International Economic Law (2021)

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1 Introduction

In 2021, publications of the International Monetary Fund (IMF) and the World Trade Organization (WTO) underscored the impact of disasters on domestic economic policies and international cooperation. Against the background of the Covid-19 pandemic and the calls for an effective response to global warming by the Intergovernmental Panel on Climate Change,[1] it was openly recognized that international economic institutions play a key role in strengthening States' resilience and preparedness to both natural disasters and health emergencies. In particular, in its 2021 World Trade Report, entitled 'Economic resilience and trade',[2] the WTO underlined how 'the health and economic crisis caused by the Covid-19 pandemic has been a massive stress test of the world trading system'.[3] On this basis, the Report analyses how the global trading system 'can help countries to be more economically resilient to shocks, and what can be done to make the system better prepared and more resilient in the future'.[4] The urgency of the proposed inquiry was justified by 'the prospect of increasingly frequent and more intense natural and man-made disasters'.[5] On the IMF side, in a policy paper published in July 2021, the Secretariat stressed that, 'climate change has emerged as one the most critical macroeconomic and financial policy challenges that the IMF's membership will face in the coming years and decades'.[6] Accordingly, 'for the Fund to live up to its mandate, it needs to assist its members in addressing' these challenges.

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1 IPCC, 'Global Warming of 1.5°C' (CUP 2018), <https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_HR.pdf>, last accessed (as any subsequent URL) on 11 July 2022.

2 See <https://www.wto.org/english/res_e/booksp_e/wtr21_e/00_wtr21_e.pdf>.

3 *Ibid*, 6.

4 *Ibid.*

5 *Ibid.*

6 IMF Policy Paper, 'IMF Strategy to Help Members Address Climate Change Related Policy Challenges: Priorities, Modes of Delivery and Budget Implications' (July 2021) <https://www.imf.org/en/Publications/Policy-Papers/Issues/2021/07/30/IMF-Strategy-to-Help-Members-Address-Climate-Change-Related-Policy-Challenges-Priorities-463093>.

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In the wake of the measures taken in 2020 to support States in addressing the economic and social crisis induced by the Covid-19 pandemic,[7] initiatives taken in 2021 by the Fund and the WTO give further evidence that strategies of disaster prevention and risk reduction can also find support in international economic law instruments. The following review will give a brief account of this.

2 Developments by the International Monetary Fund

The mandate of the IMF covers surveillance over Members' national economic policies and technical and financial assistance to Members.[8] In comparison with the original design set out in 1944 at the end of the Bretton Woods conference, these activities have gone through a considerable evolution, reshaping the IMF from an international monetary organisation dealing with short-term balance of payments difficulties of its members to an international financial institution, aiming more generally at supporting States to prevent and cope with domestic economic crises. Evidence of this is also given by the growing involvement of the Fund in climate change and disaster resilience issues.

2.1 *The Integration of Members' Vulnerability to Climate Change and Natural Disasters into the Fund's Surveillance over Domestic Economic Policies*

Bilateral surveillance of Members' economic policies is carried out against the background of the obligations provided for in art. IV, sec. 1 of the Articles of Agreement. While not strictly prescriptive, this provision establishes that Fund's Members shall pursue financial and economic policies aiming at a non-inflationary and stable economic growth. How individual States achieve these objectives is left to the discretion of the Members, with the Fund exercising an advisory role.[9] In particular, IMF monitoring involves a Secretariat mission (usually held on an annual basis) to meet Members' economic authorities and other major stakeholders, at the end of which a report is prepared by the

7 Giovanna Adinolfi and Giulio Bartolini, 'International Economic Law (2020)' (2021) 3 Yearbook of International Disaster Law, 568 ff.

8 IMF, Articles of Agreement, arts. IV and V. See <https://www.imf.org/external/pubs/ft/aa/index.htm>. For an in-depth analysis of the Fund under the perspective of international law, see Annamaria Viterbo, International Monetary Fund (Wolters Kluwer 2019^3).

