

# International Economic Law (2020)

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## 1 Introduction

As remarked by the International Monetary Fund (IMF), 2020 was ‘A Year Like No Other’,<sup>1</sup> with the COVID-19 pandemic producing the most significant recession since the Great Depression with an estimated contraction of the global gross domestic product of around 3.3%–3.5%.<sup>2</sup> Relevant international economic organisations were forced to test their instruments and policies addressing disasters, particularly those dealing with health emergencies to cope with the ongoing economic and financial crisis. Organisations have taken advantage of existing tools but have also swiftly introduced some changes and adopted new initiatives in response to COVID-19. This review will be divided in two main parts. The first section will examine global activities by international financial institutions and the second section will focus on international trade law and WTO.

## 2 Developments by International Financial Institutions

Over the past decades, international financial institutions had already developed a series of financial programs to facilitate quick availability to resources during the response and medium-long term recovery phase of disasters.<sup>3</sup>

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1 IMF, Annual Report 2020, A Year Like No Other, available at <<https://www.imf.org/external/pubs/ft/ar/2020/eng/downloads/imf-annual-report-2020.pdf>> last accessed (as any subsequent URL) on 25 July 2021.

2 IMF, World Economic Outlook. Managing Divergent Recoveries (April 2021) 20, available at <<https://www.imf.org/en/Publications/WEO/Issues/2021/03/23/world-economic-outlook-april-2021>>; World Bank, Global Economic Prospects (June 2021) 4, available at <<https://openknowledge.worldbank.org/bitstream/handle/10986/35647/9781464816659.pdf>>.

3 Giovanna Adinolfi, ‘The Role of International Financial Institutions’, in Andrea De Guttry, Marco Gestri, Gabriella Venturini (eds) International Disaster Response Law (Springer 2012) 601–626.

Some of these programs included policy instruments specifically addressing health emergencies.<sup>4</sup> Depending on the institution, these programs take different approaches including the direct transfer of funds through grants, the allocation of loans on favourable terms or the reduction of foreign debt. Although fundamental, international financial support for disaster response and relief suffers from several shortcomings. The main concern for many States is the limited extent of available resources compared to the economic effects caused by disasters including epidemics. In addition, many of the programs are voluntary in nature and require parties to meet certain conditions before being activated.

In particular, the IMF has developed specific programs tailored for States whose balance of payment has been affected by a disaster due to a reduced capacity to export or an increased need to import. These financial instruments primarily permit the IMF to provide support through loans equivalent to certain percentages of IMF's quotas belonging to affected Member States based on a statement regarding economic policies that the affected States intends to pursue to address its balance of payments difficulties, rather than imposing full-fledged macro-economic conditionality programs. The current system, in place since 2011, consists of two similar programs to be used for an urgent balance of payments need raised by exogenous shocks as armed conflicts, commodity price shocks, and 'natural disasters', namely the Rapid Financing Instrument (RFI) and Rapid Credit Facility (RCF),<sup>5</sup> this latter reserved for low-income countries.

Financial assistance provided through the RFI should be repaid within 3¼ to 5 years, with assisted States required to cooperate with the IMF to solve their shortcomings in the balance of payments including identifying the general policies to be pursued for this purpose. The Executive Board can provide assistance based on certain caps with a difference between the so-called 'regular window' of RFI or the 'large natural disaster window', an additional option introduced in 2017 for disasters that impact 20% or more of GDP. As for the 'regular window' the limit of financial assistance is provided by a cap of 50% annually of a Member State's IMF's quota or 100% of a quota on a cumulative basis, while for the 'large natural disaster window' the financial support could

4 Independent Panel for Pandemic Preparedness and Response, *Financing Pandemic Preparedness and Response* (May 2021), available at <<https://theindependentpanel.org/wp-content/uploads/2021/05/Background-Paper-14-Financing-Pandemic-Preparedness-and-Response.pdf>>.

5 For some background info on such instruments 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>>.

be extended up to 80% of quota per year and 133.33% of quota on a cumulative basis. The RCF is based on similar premises and conditions as the RFI, also providing for both a regular window, named in this case 'exogenous shock window' and a 'large natural disaster window', but is only available for low-income countries. This relief has more favourable lending policies including a zero-interest rate, a grace period of 5 ½ years and a final maturity of 10 years.

