Measures (deliberate or otherwise) that delayed or prevented the smooth flow of essential vaccine inputs, therefore, negatively impacted the global supply and distribution of vaccines.

As previously elaborated, the COVID-19 pandemic sparked (knee-jerk) reactions from countries which had serious effects on world trade, not only triggering trade rules but also attracting the attention of the WTO. Similar logic applies when one considers

54. See Press Release, UK Medicines and Healthcare Products Regulatory Agency, Regulatory Approval of Pfizer/BioNtech (Dec. 2, 2020), <https://www.gov.uk/government/publications/regulatory-approval-of-pfizer-biontech-vaccine-for-covid-19>.

55. See European Commission Press Release, The Commission, European Commission Authorises First Safe and Effective Vaccine Against COVID-19 (Dec. 21, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2466 (announcing approval of first COVID-19 vaccine in the European Union).

56. See Press Release, U.S. Food & Drug Admin., FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> (announcing approval of the first COVID-19 vaccine in the United States).

57. See Press Release, WHO, WHO Issues Its First Emergency Use Validation for a COVID-19 Vaccine and Emphasizes Need for Equitable Global Access (Dec. 31, 2020), <https://www.who.int/news/item/31-12-2020-who-issues-its-first-emergency-use-validation-for-a-covid-19-vaccine-and-emphasizes-need-for-equitable-global-access> (announcing WHO's first issuing of an emergency use validation for a COVID-19 vaccination).

58. See WHO, STATUS OF COVID-19 VACCINES WITHIN WHO EUL/PQ EVALUATION PROCESS (Mar. 2, 2022), https://extranet.who.int/pqweb/sites/default/files/documents/Status_COVID_VAX_02March2022.pdf (documenting the nine vaccines that had obtained Emergency Use Listing and over five more pending assessment)).

59. See OECD, *Using Trade to Fight COVID-19 Manufacturing and Distributing Vaccines* 5 (Feb. 11, 2021), https://read.oecd-ilibrary.org/view/?ref=1060_1060354-ie4a355ojd&title=Using-trade-to-fight-COVID-19-Manufacturing-and-distributing-vaccines. (discussing the trade and trade policy considerations behind access to the goods needed to produce, deliver and administer COVID-19 vaccines).

the (new) role of the WTO in vaccine distribution and equity. Access to international markets affords the opportunity to, among other things, source for raw materials, technology, and other associated manufacturing components that are essential to the manufacture and distribution of vaccines. With vaccine inputs, therapeutics, pharmaceuticals, diagnostics, and other products critical to combating COVID-19 being traded across borders, trade-related concerns come to the fore. In order to ensure that trade in these essential products is smooth (i.e., open and efficient), the WTO must play a critical role, working to reduce export restrictions and supply chain barriers and working to facilitate logistics and customs procedures.

The protectionism and imposition of export restrictions discussed earlier, coupled with some of the cumbersome border procedures and standards that existed pre-COVID, hampered vaccine production and distribution.⁶⁰ In a study published in 2021 that focused on vaccine production and tariffs on vaccine inputs, it was found that tariffs on critical products to manufacture vaccines were high.⁶¹ Moreover, of the 27 top manufacturers considered in the study, 23 were found to have at least five choke points.⁶² Ultimately, this threatened (or weakened) regional and global value chains. For example, in a workshop on “Enhancing Border Management in East and Southern African (ESA) Region amidst the ongoing COVID-19 pandemic” held in December 2021 by the IMPACCT Inter-Agency initiative, it was recognized that “bottlenecks to import medicines and medical equipment during the response to natural disasters, complex emergencies or disease outbreaks remain a challenge that needs to be addressed in anticipation.”⁶³ Particularly, the top five constraints identified in relation to importation of COVID-19 medical equipment in the ESA region were:

60. *See id.* at 12.

61. WTO, *Covid-19 Vaccine Production and Tariffs on Vaccine Inputs* 1 (Oct. 8, 2021), https://www.wto.org/english/tratop_e/covid19_e/vaccine_production_report_e.pdf.

62. *Id.* at 3.

63. Virginie Bohl, Coordinator of IMPACCT, *Enhancing the Movement of Medicines and Medical Equipment in East and Southern African Region Amidst COVID-19 Pandemic* (Dec. 9, 2021) (meeting minutes available at https://vosocc.unocha.org/GetFile.aspx?file=114608_Report__Importation_of_MME_in_ESA__7Dec2021.pdf).

- i. Documentation requirements;
- ii. Importation and tax exemptions rules and regulations;
- iii. Country of origin and manufacture restrictions (relating to quality);
- iv. Port of entry facilities constraints/bottlenecks (cold chain facilities, ambient for regular pharmaceuticals, etc.), infrastructure, staff, and handling equipment to manage the port during the crisis; and
- v. Minimum remaining shelf life at the arrival.⁶⁴

Additionally, vaccine-producing countries like India, the USA, and European countries imposed export restrictions on essential vaccine manufacturing components and raw materials needed for production.⁶⁵ To further compound the situation, some developed countries, comprising less than 20% of the world's population, hoarded over 60% of the world's vaccines before they were even approved for use.⁶⁶ Some developed countries also ordered vaccines in excess of what was required for their population, only to later export the excess to developing and least developed countries on short notice.⁶⁷ Such moves meant that in some instances, vaccines were exported to developing and least developed countries close to their expiration date.⁶⁸ As previously outlined, in order to administer the vaccine properly, the

64. Rashid Subira, Transport and Customs Advisor of MSF OCB, IMPACCT Member, Enhancing the Movement of Medicines and Medical Equipment in East and Southern African Region Amidst COVID-19 Pandemic (Dec. 9, 2021) (meeting minutes available at https://vosocc.unocha.org/GetFile.aspx?file=114608_Report___Importation_of_MME_in_ESA___7Dec2021.pdf).

65. Ralf Peters and Divya Prabhakar, *Export Restrictions Do Not Help Fight COVID-19*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT [UNCTAD] (Jun. 11, 2021), <https://unctad.org/news/export-restrictions-do-not-help-fight-covid-19>.

66. *Id.*

67. The Development Podcast, 'Absolutely Unacceptable' Vaccination Rates in Developing Countries, WORLD BANK GROUP (Aug. 3, 2021), <https://www.worldbank.org/en/news/podcast/2021/07/30-absolutely-unacceptable-vaccination-rates-in-developing-countries-the-development-podcast>.

68. Al Jazeera, *Nigeria Destroys More Than 1 Million Expired COVID Vaccines*, AL JAZEERA (Dec. 22, 2021), <https://www.aljazeera.com/news/2021/12/22/nigeria-destroys-more-than-1-million-expired-covid-vaccines>.

sensitivity of COVID-19 vaccines required elaborate infrastructure, resources, and logistics to be in place in advance of their reception in a country. Such elaborate architecture, especially in the case of developing and least-developed countries, calls for predictability and reliability in supply chains. Ultimately, late exportation led developing and least-developed countries to destroy some of the vaccines because they had to plan on short notice.