9 See art. IV, sec. 3 of the Articles of Agreement and the 2012 Integrated Surveillance Decision, available at <https://www.imf.org/external/pubs/ft/sd/2021/41st_Sel_Dec_EN_Web_FINAL.pdf> 6 ff.

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Secretariat and discussed by the Executive Board. Even though this process does not result in the adoption of any resolution addressed to the Member concerned, the surveillance, in principle, serves the purpose of identifying vulnerabilities in national domestic policies and providing guidelines on how to address them.

The scope of surveillance has been revised periodically (albeit belatedly in most cases) to adjust to the emerging challenges Members have had to cope with. In 2021, a comprehensive review was launched on the initiative of the IMF Secretariat. The overall purpose was to adapt the scope and content of the surveillance (and, therefore, of the consultations held by the IMF Secretariat with each Member) to the risks and uncertainties made evident by the Covid-19 pandemic and, more generally, to States' exposure to global challenges that could have an impact of domestic economic policies. One of these challenges pertains to climate change and its associated risk of large-scale natural disasters, which impose on each Member the adoption of proper mitigation and adaptation strategies and policies for transition to a low-carbon economy.[10] The underlying assumption for integrating climate change concerns into IMF surveillance is that because climate change impacts both domestic and global economic stability, the IMF needs to go beyond the current ad-hoc approach whereby the interests of the Member under surveillance drives the coverage of climate change in a Secretariat report.[11]

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10 IMF Policy Paper, 'Comprehensive Surveillance Review – Overview Paper' (May 2021) <https://www.imf.org/en/Publications/Policy-Papers/Issues/2021/05/18/2021-Comprehensive-Surveillance-Review-Overview-Paper-460270> 15 ff.

11 IMF Policy Paper, 'Comprehensive Surveillance Review – Background Paper on Integrating Climate Change into Article IV Consultations' (May 2021) <https://www.imf.org/en/Publications/Policy-Papers/Issues/2021/05/18/2021-Comprehensive-Surveillance-Review-Background-Paper-on-Integrating-Climate-Change-into-460303> 3. This ad-hoc approach is also exemplified by the so-called Climate Change Policy Assessments carried out by the Fund in coordination with the World Bank. Launched in 2017, this pilot project amounts to technical assistance provided under art. V, sec. 2(b) of the Articles of Agreement, in favour of Members highly exposed to climate change and natural disasters who request support. The purpose is to assist them in devising strategies for climate change resilience tailored on their needs and vulnerabilities. See <https://www.imf.org/en/Topics/climate-change/resilience-building>. In a similar vein, in 2019 the Fund's Executive Board endorsed the proposal by the Secretariat to develop 'disaster resilience strategies' for developing countries vulnerable to large-scale natural disasters (not necessarily triggered by climate change), as enshrined in IMF Policy Paper, 'Building Resilience in Developing Countries Vulnerable to Large Natural Disasters' (June 2019) <https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/06/24/Building-Resilience-in-Developing-Countries-Vulnerable-to-Large-Natural-Disasters-47020>.

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In principle, it can be assumed that the IMF's involvement is based on potential climate change impacts on fiscal and budgetary policies, irrespective of the aims underlying national climate change and disaster risk reduction strategies. Thus, in close coordination with other fields of international law, the IMF proposed that the yardstick against which to assess Members' fiscal and budgetary policies should depend on the National Determined Contributions (NDCs) they have announced under the 2015 Paris Agreement on Climate Change.[12] Nevertheless, in line with the prevailing opinion formulated by the scientific community[13] the IMF Secretariat did overtly recognize that, at aggregate level, the NDCs communicated until Spring 2021 are not consistent with the goal agreed in 2015 of maintaining the increase of global warming below the threshold of 1.5–2°C in comparison with pre-industrial levels. Therefore, it was suggested that NDCs would be the starting point for surveillance, but the reports issued under art. IV would stress that they 'remain insufficient to achieve the mitigation ambition enshrined in the Paris Accord' and would 'compare a country's Paris target with that of peers – i.e., countries with similar income levels and economic structures',[14] so as to 'provide a useful benchmark to assess the appropriateness of [each Member] mitigation objectives, without IMF staff setting mitigation targets itself'.[15] In view of their fundamental contribution to the reduction of greenhouse gases emissions, the IMF Secretariat suggested that the mitigation policies of the 20 largest emitters (collectively responsible for 80 percent world emissions) would be covered every 3 years or so.[16]