However, the COVID-19 pandemic has forced the Executive Board to further review caps percentages related to Member State's IMF quotas. In particular, in early April 2020, the IMF Executive Board approved proposals to enhance the Fund's emergency financing toolkit, through a temporary increase in access limits for the 'regular window' of the RFI and RCF bringing them up to 100% of quota per year and 150% of quota on a cumulative basis net of scheduled repayments or repurchases, respectively.<sup>6</sup> This extension, in place since 6 April 2020, was originally limited to a six months period but was subsequently renewed in October 2020 for a further six-month period.<sup>7</sup> It is now scheduled to end in December 2021. No changes occurred to percentage quotas under the 'large natural disaster window' which were only increased in June 2021.<sup>8</sup>

Technical aspects related to fund disbursements were also addressed by the IMF Executive Board in April 2020, creating a so-called 'pandemic emergency procedures' to streamline the consideration and approval of new emergency financing requests. Previously, States experienced a gap of three to four months between the approval and disbursement of emergency funding after a disaster under the RCF and RFI. As a result, a series of technical and procedural measures were adopted to expedite the approval of emergency financing requests, including shortening the circulation period for IMF

6 For this decision and the staff report which has been the basis for discussion see IMF Policy Paper, *Enhancing the Emergency Financing Toolkit – Responding to the Covid-19 Pandemic* (9 April 2020) available at <[https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/04/09/Enhancing-the-Emergency-Financing-Toolkit-Responding-To-The-COVID-19-Pandemic-49320?sc\\_mode=1](https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/04/09/Enhancing-the-Emergency-Financing-Toolkit-Responding-To-The-COVID-19-Pandemic-49320?sc_mode=1)>. See furthermore <<https://www.imf.org/en/News/Articles/2020/04/09/pr20143-imf-executive-board-approves-proposals-enhance-emergency-financing-toolkit-us-billion>>.

7 See <<https://www.imf.org/en/News/Articles/2020/10/05/pr20305-imf-executive-board-approves-extension-increased-access-limits-under-rcf-and-rfi>>.

8 In particular, in June 2021, the IMF Executive Board accepted to raise the annual access limit under the large natural disaster window of the RCF and RFI from 80 to 130% of quota, and cumulative annual limit from 133.33 to 183.33% of quota. See for this decision <<https://www.imf.org/en/News/Articles/2021/06/21/pr21187-imf-executive-board-approves-temp-increase-access-limits-lnd-window-rcf-rfi>> and for the explanatory paper <<https://www.elibrary.imf.org/view/journals/007/2021/044/article-A001-en.xml>>.

Executive Board documents and simplifying staff reports.<sup>9</sup> These streamlined procedures apply to both the RFI and RCF facilities as well as for debt relief programs discussed below.

Indeed, the magnitude of some disasters and the socio-economic characteristics of affected States have also prompted more radical measures. In 2010, in the aftermath of the Haiti earthquake, the IMF launched the Post-Catastrophe Debt Relief able to provide grants aimed to reduce the debts owed by affected States to the IMF.<sup>10</sup> Based on the Ebola crisis, the system was further refined in 2015, renaming it as the Catastrophe Containment and Relief Trust (CCRT) and including within its scope effects caused by health emergencies.<sup>11</sup> CCRT is limited to the poorest and most vulnerable countries involved in the IMF Poverty Reduction and Growth Trust, namely States whose per capita income is below the International Development Association's operational cut-off (currently US\$ 1,175) or twice this amount for small states. Furthermore, the possibility of the Executive Board approving such financial assistance is only present when additional funds have been transferred to the IMF by donors beyond usual IMF funding sources, making the CCRT dependent on voluntary contributions.

Currently, the CCRT is based on two lines of financial assistance, namely the Post-Catastrophe Relief Window, addressing events identified as a 'Qualifying Catastrophic Disaster', i.e. an 'exceptional natural disaster' reaching certain thresholds, and the Catastrophe Containment Window, this latter expressly devoted to health emergencies, and further amended in March 2020 by the IMF Executive Board to include global pandemics.<sup>12</sup> Based on current terms, the Executive Board is first requested to determine whether the event is a 'Qualifying Public Health Disaster', namely a situation represented by: (a) an epidemic which has spread across several areas of the affected State that may impact other States and has produced or threatens to cause significant economic disruption, namely a cumulative loss of real GDP of 10% or a cumulative loss of revenue and increase of expenditures equivalent to at least 10% of GDP;

9 On such measures, see IMF Policy Paper, Streamlining Procedures for Board Consideration of The Fund's Emergency Financing During Exceptional Circumstances Involving a Pandemic (9 April 2020) <<https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/04/09/Streamlining-Procedures-for-Board-Consideration-of-The-Funds-Emergency-Financing-During-49322>>.