With vaccine manufacturing being concentrated in a limited number of high- and middle-income countries, measures such as export restrictions hampered equitable distribution of vaccines or essential vaccine manufacturing components and raw materials. This not only derailed vaccine production in other countries, but, even worse, led to developing and least-developed countries missing their vaccination targets.⁶⁹ Vaccine inequity poses a serious threat to public health and the global economy. As DG Tedros Adhanom stated, “no one is safe, until everyone is safe.”⁷⁰ Thus, until vaccines are available to individuals in the remotest of areas and with the least capacity to access vaccines, no one will be safe since the virus may continue mutating and spreading. Moreover, given that economic recovery is people-dependent⁷¹, global economic recovery cannot be rapid where vaccine inequity persists. For example, the Global Dashboard for Vaccine Equity found that an acceleration in scaling up manufacturing and sharing enough vaccine doses with low-income countries could have added \$38 billion to their gross domestic product forecast for 2021 if they had similar vaccination rates as high-income countries.⁷² In this context, the WTO’s (new) role in ramping up

69. Ralf Peters & Divya Prabhakar, *supra* note 65.

70. Dir. Gen. Tedros Adhanom Ghebreyesus & Ursula von der Leyen, *A Global Pandemic Requires a World Effort to End It – None of Us Will Be Safe Until Everyone Is Safe*, WHO (Sep. 30, 2020), <https://www.who.int/news-room/commentaries/detail/a-global-pandemic-requires-a-world-effort-to-end-it-none-of-us-will-be-safe-until-everyone-is-safe>.

71. *Pandemic Recovery Must Put People First: UN Secretary-General*, U.N. NEWS (Feb. 2, 2022), <https://news.un.org/en/story/2022/02/1112472>.

72. *Impact of Vaccine Inequity on Economic Recovery*, UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP] DATA FUTURES PLATFORM (Feb. 2022), <https://data.undp.org/vaccine-equity-archive/impact-of-vaccine-inequity-on-economic-recovery-2022/>.

vaccine production and advocating for vaccine equity is considered below.

A. The Role of the WTO Secretariat

Common to the role played by DG Lamy at the beginning of the 2008 financial crisis was the call for transparency, cooperation, and a combined effort by DG Azevêdo and DG Ngozi in order to create a coherent response to the pandemic.

DG Azevêdo's call for a global solution became a constant refrain in speeches and at meetings with other IGOs. He would emphasize the co-dependency between countries, urging that no one country is self-sufficient regardless of its level of advancement or power, and that through trade, basic and essential goods and services are produced and transferred efficiently.⁷³ Projecting the existing and potential effects that the pandemic would have on trade, he stressed the need for timely transparency on measures adopted by countries, particularly in relation supply of goods, especially essential medical goods, food-related trade measures, levels of food production, consumption and stocks, as well as food prices.⁷⁴ For example, at the beginning of the pandemic, DG Azevêdo and the IMF Managing Director, Kristalina Georgieva issued a statement stressing that the cooperation unfolding global financial crisis in 2008 greatly assisted in the recovery process and that trade restrictions deepened and prolonged the Great Depression of the 1930s.⁷⁵ Similar statements coloured the remainder of his term and, often, were made in coordination with states, and other IGOs such as

73. WTO, *Azevêdo Sees Sharp Fall in Trade, Calls for Global Solutions To COVID-19 Crisis* (Mar. 25, 2020), https://www.wto.org/english/news_e/news20_e/dgra_25mar20_e.htm?utm_source=yxnews&utm_medium=desktop&utm_referrer=https%2525253A%2525252F%2525252Fyandex.com%2525252Fnews.

74. WTO, *COVID-19 and World Trade*, YOUTUBE (Mar. 25, 2020), https://www.youtube.com/watch?v=v_-ZY1QAr2g.

75. WTO, *IMF and WTO Heads Call for Lifting Trade Restrictions on Medical Supplies and Food* (April 24, 2020), https://www.wto.org/english/news_e/news20_e/igo_15apr20_e.htm.

the G7,⁷⁶ the G20,⁷⁷ the Ottawa Group,⁷⁸ FAO,⁷⁹ WHO,⁸⁰ ICC,⁸¹ and the WCO.⁸²

When she assumed office, DG Ngozi picked up from DG Azevêdo, adding to his call a direct message to vaccine manufacturers.⁸³ DG Ngozi issued statements prepared with other IGOs but also, using her experience and expertise,⁸⁴ used her office to facilitate Members' work on cooperation, transparency, and vaccine equity.⁸⁵ She was categorical in urging WTO Members to reduce export restrictions and supply chain

76. WTO, *WTO DG Welcomes G7 Leaders' Statement on Covid-19* (Mar. 17, 2020), https://www.wto.org/english/news_e/news20_e/dgra_17mar20_e.htm.

77. WTO, *DG Azevêdo Welcomes G20 Pledge on COVID-19 Response and Economic Recovery* (March. 30, 2020), https://www.wto.org/english/news_e/news20_e/dgra_26mar20_e.htm; WTO, *DG Azevêdo Welcomes G20 Ministers' Commitment to Notify WTO of COVID-19 Related Trade Measures* (March. 30, 2020), https://www.wto.org/english/news_e/news20_e/dgra_30mar20_e.htm.

78. WTO, *DG Azevêdo to Ottawa Group: Cooperation at The WTO Would Help the Global Economy Recover From COVID-19* (June 15, 2020), https://www.wto.org/english/news_e/news20_e/dgra_16jun20_e.htm.

79. WTO, *Agency Chiefs Issue Joint Call to Keep Food Trade Flowing in Response to COVID-19* (March 31, 2020), https://www.wto.org/english/news_e/news20_e/igo_26mar20_e.htm.

80. *Id.*

81. WTO, ICC, *WTO Heads Urge Business Dialogue to Inform Response to Trade Fallout From COVID-19* (Apr. 2, 2020), https://www.wto.org/english/news_e/news20_e/igo_02apr20_e.htm.

82. *Id.* (Also, the WTO, in cooperation with the WCO, have encouraged and supported the use of priority lanes for road transport, known as "Green Lanes," established at certain border crossings to safeguard international road transport supply chains for certain categories of goods, such as foodstuffs, medical equipment, certain categories of essential raw materials, etc.).

83. WTO, *DG Calls on COVID-19 Vaccine Manufacturers to Increase Production in Developing Countries* (Mar. 9, 2021), https://www.wto.org/english/news_e/news21_e/dgno_09mar21_e.htm.