However, the forward-looking stance taken by the IMF Secretariat has not been endorsed by the Fund's Executive Board, composed of 24 directors appointed by the membership. Indeed, while recognizing the importance of integrating climate change vulnerability and its associated risks into IMF monitoring of domestic economic policies, the Board has espoused a milder approach, that encroaches on the shaping of mitigation policies to a lesser extent than the approach proposed by the Secretariat.[17]

12 IMF Policy Paper 2021 (n 11), 10 ff.
13 See (n 1).
14 IMF Policy Paper 2021 (n 11), 11.
15 *Ibid.*
16 *Ibid.*, 8 ff.
17 IMF Press Release 21/136 'IMF Executive Board Concludes the 2021 Comprehensive Surveillance Review' (10 May 2021), <https://www.imf.org/en/News/Articles/2021/05/19/pr21136-imf-executive-board-concludes-the-2021-comprehensive-surveillance-review>. See also IMF Press Release 21/238, 'IMF Executive Board Discusses a Strategy to Help Members Address Climate Change-Related Policy Challenges' (30 July 2021), <https://www.imf.org/en/News/Articles/2021/07/30/pr21238-imf-executive-board-discusses-strategy-address

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2.2 *Developments in Financial Support Programmes*

As already investigated in the third volume of this Yearbook, in 2020, the IMF adopted a number of decisions in view of streamlining its financial assistance to Members coping with the economic and social consequences of the Covid-19 pandemic.[18] In 2021, the Fund's policies pursued under art. V, sec. 3 of the Articles of Agreement have not gone under major changes. The main instruments to provide financial support to the Members whose balance of payments has been affected by natural disasters still remain in the Rapid Financing Instrument (RFI) and the Rapid Credit Facility (RCF) established in 2011. Access to these facilities is opened, respectively, to all Members and to low-income countries. Both include a window to support countries impacted by large natural disasters (i.e., with an economic impact of at least 20 percent GDP of the affected country), and in no case is the beneficiary required to submit a full-fledged economic adjustment programme. Accordingly, no ex-post conditionality applies to Fund disbursements, as established under "ordinary" financial assistance. This feature justifies the limits to the access to financial assistance set under both the RFI and the RCF, which is either equivalent to 50 percent of the beneficiary Member's contribution to the capital of the Fund (so-called "quota")[19] on an annual basis (100 percent on a cumulative basis) under both the RFI "regular window" and the RCF "exogenous shocks window", and to 80 percent of the quota (133.33 percent on a cumulative basis) under the "large natural disaster" window of both facilities. Consistent with the increase of the thresholds for the regular and exogenous shocks windows decided in 2020,[20] the Fund in 2021 has further enhanced its emergency financial toolkit. Indeed, it was established that on a temporary basis (i.e., until the end of 2021), Members might be authorised to draw annually resources from the two large natural disasters windows up to a maximum of 130 percent (183.33 percent on a cumulative basis) of their quota.[21]

-climate-change-related-policy-challenges>. In the 2022 outcome of the comprehensive surveillance review, it is established that a discussion with the 20 largest emitters of their contribution to the global mitigation effort remains "voluntary": 'if the authorities refuse to engage, staff reports would not cover it', IMF, 'Guidance Note for Surveillance under Article IV Consultations' (June 2022) 55, para. 115, see <https://www.imf.org/en/Publications/Policy-Papers/Issues/2022/06/23/Guidance-Note-for-Surveillance-Under-Article-IV-Consultations-519916>.

18 See Adinolfi and Bartolini (n 7) 568 ff.

19 See IMF Articles of Agreement, arts. II and III.

20 See Adinolfi and Bartolini (n 7) 570.

21 See <https://www.imf.org/en/News/Articles/2021/06/21/pr21187-imf-executive-board-approves-temp-increase-access-limits-lnd-window-rcf-rfi>. See also IMF Policy Paper, 'Temporary Modifications to Access Limits under the Large Natural Disaster Window of

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These changes involved the already existing facilities of the IMF. A more decisive result in terms of an increase of the resources available to Members has been achieved in 2021 by the decision to allocate new special drawing rights (SDRs).