10 See Decision No. 14649-(10/64), available at <[https://www.imf.org/external/selecteddecisions/Description.aspx?decision=14649-\(10/64\)](https://www.imf.org/external/selecteddecisions/Description.aspx?decision=14649-(10/64))>.

11 See Decision No. 15708-(15/12), available at <[https://www.imf.org/external/selecteddecisions/description.aspx?decision=15708-\(15%2F12\)#fn\\_39-backlink](https://www.imf.org/external/selecteddecisions/description.aspx?decision=15708-(15%2F12)#fn_39-backlink)>.

12 See <<https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/04/02/Catastrophe-Containment-and-Relief-Trust-Policy-Proposals-and-Funding-Strategy-49305>>.

or (b) a global pandemic inflicting severe economic disruption across IMF's members creating balance of payments needs on such a scale as to warrant a concerted international effort to support the poorest and most vulnerable countries. The Executive Board determined, effective on 14th April 2020, that the COVID-19 pandemic was a 'Qualifying Public Health Disaster' for the purposes of the CCRT.<sup>13</sup>

In such cases eligible countries can receive debt flow relief on their debt service due to the IMF for two years after the occurrence of the epidemic, while the possibility to manage full cancellation of an affected State's stock of debt is an option based on available resources. Furthermore, in extending debt relief, the IMF requires the identification of similar debt relief by other creditor including States and International Organisations, whose debts together account for at least 80% of the member's total sovereign external debt. The affected State is expected to cooperate with IMF to solve balance of payments shortcomings also through the implementation of adequate macroeconomic policies, as detailed in the letter of application. Regardless of such potential limits, this system has permitted both the full cancellation of Haiti's debt to the IMF after the 2010 earthquake, and to provide US\$ 100 million debt relief to Ebola-afflicted countries (Guinea, Liberia, and Sierra Leone) in light of past disease outbreaks. Conversely, the COVID-19 pandemic has prompted calls for debt relief by around 30 States with an initial disbursement of around US\$500 million and a call made by IMF to donors to raise a US\$1.4 billion in grants for managing the CCRT during the current pandemic.<sup>14</sup>

Furthermore, the spread of COVID-19 activated the Pandemic Emergency Financing Facility (PEF) insurance window. The PEF was launched after the Ebola crisis to face health emergencies raised by six typologies of viruses that are most likely to cause a pandemic, including *Coronaviridae* ones, as for COVID-19.<sup>15</sup> It has been managed through the support of donor States and catastrophe bonds issued for the private market by the World Bank in 2017 in

13 See <<https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/04/16/Catastrophe-Containment-And-Relief-Trust-Approval-Of-Grant-Assistance-For-Debt-Service-Relief-49330>>.

14 See <<https://www.imf.org/en/Publications/Policy-Papers/Issues/2021/04/05/Catastrophe-Containment-and-Relief-Trust-Third-Tranche-Of-Debt-Service-Relief-In-The-Context-50336>>.

15 See <<https://www.worldbank.org/en/news/press-release/2017/06/28/world-bank-launches-first-ever-pandemic-bonds-to-support-500-million-pandemic-emergency-financing-facility>> and <<https://www.worldbank.org/en/topic/pandemics/brief/pandemic-emergency-financing-facility>>.

order to provide support to countries who are members of the International Development Association (IDA).

However, a criticism of this instrument were conditions for triggering its activation qualified as not permitting a prompt disbursement, regardless having been selected in coordination with the World Health Organization. In particular, criteria for activating the disbursement of the PEF included the need to identify a certain outbreak size, as for a total number of fatalities identified in 250 victims in IDA countries, the need to pass at least 12 weeks from early cases, the request of cross-border spreads, with the virus requested to be present in more than one country, each having 20 or more fatalities or the exponential growth of cases in IDA countries certified by a third-party calculation entity. Such conditions were nonetheless confirmed on 27th April 2020 by the Steering body of the PEF and this qualification permitted a first allocation of US\$195.84 million to IDA countries, with special attention given to fragile and conflict-affected countries or pre-approved frontline responder organizations in the affected areas, such as WHO or UNICEF, with a minimum of US\$1 million and maximum of US\$15 million going to each country.<sup>16</sup> At the end of September 2020, the entire \$195.84 million COVID-19 insurance pay-out was completed.<sup>17</sup> The IMF has not launched a further round of pandemic bonds.