84. WTO, *WTO Director-General: Ngozi Okonjo-Iweala*, https://www.wto.org/english/thewto_e/dg_e/dg_e.htm (DG Ngozi is a global finance expert, an economist and international development professional, and was formerly the Chair of the Board of Gavi, the Vaccine Alliance).

85. WTO, *COVID-19 and World Trade*, https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm (last visited Oct 13, 2021) (indicating trade-related information such as actions and initiatives by DG Ngozi and the response of the multilateral system in the context of the COVID-19 pandemic).

barriers, and to compromise in order to arrive at points of convergence on matters vaccines.⁸⁶

Moreover, having received support from WTO Members, DG Ngozi worked with associations, manufacturers, producers, and distributors of vaccines and essential medical suppliers to ramp up vaccine production and secure vaccine equity. The DG convened multiple meetings with vaccine manufacturers, suppliers, and other industry stakeholders, who were keen to identify chokepoints and supply constraints that limited vaccine manufacture, distribution, and equity.⁸⁷ As a result, the WTO Secretariat published reports on COVID-19 vaccine production bottlenecks and chokepoints with a view to sharing information, increasing transparency, and highlighting trade facilitating measures.⁸⁸ Additionally, at the meetings with vaccine manufacturers, DG Ngozi asked that the manufacturers enhance cooperation by prioritising technology and know-how transfer.⁸⁹ Urging transparency in contract agreements and product pricing, DG Ngozi was active in ensuring that all relevant stakeholders were consulted and involved in order to rapidly arrive at a mutually beneficial solution.⁹⁰ Noting the positive results of these efforts, DG Ngozi observed that large vaccine manufacturers such as Pfizer had cooperated with other vaccine manufacturers to lessen the expense of vaccines and increase capacity building efforts in countries such as South Africa.⁹¹

A common refrain by DG Ngozi was that “Vaccine policy is trade policy, [and] trade is about people.”⁹² Thus, her firm stance was to ensure that the WTO acted as a force multiplier in meeting

86. Summary following “COVID-19 and Vaccine Equity: What Can the WTO Contribute?” WTO (Apr. 14, 2021), https://www.wto.org/english/news_e/spno_e/spno7_e.htm.

87. *Id.*

88. WTO, *Indicative List of Trade-Related Bottlenecks and Trade-Facilitating Measures on Critical Products to Combat COVID-19* (Oct. 8, 2021), https://www.wto.org/english/tratop_e/covid19_e/bottlenecks_update_oct21_e.pdf.

89. *Supra* note 85.

90. *Id.*

91. WTO, *DG Okonjo-Iweala: Vaccine Policy Key to Sustainable Economic and Trade Recovery* (Sep. 23, 2021), https://www.wto.org/english/news_e/spno_e/spno15_e.htm.

92. *E.g., Id.*; WTO, *Public Forum 2021: Introductory Remarks by DG Okonjo-Iweala* (Sep. 23, 2021), https://www.wto.org/english/news_e/spno_e/spno16_e.htm.

the goals of increased vaccine manufacture, distribution, and equity by supporting the private sector to produce, and supporting collaborative efforts such as COVAX to distribute more.⁹³ It remains to be seen whether her efforts to create networks will be leveraged beyond the pandemic for other work at the WTO.

1. Trade Facilitation Agreement

In the meantime, some WTO Members equally called for consideration of practical ways to enhance a coordinated response to the pandemic.⁹⁴ For example, some WTO Members including Australia, Canada and Norway supported the DG's move by urging for the consideration of practical ways to enhance production capacity and licensing of technologies through cooperation with the private sector.⁹⁵ Similar calls were made by the European Union, urging the support of the private sector through the DG.⁹⁶ Additionally, Brazil and the USA urged the National Trade Facilitation Committee to host informal meetings with the private sector to facilitate direct feedback regarding on-the-ground implementation of the Agreement on Trade Facilitation, such as private sector experience or existing challenges.⁹⁷

2. Trade Policy Review

Moreover, the enhanced COVID-19 Trade Policy Review (TPR) also proved useful in WTO's role in vaccine distribution and equity. Through the TPR, there was enhanced transparency on

93. *Supra* note 91.

94. Communication from Australia, Canada, Chile, Colombia, New Zealand, Norway, and Turkey to the WTO General Council, *Enhancing the Role of the World Trade Organization in the Global Effort Towards the Production and Distribution of COVID-19 Vaccines and Other Medical Products*, §1.1, WTO Doc. WT/GC/230 (Mar.19, 2021).

95. *Id.* §1.3.

96. Communication from the European Union to WTO General Council, *Urgent Trade Policy Responses to the COVID-19 Crisis*, §1.4, WTO Doc. WT/GC/ 231, (Jun.4, 2021).

97. Communication from Brazil and the United States to the Committee on Trade Facilitation, *Proposal to Formalize Engagement with the Private Sector*, §2, WTO Doc. G/TFA/W/42/Rev.1, (Sep. 27, 2021).

the implementation of trade liberalizing and derestriction of trade restricting measures related to vaccines, as well as an overview of the developments related to vaccine distribution and equity.⁹⁸ The WTO Secretariat also conducted COVID-19-related research and published reports and documents. The WTO Secretariat published an indicative list compiling information on the critical inputs for the manufacture, distribution, and administration of COVID-19 vaccines.⁹⁹ The list was produced in collaboration with the Asian Development Bank, the Organisation for Economic Cooperation and Development, the World Customs Organization, some COVID-19 vaccine manufacturers, researchers Chad Bown and Chris Rogers, the Coalition for Epidemic Preparedness Innovations, and DHL.¹⁰⁰ The document was first compiled by the WTO Secretariat as a working document to facilitate discussions at the WTO COVID-19 Vaccine Supply Chain and Regulatory Transparency Symposium.¹⁰¹ At that event, several organisations contributed with inputs to improve the indicative list of critical inputs for COVID-19 vaccines.¹⁰² Moreover, building on WTO Secretariat COVID-19 related Information Notes, and the IMF Staff Discussion Note – A Proposal to End the COVID-19 Pandemic, the WTO and the IMF launched a Vaccine Trade Tracker that was used as a data source on the trade and supply of COVID-19 vaccines by product, economy, and arrangement type.¹⁰³ The Tracker proved to be an essential data-collection and information-sharing tool.

98. Annual Report by the Director-General, *Overview of Developments in the International Trading Environment*, §§ 1 ¶¶ 2–3; §§ 3.104, 3.157, WTO Doc. WT/TPR/OV/24 (Nov.22, 2021).

https://www.wto.org/english/news_e/news21_e/OV24.pdf (last visited Mar 23, 2022).