Introduced in 1969, SDRs are an international reserve asset which can be issued by the Fund and whose value is determined on the basis of the worth of a basket composed of the five major national currencies used in international transactions (i.e., US dollar, Euro, Japanese yen, UK pound and Chinese renminbi). When deemed necessary to meet a global long-term need of reserve assets, and to complement existing international liquidity, SDRs are allocated and distributed among Members by the IMF Board of Governors (where every Member has a seat) in proportion to their quota to the Fund's capital.[22] Once available, Members may exchange the SDRs for foreign currencies. According to art. XIX of the Articles of Agreement, the exchange operation takes place with another IMF Member that is either designated by the Fund itself (sec. 5) or with whom a voluntary exchange agreement is concluded (sec. 2(b)). The advantages of allocating and using SDRs is that they can be traded to obtain foreign currencies that can then be freely employed to meet payment and financing needs without Members being subject to the policy conditionality usually attached to the IMF financial assistance under art. V.

Since 1969, the IMF has approved allocations of SDRs only three times, in 1970–1972, 1989–1990 and 2009. In 2021, a new allocation has been decided, whereby SDRs equivalent to USD 650 billion have been distributed among Members, 40 percent which are for the benefit of emerging and developing economies.[23] The decision was justified by the growing financing needs experienced by the membership to tackle the economic and social crisis induced by the pandemic. The allocation serves the purpose of supporting Members to meet urgent balance of payments needs as under the RFI or the RFC as well as, on a more structural level, helping Members to finance pandemic recovery

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the Rapid Credit Facility and of the Rapid Financing Instrument' (June 2021), <https://www.imf.org/en/Publications/Policy-Papers/Issues/2021/06/21/Temporary-Modifications-To-Access-Limits-Under-The-Large-Natural-Disaster-Window-Of-The-461093>. At the beginning of 2022, the original annual limits under the two facilities have been restored, while the Executive Board decided to maintain until mid-2023 the cumulative access limits of the four windows at the higher levels of 150 and 183.33 percent of quotas: see <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/19/55/Rapid-Financing-Instrument> and <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/08/Rapid-Credit-Facility>.

22 Art. XVIII, sec. 1 and sec. 2(b) of the Articles of Agreement.

23 See <https://www.imf.org/en/News/Articles/2021/07/30/pr21235-imf-governors-approve-a-historic-us-650-billion-sdr-allocation-of-special-drawing-rights>.

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and to strengthen and rebuild the economic and social fabric severely affected by the pandemic.

Distributed among Members in proportion to their quota, SDRs have been mainly allocated to developed economies in 2021, even though these States have suffered less financing needs than other States and have access to other external reserve assets (such as, for instance, the Recovery and Resilience Facility established in 2021 by the European Union). Undoubtedly this is a distortion of the SDRs mechanism which however cannot be corrected at the root but only with an amendment to the Articles of Agreement. To channel liquidity from States with more stable financing options to those where the needs are the greatest, a proposal has been submitted to establish the Resilience and Stability Trust (RST). This new facility would be administered by the Fund as a trustee under art. V, sec. 2(b) of the Articles of Agreement.[24] Fueled by the SDRs made available by developed economies, the RST financial assets could be used to provide loans to low-income and vulnerable middle-income Members who share a tight fiscal space and limited access to long-term financing on the markets. These funds could be used to address long-term structural challenges which require upfront action by States. In particular, the loans would be authorised to support investments in climate change resilience and in pandemic response and preparedness.