Additionally, to highlight the flexibility of approaches to respond to pandemics, a final mention should be made of the Debt Service Suspension Initiative launched in April 2020 as a response to the COVID-19 crisis by G-20 States based on past appeals by the IMF and World Bank. This initiative has resulted in a temporary suspension of G-20 bilateral credits with the poorest countries, resulting in about US\$5 billion in debt service for more than 40 out of the 73 eligible States. In this case debt-services payments were originally suspended until the end of 2020 and then extended until December 2021 due to the continuing crisis. IMF and the World Bank provided technical support for this initiative.<sup>18</sup>

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16 For allocations, see <<https://pubdocs.worldbank.org/en/140481591710249514/pdf/PEF-country-allocations-table.pdf>>.

17 See <<https://www.worldbank.org/en/topic/pandemics/brief/fact-sheet-pandemic-emergency-financing-facility>>.

18 For some information see <<https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative>>.

### 3 Developments under WTO Law

The main concern for international trade lawyers in 2020 focused on the impact of the COVID-19 pandemic on trade flows<sup>19</sup> and, most importantly, on trade and trade-related policies.<sup>20</sup> Within the World Trade Organization (WTO) the Secretariat and the Members have taken a number of steps to respond to the COVID-19 crisis including: to enhance access to essential goods and services (section 3.1) and to vaccines and other medical tools (section 3.2); to design and implement support measures aimed at lessening the economic downturn triggered by the pandemic (section 3.3); and finally, to increase the transparency of domestic policies (section 3.4).

These developments have come at a time when the WTO was facing a huge crisis, due to the stalemate of the trade negotiations launched in 2001 and the paralysis of the dispute settlement mechanism since late 2019. Against this background, the pandemic could in principle contribute to the modernisation of the multilateral trading system. Entered into force in 1995, WTO law offers a framework for international trade relations in a geopolitical and economic scenario that has undergone some fundamental transformations in the meantime. At present, States and international organizations cannot overlook that trade and trade-related policies are instrumental in coping with core challenges, including health emergencies, climate change and climate-related hazards. Accordingly, there is scope for ascertaining whether the current legal order is in accord with these new tasks or whether it requires improvements.

#### 3.1 *The Legitimacy of COVID-19-Related Trade Measures*

The current pandemic poses a new challenge, since any existing State has been and will be called to design and implement response and recovery policies and to strengthen resilience to health emergencies. Therefore, the need for coordinated and collective action emerged as a crucial topic.

In 2020, States responded to the outbreak of the COVID-19 pandemic through trade measures that can be classified in two groups.<sup>21</sup> Trade facilitating measures aimed at smoothing the entry of goods and services deemed essential

19 It is estimated that in 2020 the pandemic impacted negatively on trade volumes, with some goods and services sector experiencing a severe fall in trade flows: see WTO, 'Annual Report 2021' (2021) 76 ff.

20 For a comprehensive analysis, see Richard E. Baldwin and Simon J. Evenett (eds) 'COVID-19 and Trade Policy: Why Turning Inward Won't Work' (CEPR 2020).

21 See WTO, 'Overview of the Developments in the International Trading Environment. Annual Report by the Director-General (Mid-October 2019 to mid-October 2020)'

for providing health assistance to the affected population. By and large, they included the temporary suspension of ordinary tariffs, other customs duties and charges, and sales taxes on certain imported goods; in some sectors, the suspension of tariff restrictions that had been previously imposed to maintain a level playing field on the domestic market (i.e., antidumping duties); and the simplification of import processes and procedures. At the same time, the pandemic has triggered trade restrictions, primarily aimed at reserving for the national market the domestic production of core items and avoiding diversion of these goods to foreign countries. In this regard, reference can be made to export bans or restrictions and to the introduction of licensing requirements for the exportation of personal protective equipment, medical products, COVID-19 vaccines and their components.

Trade in services has also been positively affected by a relaxation of regulations, in particular those concerning compliance with mandatory professional qualifications required at the domestic level for the supply of core services, such as medical and health services. However, in this sector, trade has suffered a major decline as a consequence of restrictions imposed upon movement of persons, both domestically and on a cross-border level. Even though these limitations do not directly concern trade, they have nevertheless had a negative impact on it, as illustrated by the decline in tourism and transportation services.