99. *WTO Issues Joint Indicative List of Critical Inputs for COVID-19 Vaccines*, WTO (Jul. 13, 2021), https://www.wto.org/english/news_e/news21_e/covid_13jul21_e.htm.

100. *Id.*

101. *Id.*

102. *Id.*

103. *WTO-IMF COVID-19 Vaccine Trade Tracker*, WTO, https://www.wto.org/english/tratop_e/covid19_e/vaccine_trade_tracker_e.htm (last visited Oct. 14, 2021).

3. Non-Governmental Organisations

Additionally, Article V:2 of the WTO Agreement, relating to the WTO's relations with NGOs, provides that the General Council may make appropriate arrangements for consultations and cooperation with other NGOs that have responsibilities related to those of the WTO.¹⁰⁴ Pursuant to this, in 1996, the General Council developed guidelines for arrangements on relations with NGOs.¹⁰⁵ Such arrangements are commonly termed "coherence."¹⁰⁶ The guidelines recognised cooperation with NGOs as a "valuable resource" in achieving, among other things, greater transparency and enriching public debate on WTO-related issues.¹⁰⁷ Consequently, over the years, the WTO has engaged in regular dialogue and cooperation with NGOs who sometimes enrich public debate on ongoing negotiations by providing information to WTO Members and issuing public statements.¹⁰⁸ Perhaps the most prominent collective engagement with NGOs is the annual WTO Public Forum, which offers government officials, NGOs, scholars, and others a platform for debate and discussions on trade-related topics.¹⁰⁹

During the COVID-19 pandemic, NGOs issued joint statements, letters, and papers calling on the WTO and its Membership to take action to mitigate the pandemic, such as, through the TRIPS waiver, by advocating for open and transparent contracting processes, and by engaging with other IOs to put in place mechanisms to fight the pandemic.¹¹⁰

104. Marakesh Agreement Establishing the World Trade Organization, art. V:2, Apr. 15, 1994, 1867 U.N.T.S. 154. [hereinafter Marakesh Agreement].

105. See World Trade Org. General Council, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WTO Doc. WT/L/162 (Jul. 23, 1996), https://www.wto.org/english/forums_e/ngo_e/162.pdf.

106. *The WTO and Other Organizations*, WTO, https://www.wto.org/english/thewto_e/coher_e/coher_e.htm (last visited Oct. 14, 2021).

107. See World Trade Org. General Council, *supra* note 105, at ¶ 4.

108. *NGOs and the WTO*, WTO, https://www.wto.org/english/forums_e/ngo_e/ngo_e.htm (last visited Jan 3, 2022).

109. See *id.*

110. See, e.g., Ngozi Okonjo-Iweala (WTO Director-General) & Dacio Castillo (Chair of the General Council), Civil Society Open Letter dated Dec. 8, 2021 to the Chair of TRIPS Council (Dec. 8, 2021), https://www.wto.org/english/tratop_e/covid19_e/cso_letter_dec21_e.pdf.

Additionally, NGOs engaged with the WTO by participating in discussions aimed at enhancing the rollout of a global vaccination programme.¹¹¹

B. The Role of the WHO, WIPO, WTO Trilateral Cooperation

The WTO has also had collective engagements with the World Intellectual Property Organization (WIPO) and WHO. Before the pandemic, the WTO already had existing relationships with the two IGOs.¹¹² The three organisations cooperate on a range of issues related to trade, intellectual property, and health.¹¹³ For instance, the “WHO has observer status in the Committee on Sanitary and Phytosanitary (SPS) Measures and the Technical Barriers to Trade (TBT) Committee, and it has ad hoc observer status in the Council on Trade-related Aspects of Intellectual Property Rights (TRIPS) and the Council for Trade in Services.”¹¹⁴ Together, all three organisations form a trilateral cooperation on intellectual property where they cooperate at the interface of intellectual property, trade, and public health.¹¹⁵

During the pandemic, the trio joined efforts towards issues around public health. For example, the trio:

- i. issued joint statements calling for vaccine equity and intensified cooperation in support of

111. See *Global Business/Civil Society Response to COVID-19*, WTO, https://www.wto.org/english/tratop_e/covid19_e/covid19_business_e.htm (last visited Jan. 3, 2022) (referring to a WTO page listing hyperlinks to various statements issued by the business community and civil society).

112. See *The WTO and World Intellectual Property Organization*, WTO, https://www.wto.org/english/thewto_e/coher_e/wto_wipo_e.htm (last visited Sept. 9, 2022) (evidencing the mutually supportive relationship dating back to the Uruguay Round); see also WTO & WHO, *WTO Agreements and Public Health: A Joint Study by the WHO and the WTO Secretariat* (2002), https://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf.

113. See *Trilateral Cooperation on Public Health, Trade, and Intellectual Property*, WTO, https://www.wto.org/english/tratop_e/trips_e/who_wipo_wto_e.htm (last visited Sept. 8, 2022) (evidencing the purpose of these three organizations collaborating to deal with multi-dimensional challenges in the public health sector).

114. *Work With Other International Organizations: The WTO and World Health Organization (WHO)*, WTO, https://www.wto.org/english/thewto_e/coher_e/wto_who_e.htm (last visited Oct. 12, 2021).

115. See *Trilateral Cooperation*, *supra* note 113.

- access to medical technologies worldwide to tackle COVID-19;
- ii. organised practical, capacity-building workshops for developing and least-developed countries aimed at improving information sharing on developments related to the pandemic as they occur and responses to achieve equitable access to COVID-19 health technologies; and
 - iii. launched an update of the extract “Integrated health, trade and IP approach to respond to the COVID-19 pandemic.”¹¹⁶

Moreover, the DGs of the trio “agreed to implement a joint platform for tripartite technical assistance to Member governments relating to their needs for COVID-19 medical technologies.”¹¹⁷

116. WHO, WIPO, WTO *Update Information Note on Integrated Health, Trade, IP Response to COVID-19*, WTO (Oct. 22, 2021), https://www.wto.org/english/news_e/news21_e/trip_22oct21_e.htm; see also World Trade Org., *Promoting Access to Medical Technologies and Innovation* (2nd ed. 2021), available at https://www.wto.org/english/res_e/booksp_e/who-wipo-wto_2020_e.pdf (detailing the impact of COVID-19 on health systems and responses at the global level); see also *Joint News Release*, *infra* note 117; *Joint Release by WHO, WTO and WIPO: Directors General of WHO, WIPO and the WTO Agree on Intensified Cooperation in Support of Access to Medical Technologies Worldwide to Tackle the COVID-19 Pandemic*, WIPO (June 24, 2021), https://www.wipo.int/pressroom/en/articles/2021/article_0006.html. See generally WHO, WIPO, WTO *Workshop on Innovation in, and Access to, COVID-19 Technologies Virtual*, WIPO (Sept. 27, 2021), https://www.wipo.int/meetings/en/details.jsp?meeting_id=65948 (last visited Sept. 29, 2022) (conceptualizing the goal of intellectual workshops created by the trilateral leaders). See also *WTO Launches Virtual Course on Trade and Public Health with Special Focus on COVID-19*, WTO (May 3, 2021), https://www.wto.org/english/news_e/news21_e/heal_03may21_e.htm (explaining the virtual course created to supplement the WHO-WIPO-WTO study on Promoting Access to Medical Technologies and Innovation).