The RST illustrates a development in the IMF approach to disaster response and risk reduction. Indeed, until 2021 the Fund's financial toolbox was mainly designed to sustain Members in their efforts during the immediate response phase following an emergency, to cover their external imbalance due to an increase in importation (unavoidable, for instance, to obtain access to goods and materials needed to cope with the urgent needs arising in the aftermath of a disaster) or to assist Members to cope with a decrease in the volume and value of exportation as a result of damages to production facilities due to calamitous events. With the establishment of the RST, the Fund aligns itself with the path traced by the 2015 Sendai Framework on Disaster Risk Reduction, where crucial attention is given to preparedness and resilience to disasters. A greater coherence is reached also within the policies of the IMF once vulnerability to disasters and climate change has been integrated into surveillance over national economic policies. However, it cannot be overlooked that the Fund's

24 IMF Policy Paper, 'Proposal to Establish a Resilience and Stability Trust' (April 2022), <https://www.imf.org/en/Publications/Policy-Papers/Issues/2022/04/15/Proposal-To-Establish-A-Resilience-and-Sustainability-Trust-516692>. The proposal has been approved by the Executive Board on 18 April 2022 (<https://www.imf.org/en/News/Articles/2022/04/18/pr22119-imf-executive-board-approves-establishment-of-the-rst>).

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support under the RSF is made conditional upon the voluntary contributions by non-eligible Members. Indeed, loans through the RSF are not financed by IMF capital, but by the SDRs transferred to the Trust by developed Members. Lacking these contributions, or in case contributions are insufficient to satisfy loans' requests, access to the RST could be foreclosed to beneficiary Members.

3 Developments under WTO Law

The world trading system established under the aegis of the WTO in 1995 has been undergoing a huge crisis in the more recent years. As mentioned at the beginning of this contribution, in the 2021 World Trade Report the Secretariat has openly acknowledged that international cooperation in the trade field has a role to play in addressing the challenges of climate change and health emergencies. How the WTO may contribute will depend on the settlement of the global trade crisis.

In 2021, the WTO's dispute settlement mechanism remained paralysed by the United States veto over the election of the members of the Appellate Body. Therefore, the number of disputes submitted to and settled by the WTO has been quite low. With regard to the round of multilateral trade negotiations launched in 2001, the Secretariat has been highly committed to facilitate them, in order to arrive at a positive solution by the Ministerial Conference scheduled in December 2021 in Geneva. However, officially because of the travel constraints introduced in November 2021 by some European countries to the entry of persons arriving from countries severely affected by the pandemic, the decision was adopted to postpone the meeting so as to allow the highest possible participation of Member representatives in face-to-face negotiations at the Conference.[25] This extra time has also been spent to come to a positive conclusion of the many tables of negotiations, some of which are particularly relevant for our purposes, as will be discussed below.

3.1 *Hazard-Related Topics Discussed in View of the Forthcoming Ministerial Conference*

As a member-driven organisation, the WTO has been conferred a very limited law-making power with strict constraints upon the possibility for the Secretariat to submit proposals. In contrast to the IMF, Members exercise

25 WTO, 'General Council decides to postpone MC12 indefinitely' (26 November 2021) <https://www.wto.org/english/news_e/news21_e/mc12_26nov21_e.htm>.

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the responsibility for "updating" the multilateral trading regime to face new challenges by preparing texts for deliberation and engaging in consultations so that the General Council or the Ministerial Conference can adopt by consensus new treaty texts, decisions or declarations.[26] In 2021, the debate within the Organization was focused on some topics that could strengthen the role of the WTO law in supporting the adoption by the Members of domestic measures addressing resilience to health emergencies. These included the so-called Trade and Health Initiative and the proposal for a waiver to the obligations arising under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

The Trade and Health Initiative was proposed by a group of WTO Members (the so-called Ottawa Group) in November 2020. Premised on the un-coordinated reaction to the pandemic, with many States adopting unilateral trade restrictions with the goal of safeguarding the access of the national population to items indispensable to tackle the crisis, the Initiative aims at designing a common regulatory framework that, in accordance with the several exceptions to the obligations on trade liberalization and non-discrimination set out in the WTO agreements, may help to prevent or at least reduce the magnitude of disruptions to supply chains in future health emergencies. In 2021, the proponents submitted a draft decision to be discussed and approved by the WTO General Council.[27]