From the perspective of WTO law, trade facilitating measures are not of particular concern, to the extent they are applied on a non-discriminatory basis.<sup>22</sup> As for trade restrictions, the legal scholarship has devoted particular attention to the flexibilities provided for in the WTO agreements, to assess to what extent they can legitimately justify the adoption of measures clearly at variance with the liberalization and non-discrimination commitments that arise from the participation in the multilateral trading system.<sup>23</sup> It is worth noting

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(30 November 2020) WT/TPR/OV/23; WTO, 'Report on G20 Trade Measures (Mid-October 2020 to Mid-May 2021)' (28 June 2021).

22 Under WTO law, the basic prohibitions of discrimination are codified under the most-favoured nation clauses and the national treatment clauses set out in articles I and III of the General Agreement on Tariffs and Trade 1994, and in articles II and XVII of the General Agreement on Trade in Services. For the text of WTO agreements referred to in the present contribution, see WTO, 'The WTO Agreements. The Marrakesh Agreement Establishing the World Trade Organization and its Annexes' (CUP 2017<sup>2</sup>).

23 Bernard Hoekman, Matteo Fiorini and Aydin Yildirim, 'Export Restrictions: A Negative-Sum Policy Response to the COVID-19 Crisis', EUI Working Paper RSCAS 2020/23; Mona Pinchis-Paulsen, 'COVID-19 Symposium: Thinking Creatively and Learning from COVID-19 – How the WTO can Maintain Open Trade on Critical Supplies' (2 April 2020) <[opiniojuris.org/2020/04/02/covid-19-symposium-thinking-creatively-and-learning](http://opiniojuris.org/2020/04/02/covid-19-symposium-thinking-creatively-and-learning)

that in 2020, no trade restriction associated with COVID-19 outbreak had been challenged before the WTO dispute settlement organs. This may be due to the temporary nature of the measures, but also to the fact that most States resorted to restrictions to cope with the worldwide outbreak of a deadly viral infection.

It is also on this basis, that in November 2020 a group of WTO Members (the so-called “Ottawa group”), launched the ‘Trade and Health Initiative’, aiming at enhancing a cross-national trade response.<sup>24</sup> The Initiative identifies unilateral actions that could be taken in a coordinated fashion by WTO Members in order to prevent disruptions in the supply chains of essential medical goods. These actions include the elimination of existing export restrictions. In the event they are deemed as necessary, such measures should be targeted, transparent, proportional, temporary, and consistent with WTO obligations and flexibilities. At the same time, States are encouraged to guarantee that any new export restrictions do not impede the access by least-developed and developing countries to medical goods necessary to combat the COVID-19 pandemic and do not disrupt the provision of international humanitarian assistance. With regard to imports, WTO Members are invited to temporarily remove or reduce tariffs on needed medical items and to exchange experiences and best practices with regard to customs facilitation measures and in the area of technical regulations. The Initiative suggested a working definition of ‘essential medical goods’ and recommended the use of the list prepared in 2020 by the World Customs Organization in coordination with the World Health Organization, while acknowledging scope for changes to the list by WTO Members.<sup>25</sup>

According to the proponents, the ‘Trade and Health Initiative’ could serve as a basis for new negotiations under the aegis of the WTO. In particular, new trade deals could lead to the modification of the scheduled tariff commitments binding upon each Member<sup>26</sup> through the reduction or the removal of ordinary customs duties applied on the importation of essential medical goods. In this regard, the Initiative is aligned with previous practice under the WTO, including the conclusion of the 1994 Agreement on Trade in Pharmaceutical

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-from-covid-19-how-thewto-can-maintain-open-trade-on-critical-supplies/>; Joost Pauwelyn, ‘Export Restrictions in Times of Pandemic: Options and Limits Under International Trade Agreements’, (2020) 54 *Journal of World Trade* 5, 727.

24 WTO, ‘COVID-19 and Beyond: Trade and Health’ (24 November 2020) WT/GC/223. In June 2021, the Initiative resulted in a proposal for a WTO General Council declaration: see WTO, ‘COVID-19 and Beyond: Trade and Health’ (30 June 2021) JOB/GC/251/Rev.3.

25 See ‘HS classification reference for Covid-19 medical supplies, 3.01 Edition’ (June 2020), available at <[http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/covid\\_19/hs-classification-reference\\_edition-3\\_en.pdf?la=en](http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/covid_19/hs-classification-reference_edition-3_en.pdf?la=en)>.