117. *Joint Release by WHO, WTO and WIPO: Directors General of WHO, WIPO and the WTO Agree on Intensified Cooperation in Support of Access to Medical Technologies Worldwide to Tackle the COVID-19 Pandemic*, WIPO (June 24, 2021), https://www.wipo.int/pressroom/en/articles/2021/article_0006.html.

C. *The Role of the Multi-Lateral Leaders Task Force on COVID-19 Vaccines Therapeutics and Diagnostics for Developing Countries*

To achieve greater coherence in fighting the COVID-19 pandemic, the WTO worked with the World Bank, the IMF, and the WHO by creating the Multi-Lateral Leaders Task Force on COVID-19 Vaccines, Therapeutics, and Diagnostics for Developing Countries (the MLT Task Force) in mid-2021.¹¹⁸ This joint initiative was formed as a “war room”¹¹⁹ to help track, coordinate, and advance the delivery of COVID-19 health tools to developing countries and to bring together various stakeholders and national leaders to eliminate roadblocks in the way of this objective.” MLT Task Force meetings were held at the technical level to discuss strategies to improve access to COVID-19 health tools.¹²⁰ The Task Force also undertook several joint initiatives such as issuing joint statements;¹²¹ launching a new website aimed at serving as a platform for information on access to COVID-19 vaccines, therapeutics, and diagnostics and on the activities of the organisations in tackling the pandemic;¹²² and engaging with vaccine manufacturers and other private

118. See *Task Force on COVID-19 Vaccines, Therapeutics, and Diagnostics*, <https://www.covid19taskforce.com/en/programs/task-force-on-covid-19-vaccines> (last visited Oct. 14, 2021).

119. *Joint Statement by the Heads of the World Bank Group, International Monetary Fund, World Health Organization, and World Trade Organization on the First Meeting of the Task Force on COVID-19 Vaccines, Therapeutics and Diagnostics for Developing Countries*, WORLD BANK GRP. (June 30, 2021), <https://www.worldbank.org/en/news/statement/2021/06/30/joint-statement-on-first-meeting-of-task-force-on-COVID19-vaccine-therapeutics-and-diagnostics-for-developing-countries>.

120. *International Organizations, Manufacturers Agree to Intensify Cooperation to Deliver COVID-19 Vaccines: Fourth Meeting of the Multilateral Leaders Task Force on Scaling COVID-19 Tools*, WORLD BANK GRP. (Sept. 16, 2021), <https://www.worldbank.org/en/news/statement/2021/09/16/international-organizations-manufacturers-agree-to-intensify-cooperation-to-deliver-covid-19-vaccines>.

121. See generally *Task Force on COVID-19 Vaccines, Therapeutics, and Diagnostics*, *supra* note 118 (referring to a list of joint statements that had been issued by the MLT Task Force).

122. *IMF, World Bank, WHO, WTO Launch Joint Vaccine Information Website*, WTO (July 30, 2021), https://www.wto.org/english/news_e/news21_e/igo_28jul21_e.htm#:~:text=The%20heads%20of%20the%20International,the%20organizations%20in%20tackling%20the.

institutions to highlight supply chain issues and cross border trade flow restrictions and other trade obstacles in a bid to enhance vaccine production, distribution, and equity.¹²³

D. Ministerial Decision on the Agreement on Trade Related Aspects of Intellectual Property (TRIPS Waiver)

On October 2, 2020, India and South Africa requested that the Council for TRIPS recommend to the General Council a waiver for the implementation, application, and enforcement of Sections 1, 4, 5, and 7 of Part II of the TRIPS Agreement to remove potential intellectual property rights barriers and to guarantee unhindered global sharing of technology and know-how to rapidly prevent, contain, or treat COVID-19.¹²⁴ At the time, there were concerns that some intellectual property rights were hurdles in the path toward efficient and economical production, distribution, and access to COVID-19 vaccines, therapeutics, diagnostics, and other pharmaceutical products.¹²⁵ Related to this, there were concerns that the rigidity in the TRIPS Agreement would pose difficulties to developing and least developed countries that seek to use them to secure an adequate supply of pharmaceutical products within their territories given

123. *Terms of Reference Page Describing the Multilateral Leaders Task Force on COVID-19's Goal, Membership, Priority Areas, and Overall Coordination*, Imf, World Bank Grp., WorldHealthOrg., WorldTradeOrg., <https://www.covid19taskforce.com/en/programs/task-force-on-covid-19-vaccines/about/#2> (last visited Sept. 20, 2022); see generally *References Page with Information and Resources to the Multilateral Leaders Task Force on COVID-19*, Imf, World Bank Grp., World Health Org., World Trade Org., <https://www.covid19taskforce.com/en/programs/task-force-on-covid-19-vaccines/resources> (last visited Sept. 20, 2022).

124. Council for Trade-Related Aspects of Intell. Prop. Rights, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19*, WTO Doc. IP/C/W/669, at 2–3 (Oct. 2, 2020).

125. Susan Decker & Christopher Yasiejko, *World War II-Style Mobilization Order May Carry Risks* Bloomberg (Mar. 23, 2020), <https://www.bloomberg.com/news/articles/2020-03-20/world-war-ii-style-production-may-carry-legal-risks-for-patriots> (reporting on the varying legal issues related to using patented medical and/or pharmaceutical products, such as N95 respirators, infectious disease diagnostic tests, and others). See also Morgan Watkins, *Kentucky Gov. Andy Beshear Calls on 3M to Release Patent for N95 Respirator amid Pandemic*, Louisville Courier Journal (Apr. 3, 2020), <https://www.courierjournal.com/story/news/2020/04/03/beshear-calls-3-m-release-patent-n-95-respirator-amid-pandemic/5112729002/>.

the inordinate global demand-supply gap.¹²⁶ It is also important to recall that at the time the request for the waiver was made, not only were some countries still using the export restrictions discussed earlier, but also, no vaccines capable of providing active acquired immunity against COVID-19 had been developed.¹²⁷ Thus, the TRIPS waiver was proposed by developing and least-developed countries as a means of relaxing some intellectual property rights to guarantee unimpeded and timely access to COVID-19 vaccines, therapeutics, diagnostics, and other pharmaceutical products as they are developed.