First, the proposal calls for the review and the elimination of restrictions on the export of essential medical goods introduced to combat the Covid-19 pandemic and for the exercise of restraint in the imposition of similar restrictions in the future. If implemented, restrictions should be temporary in nature, proportionate, targeted and transparent, and take into consideration the needs of developing and least-developed countries with scarce manufacturing capacity that are highly dependent on imports. Second, the proposal outlines the importance of reviewing customs procedures (in view of smoothing the entry of essential medical goods) and technical regulations (towards a regulatory alignment that could facilitate trade in essential medical goods). Finally, the Ottawa Group supports the elaboration of 'emergency duty free programs', that could be implemented in times of crisis for a temporary removal of tariffs on the importation of medical goods. The Initiative converged in the negotiations for an outcome document of the Ministerial Conference on the

26 See art. IX, para. 1 of the Marrakech Agreement establishing the World Trade Organization <https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm>.

27 WTO, 'COVID-19 and Beyond: Trade and Health' (30 June 2021) Job/GC/251/Rev.3.

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'WTO Response on the Pandemic', where States expressed a preference for a political declaration, rather than a legal document setting out rights and obligations upon Members.[28] This suggests that the final outcome would most probably be less ambitious in terms of legal effectiveness than envisaged by the Trade and Health Initiative, but still capable of reflecting a consensus by the membership.[29]

Another subject extensively discussed in 2021 was the proposal by India and South Africa introduced in 2020 for a three-year waiver to the obligations set out under the TRIPS agreement on the protection of patents, copyrights, industrial design and undisclosed information with respect 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.[30] According to the proponents (including more than 50 Members, composed mainly of African States and least-developed countries), the approval of the waiver would support policies aimed at strengthening the production of the covered items at the global level and guaranteeing the widest access possible to them. On the contrary, the opponents argued that the TRIPS agreement already includes exceptions and flexibilities that can be invoked by concerned Members to increase their manufacturing capacity to meet the needs of both the domestic population and foreign States (in particular, the regime for compulsory licences under arts. 31 and 31 *bis*), and that in any case the approval of the waiver would not reduce or manage all the complexities that characterise the production of vaccines. These arguments were articulated by the European Union in the draft General Council declaration proposed in June 2021, where emphasis was placed on the right of WTO

28 WTO, 'Minutes of the Meeting held in Virtual Format on 7–8 October 2021' (22 November 2021) WT/GC/M/193, para. 5.38.

29 Negotiations led to the adoption in 2022 of the 'Ministerial Declaration on the WTO Response to the Covid-19 Pandemic and Preparedness for Future Pandemics' (22 June 2022) WT/MIN(22)/31, WT/L/1142.

30 WTO, 'Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19. Revised Decision Text' (25 May 2021) IP/C/W/669/Rev.1. On this issue, see Bryan Mercurio, 'WTO Waiver from Intellectual Property Protection for COVID-19 Vaccines and Treatments: A Critical Review', Virginia Journal of International Law Online 2021, 9 <https://static1.squarespace.com/static/5f0a3654a47d231c00ccd14f/t/6113efc55267c52179d36e85/1628696517790/Mercurio+WTO+Waiver_Sargsyan+Final+Review+bcm+081121.pdf>.

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Members to use the already existing flexibilities provided for in the TRIPS agreement to adopt measures to protect public health.[31]

31 WTO, 'Draft General Council Declaration on the TRIPS Agreement and Public Health in the Circumstances of a Pandemic. Communication from the European Union to the Council for TRIPS' (18 June 2021) IP/C/W/681. At the 2022 Ministerial Conference, the waiver has been approved, but only to the obligations on patents (not on other intellectual property rights under the scope of the TRIPS agreement) and exclusively for the production of Covid-19 vaccines. It is established that the waiver can be invoked by developing countries, excluding those that have specifically opted out before the General Council; other developing WTO Members with manufacturing capacity are encouraged to commit themselves not to avail of the waiver. See, WTO, 'Ministerial Declaration on the TRIPS Agreement' (22 June 2022) WT/MIN(22)30 WT/L/141.

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