The initial proposal sparked extensive discussions and comments from Members, which saw the co-sponsors submit a revised draft text on 25 May 2021 for the consideration of the Council for TRIPS.¹²⁸ Owing to the long-running negotiations since the revised proposal, negotiations on a potential waiver were discussed between South Africa, India, the USA, and the EU at the ministerial or senior official level with the involvement of DG Ngozi and DDG González.¹²⁹ These negotiations were aimed at developing a compromise text that would be agreeable to all WTO Members.¹³⁰ By March 2022, the four Members agreed on a solution that would apply for three or five years and would cover COVID-19 vaccines for an initial six months, and thereafter Members would reconsider the possibility of extending the coverage to tests and therapeutics.¹³¹ Notably, such a waiver would only apply to a “developing country Member that exported less than 10% of world exports of COVID-19 vaccine doses in 2021.”¹³²

126. Council for Trade-Related Aspects of Intell. Prop. Rights, *supra* note 124, ¶ 10.

127. *Id.* ¶ 4; Cong. Rsch. Serv., IF11551, Export Restrictions in Response to the COVID19Pandemic(Apr.23,2021),<https://crsreports.congress.gov/product/pdf/IF/IF11551>.

128. Council for Trade-Related Aspects of Intell. Prop. Rights, *supra* note 124, at 1–4.

129. Ashleigh Furlong, *Compromise Reached on COVID-19 Vaccine Intellectual Property Rights Waiver*, POLITICO (Mar.15, 2022), <https://www.politico.eu/article/compromise-reached-on-covid-19-vaccine-intellectual-property-rights-waiver/>; *see also Quad’s Outcome Document on IP COVID-19 Response Made Public*, World Trade Org. (May 3, 2022), https://www.wto.org/english/news_e/news22_e/trip_03may22_e.htm.

130. *Id.*

131. *Id.*

132. *Id.*

At MC12, the breadth and scope of the waiver narrowed as it developed.¹³³ Particularly, by consensus, Members agreed that eligible Members¹³⁴ need not require the proposed user of the subject matter of a patent to make efforts to obtain an authorization from the right holder as set out in TRIPS Article 31(b).¹³⁵ Moreover, through the TRIPS waiver, eligible Members were permitted to waive the requirement of TRIPS Article 31(f)¹³⁶ that requires that authorized use under TRIPS Article 31 be predominantly to supply its domestic market.¹³⁷ Furthermore, eligible Members were allowed to export any proportion of the products manufactured under the authorization in accordance with the TRIPS waiver to other eligible Members, including through international or regional joint initiatives aimed at ensuring the equitable access of eligible Members to the COVID-19 vaccine covered by the authorization.¹³⁸ Finally, Members agreed that the determination of adequate remuneration under Article 31(h)¹³⁹ may take into account the humanitarian and not-for-profit purpose of specific vaccine distribution programs aimed at providing equitable access to COVID-19 vaccines to support manufacturers in eligible Members in producing and supplying these vaccines at affordable prices for eligible Members.¹⁴⁰ In setting adequate remuneration in these cases, eligible Members were permitted to take into consideration existing good practices in instances of national

133. World Trade Organization, Ministerial Conference, Twelfth Session, *Ministerial Decision on the TRIPS Agreement*, WT/MIN(22)/30, WT/L/1141, at 1 (June 22, 2022).

134. *Id.* at 1 n.1 (noting that all developing country Members are eligible Members; however, developing country Members with existing capacity to manufacture COVID-19 vaccines are encouraged to make a binding commitment not to avail themselves of this Decision).

135. *Id.* at 1; see Marrakesh Agreement, Annex 1C.

136. *Ministerial Decision on the TRIPS Agreement*, *supra* note 133, at 1; see Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 39, at 333.

137. *Id.*

138. *Ministerial Decision on the TRIPS Agreement*, *supra* note 133, at 1–2.

139. *Id.* at 2; see Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 39, at 333.

140. *Ministerial Decision on the TRIPS Agreement*, *supra* note 133, at 2.

emergencies, pandemics, or similar circumstances.¹⁴¹ Members agreed to decide on the extension of the waiver to cover the production and supply of COVID-19 diagnostics and therapeutics no later than six months from the date of this Decision, which was June 17, 2022.¹⁴²

The waiver, as agreed, was received with mixed reactions,¹⁴³ with some arguing that the scope of the waiver was narrow and its content too thin whereas others argued that the flexibilities under the waiver were far-reaching and could potentially deter the innovation and invention that is stimulated by intellectual property discussions. By the time WTO Members agreed on the waiver, only 58 of the WHO's 194 Member States had attained 70% vaccination coverage in their countries with only 37% of healthcare workers in low-income countries have received a complete course of primary vaccination.¹⁴⁴ Even with the divergent views on the scope and efficacy of the waiver, as it takes effect, its utility is a subject that can only be evaluated with the benefit of time.

141. *Id.*

142. See *id.* at 2 (noting "no later than six months from the date of this Decision, Members will decide on its extension to cover the production and supply of COVID-19 diagnostics and therapeutics").

143. See *TRIPS Council Welcomes MC12 TRIPS Waiver Decision, Discusses Possible Extension*, WORLD TRADE ORGANIZATION (July 6, 2022), https://www.wto.org/english/news_e/news22_e/trip_08jul22_e.htm (noting many members welcomed the successful outcome of the 12th Ministerial Conference while other members argued that the waiver on COVID-19 vaccines falls short of their expectation); see also *Lack of a Real IP Waiver on COVID-19 Tools is a Disappointing Failure for People*, Medecins Sans Frontieres (June 17, 2022), <https://www.msf.org/lack-real-ip-waiver-covid-19-tools-disappointing-failure-people> (noting the Medecins Sans Frontieres' disappointment that a true intellectual property waiver covering all COVID-19 medical tools and including all countries could not be agreed upon); see generally *TRIPS Waiver: An Insufficient Multilateral Response. TRIPS Consistent National Actions Are Called For*, THE SOUTH CENTRE, <https://ipaccess.smeds.southcentre.int/wp-content/uploads/2022/06/SC-Statement-TRIPS-waiver-FINAL.pdf> (last visited Jul 10, 2022) (noting that a TRIPS waiver would irreparably jeopardize innovation).

144. *Vaccine Equity*, World Health Organization, <https://www.who.int/campaigns/vaccine-equity> (last visited Aug. 29, 2022, 4:13 PM); see also *Ministerial Decision on the TRIPS Agreement*, *supra* note 133, at 1 (noting the agreement was adopted on June 17, 2022).

IV. PREPAREDNESS FOR FUTURE PANDEMICS

The COVID crisis proved that there are actions and initiatives by IGOs or multinational corporations that could not be handled effectively solely by States. IGOs brought about a unique and plus-value to the global reaction called for by the pandemic. Thus, in the context of a global crisis, a global solution—one that involves many actors who traditionally do not collaborate so closely—is needed.¹⁴⁵ Global solutions require forums for international cooperation on trade of essential goods and services, including vaccines, and the WTO is an international organisation which provides exactly such a governance forum.¹⁴⁶

Given a shared appreciation of the urgency of dealing with the global crisis, during the COVID-19 pandemic, untraditional partnerships were formed rapidly with the common goal of mitigating and/or eradicating the pandemic.¹⁴⁷ Outside pre-existing frameworks, new partnerships were formed by IGOs, NGOs, and/or multinational corporations. These sentiments are a true reflection of what the COVID-19 pandemic taught us: *A global crisis requires a global solution*. A global solution means having all hands-on deck, steering in the same direction. To this end, are there any other lessons that may be useful in future pandemics?

As a result of the pandemic, governments realised the role played by trade and the WTO in ensuring the smooth flow of essential products (e.g., food, medical goods, and services). The WTO's experience in transparency, exchanges, and governance pushed governments to use the WTO as a central forum during the COVID-19 pandemic to boost their resilience and mitigate the pandemic.

145. See Martin Wolf, *What the World Can Learn from the Covid-19 Pandemic*, Financial Times (Nov. 4, 2020) <https://www.ft.com/content/7fb55fa2-4aea-41a0-b4ea-ad1a51cb415f> (noting that getting through the pandemic requires “global cooperation” and that “global challenges need global solutions”).

146. Gabrielle Marceau & Pramiti Parwani, *COVID-19 and International Trade: The Role of the WTO in Fighting the Pandemic and Building Back Better*, 16 Glob. Trade and Customs J. 280, 281 (2021).

147. See U.N. Dep't of Econ. and Soc. Affs., *Partnerships in Response to COVID-19*, 4(2021), https://sdgs.un.org/sites/default/files/202105/Partnerships%20in%20response%20to%20COVID-19%20light_0.pdf (last visited Sept. 11, 2022).

Existing disciplines and flexibilities that exist in WTO rules (e.g., the presumption of WTO-consistency in the TBT and SPS Agreement in favour of national measures/regulation/standards that comply with existing standards developed by other bodies) encourage cooperation.¹⁴⁸ This principle of international coherence can boost resilience because countries can adopt standards based on other existing standards presumed to be efficient, effective, and WTO-compliant. Perhaps related to this is the need for governments to favour equivalence and mutual recognition rather than insisting on harmonisation. For example, the WTO mutual recognition rules which exist for goods and services can also be extended to vaccines.¹⁴⁹ In a study that considered the effect of trade agreements on mitigating the COVID-19 pandemic, it was found that:

- i. the presence of resilient trade guarantees flow, accessibility, and security of global value chains; and
- ii. resilient trade is brought about by integration, and more particularly, deep trade integration.¹⁵⁰

The guarantee afforded by deep trade integration is a result of the robust conditions and enforcement rules contained in trade agreements.¹⁵¹ It is for these reasons that we need to continue exploring how existing legal rules or principles (of the WTO and other agreements) can be interpreted and applied to offer the flexibility that pandemics call for while maintaining security and predictability that encourage partnerships which have proven to aid in mitigating and eradicating pandemics.

148. See U.N. Director-General, *The Place of the WTO in the International Legal Order* (June 15, 2008), https://www.wto.org/english/news_e/sppl_e/sppl94_e.htm (discussing how the W.T.O. takes existing international norms into account); *SPS – TBT, Marine Product Export Development Authority* (2021), https://mpeda.gov.in/?page_id=1061.

149. See World Trade Organization, *WTO Adopts Guidelines for Recognition of Qualifications in the Accountancy Sector*, WT/PRESS/73 (adopted May 29, 1997) (explaining the implementation of mutual recognition rules).

150. See U.N. Conference on Trade and Development, *Trade Agreements and Trade Resilience During COVID-19 Pandemic*, UNCTAD/SER.RP/2021/13, at 13 (October 2021).

151. *Id.*

Earlier we highlighted that export restrictions or prohibitions imposed on vaccines and vaccine inputs were quite disruptive, as they led to domino effects with worldwide production of urgently-needed goods being endangered.¹⁵² Surely, then, Article XI:2(a) cannot be said to have been designed to be applied during a global public health crisis where vaccines, medical goods, and other products are essential to *all* countries. When WTO Members resolved to develop an integrated, more viable, and durable multilateral trading system,¹⁵³ they could not have intended for a system whereby a Member can impose export restrictions and prohibitions on products critical to the survival of the global commons. Even then, the international law principle of sovereignty—which denotes, among other things, a state’s right to regulate affairs within its territory¹⁵⁴—cannot be gainsaid. In times of crisis, therefore, states adopt measures aimed at protecting their citizens first.¹⁵⁵ The reality that presents itself, however, is that whereas the sovereignty principle recognises and respects boundaries, in their very nature, crises such as COVID-19 know no boundaries. Thus, when states adopt measures that restrict the export of vaccines and other medical products with the illegitimate presumption that such measures protect the lives

152. See *Why the Success of Your Business Depends on COVID-19 Vaccines – and Vice Versa*, HealthPartners (Sept. 11, 2022, 5:22 PM), <https://www.healthpartners.com/plan/blog/how-covid-19-vaccine-impacts-business-success/> (discussing the impact vaccination rates have on businesses); see Ralf Peters & Divya Prabhakar, *Export Restriction Do Not Help Fight COVID-19*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT [UNCTAD] (June 11, 2021), <https://unctad.org/news/export-restrictions-do-not-help-fight-covid-19>.

153. See W.T.O. Director-General, *Growing Complexity in International Economic Relations Demands Broadening and Deepening of Multilateral Trading System* (Oct. 16, 1995), https://www.wto.org/english/news_e/pres95_e/pr025_e.htm (explaining the shift towards liberal trade policies, greater reliance on international competition, and accommodation of low-income developing countries).

154. Samantha Besson, *Sovereignty*, 1 MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L. 366, 376 (2012).

155. See Evangelina Petridou & Nikolaos, *Staying at Home or Going Out? Leadership Response to the COVID-19 Crisis in Greece and Sweden*, 29 J. Contingencies and Crisis Mgmt. 293, 293 (2021) (“each state has turned inwards to protect its own citizens by closing borders and imposing travel bans, curfews and lockdowns to varying degrees.”).

of their citizens, ultimately, they jeopardise the lives of their citizens because “no one is safe, until everyone is safe.”¹⁵⁶

As such, the design of the law needs to be reformulated to account for global crises where a coordinated response is needed. Perhaps, for example, the environmental law principle *sic utere tuo ut alienum non laedas*, which loosely translates to “use your own property in such a manner as not to injure that of another,”¹⁵⁷ and is enshrined in Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),¹⁵⁸ and Principle 2 of the Rio Declaration on Environment and Development (Rio Declaration)¹⁵⁹ can be useful in this regard. If extrapolated to WTO law, Members will continue to enjoy their autonomy in regulation and responding to crises, provided that such autonomy is not exercised in a manner that endangers the global commons (e.g., by imposing export restrictions or prohibitions on products critical to *all* countries). Ultimately, this will guarantee equity not only among states but also among other stakeholders, such as the private sector, to ensure survival and sustainability.

Moreover, the law should be interpreted in a manner that considers today’s context of rapid changes due to digitalisation, globalisation, and the need to sustain economic development. Put differently, evolutionary interpretation is needed to ensure that due acknowledgement is given to developments such as

156. Peters & Prabhakar, *supra* note 152; *No-One is Safe Until Everyone is Safe – Why We Need a Global Response to COVID-19*, UNICEF (May 24, 2021), <https://www.unicef.org/press-releases/no-one-safe-until-everyone-safe-why-we-need-global-response-covid-19> (describing the global nature of the pandemic and the harsh consequences resulting from pre-existing inequalities).

157. Legal Maxims, *Black’s Law Dictionary* (11th ed. 2019), available at Westlaw.

158. See Rep. of the U.N. Conf. on the Hum. Env’t, U.N. Doc. A/CONF.48/14/Rev.1 (1973), Principle 21 (“States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”).

159. See Rep. of the U.N. Conf. on Env’t and Dev., U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (1993) (“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”).

digitalisation and globalisation—especially in times of a pandemic. International law needs not be static but should be adaptable. The development and interpretation of international law must be balanced against the need for adaptability and flexibility as the COVID-19 experience has shown us. For example, Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics¹⁶⁰ is a great foundation to leverage the partnerships that the WTO has created during the COVID-19 pandemic for future pandemics or in combating other existing or imminent global crises.¹⁶¹ It is also an avenue to ensure that in the future, equity and equality will prevail among global commons when there is a shortage of critical goods or constraints to accessing critical goods during a crisis.

Notably, while partnerships amongst IGOs and between IGOs and NGOs have traditionally played a great role in realizing common goals, it now seems that public-private partnerships (PPP) are equally as essential and should be expanded. The COVID-19 pandemic greatly exemplified this. PPPs are not new and have been used to deal with global challenges dating as far back as the HIV/AIDS epidemic in the 1990s.¹⁶² What the COVID-19 pandemic exemplified regarding PPPs, however, is that the private sector is efficient, economical, and effective in dealing with the great challenge of supplying, distributing, and vaccinating people around the world.¹⁶³ This shows that the private sector can not only produce and distribute essential goods and services swiftly but can also distribute such goods and services to the remotest areas in the globe: the resources and networks that actors in the private sector enjoy, granting them

160. See generally World Trade Organization, Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics, WTO Doc. WT/MIN(22)/31, WT/L/1142 (Jun. 22, 2022).

161. See generally Angela Ellard, Deputy Director-General, WTO, DDG Ellard Encourages OACPS Members to Intensify Efforts to Bridge Gaps in Run-up to MC12, WTO (Oct. 28, 2021), https://www.wto.org/english/news_e/news21_e/ddgae_28oct21_e.htm.

162. See Conor Savoy & Elena Méndez-Leal, *Beyond COVAX: The Importance of Public-Private Partnerships for Covid-19 Vaccine Delivery to Developing Countries*, Ctr. for Strategic & Int'l Stud., Sept. 2021, at 3, <https://www.csis.org/analysis/beyond-covax-importance-public-private-partnerships-covid-19-vaccine-delivery-developing>.

163. *Id.* at 3–8.

access to state-of-the-art facilities such as the refrigerators required to transport and store vaccines and the experience and expertise accruing from years of specialization.¹⁶⁴

Traditionally, controversy has been rife over involving the private sector in WTO affairs.¹⁶⁵ Those opposed to their involvement argue that WTO is a Member-driven organisation; thus involving the private sector would not only undermine the Member-driven nature of the WTO but also introduce undue influence caused by special interests.¹⁶⁶ On the other side of the debate, the argument is that there are certain nuances and insights that only the private sector can elaborate or bring to discussion at the WTO; hence the need to have them at the table.¹⁶⁷ The interconnection between global trade, human health, and the efficiency, economy, and effectiveness of the private sector as revealed by the pandemic make it evident that building back better means setting discussions, formulating legislation, and implementing policies in a manner that, where necessary, multiple stakeholders (whether public / private / international / regional / national) work towards the realisation of sustainable and effective trade policies, practices, and outcomes.

The new collaborations made by the WTO with the private sector strengthened efforts at mitigating the crisis. It cannot be, therefore, that private sector engagement shall only be on a whim. Indeed, the WTO being a Member-driven organisation, Members ought to establish a mechanism that would allow the engagement of the private sector for the multilateral trading system to be enhanced through the expertise, insight, and experience of the private sector. At any rate, with the increased complexity and sophistication of global value chains, the risk of widening the already existing gap between realities in the private sector and policy makers is widened. Therefore, the question is no longer *if* the private sector should be involved but rather *how* the private sector will be involved.

164. *Id.*

165. See generally Jeffrey Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, 1998 J. of Int'l Econ. Law 433, 434–35, 456.

166. See *id.* at 437–39, 456.

167. *Id.* at 434–36.

V. CONCLUSION

This paper concludes where it began. The unrestrained competition in the marketplace and the uncoordinated national government interventions are unsatisfactory methods of managing the scarcity that crises prompt. Trade played a critical role in meeting skyrocketing demand for COVID-19 vaccines and other essential products. Without a doubt, the crisis provided the WTO with an opportunity to go beyond its traditional policy space by taking up (new) responsibilities representative of its role as a forum for the negotiation, facilitation, implementation, administration, and operation of global trade rules that are responsive and reflective of changing global realities. Even then, the lessons to be drawn from the pandemic reveal that more work needs to be done if states, especially developing and least-developed countries, are to be prepared for future pandemics. To wit, the desire registered by Members in the Preamble to the Marrakesh Agreement (that trade barriers should be reduced and discriminatory treatment in international trade relations eliminated) should inform preparedness for future pandemics to ensure equity and equality in accessing essential products that are in short supply, yet critical to the survival of the global commons, in a manner that promotes the use of the world's resources under the objective of sustainable development.¹⁶⁸

168. See generally Marrakesh Agreement (asserting that the ideas of non-discrimination, collaboration, and the formation of mutually advantageous trade arrangements are essential to optimizing the world's resources and ensuring the success of the World Trade Organization).