26 See General Agreement on Tariffs and Trade (1994) articles II and XXVIII.

Products<sup>27</sup> and the 1996 Information Technology Agreement with its expansion agreed upon in 2015.<sup>28</sup>

### 3.2 Access to Vaccines

To grant access to COVID-19 vaccines in countries with no or scarce manufacturing capacity that depend heavily on imports or humanitarian assistance, India and South Africa in October 2020 submitted a proposal for a waiver to the obligations set out in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) on the protection of patents (together with copyrights, industrial designs, and undisclosed information) 'in relation to the prevention, containment or treatment of COVID-19'.<sup>29</sup> This proposal is the latest chapter of a long-standing dispute over the balance between protection of intellectual property rights (IPRS) as an incentive to innovate and access to essential medical tools in countries with scant resources.

The 1994 WTO TRIPS Agreement takes into account both concerns. Indeed, under the assumption that IPRS are 'private rights',<sup>30</sup> WTO Members are bound to afford patents holders an exclusive right of exploitation through the implementation and enforcement of specific standards of protection.<sup>31</sup> In parallel, Article 8 of TRIPS acknowledges Members' right to adopt measures deemed necessary to protect public health, provided they are consistent with other TRIPS provisions. Therefore, drawing the boundary between the exclusive private rights of patent holders and restrictions for public health reasons requires States to take into consideration TRIPS flexibilities along with practices followed on the basis of market considerations.

In particular, States can promote the use of *voluntary licences*, whereby a patent holder (e.g., pharmaceutical companies) consents for others to make, use and sell the protected product in return for compensation. The conclusion of these arrangements is left to the autonomy of the interested parties and is guided mainly by profit considerations on the part of the IPR holder.

27 See <[https://www.wto.org/english/tratop\\_e/pharma\\_ag\\_e/pharma\\_agreement\\_e.htm](https://www.wto.org/english/tratop_e/pharma_ag_e/pharma_agreement_e.htm)>.

28 See <[https://www.wto.org/english/tratop\\_e/inftec\\_e/inftec\\_e.htm](https://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm)>.

29 WTO, 'Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19' (2 October 2020) IP/C/W/669. The proposal was later refined, establishing that the waiver would apply 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') and be in force for three years from the date of its approval (WTO, 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/660/Rev.1).

30 See the third recital of the preamble to the TRIPS Agreement.

31 TRIPS Agreement, Part II articles 27–33 and Part III.

The WTO TRIPS Agreement also includes specific language for pursuing ‘compulsory licences’ granted without the consent of the patent owner. As provided for since 1995, government authorities can issue compulsory licences in favour of local manufacturers predominantly for the supply of the domestic market of the product at issue (Article 31 (f)). The compulsory licence mechanism requires adequate remuneration for the patent holder (Article 31 (h)) and is available only after all efforts have been made to obtain his/her authorization, except in cases of national emergency, other circumstances of extreme urgency or public non-commercial use (Article 31 (b)). However, in response to the HIV/AIDS crisis of the 1990s and the limited drug manufacturing capacities in impacted countries, the WTO first acknowledged that Members enjoy a wide autonomy in determining the basis upon which compulsory licences may be granted.<sup>32</sup> In 2003, a waiver to Article 31 TRIPS was adopted, whereby compulsory licences could also cover exports of pharmaceuticals to least-developed countries or other Members with no or insufficient manufacturing capacity.<sup>33</sup> In 2017 an amendment to the TRIPS Agreement entered into force, adding a new Article 31 *bis* taking up and replacing the 2003 waiver for those WTO Members that had accepted it.<sup>34</sup>

Besides this specific discipline on patents, a further “general” flexibility is provided for in Article 73 of TRIPS, whereby WTO Members are not prevented from taking any action they consider necessary for the protection of essential security interests in time of war or other emergency in international relations (Article 73 (b)(iii)). This provision has been the object of scrutiny in the ‘Saudi Arabia – IPRS’ dispute,<sup>35</sup> where for the first time the panel interpreted it on the basis of the previous case law concerning the twin security exception clause set out in Article XXI of GATT 1994.<sup>36</sup> According to the ‘Saudi Arabia – IPRS’ panel report, to legitimately invoke Article 73 (b)(iii) of TRIPS a WTO Member

32 WTO, ‘Declaration on the TRIPS Agreement and Public Health. Adopted on 14 November 2001’ (20 November 2001) WT/MIN(01)/DEC/2, para. 5, let. (b).

33 WTO, ‘Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health. Decision of 30 August 2003’ (1 September 2003) WT/L/540 and Corr. 1.

34 As of July 2021, the amendment has been accepted by 134 WTO Members (including the 27 EU members States) [https://www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm). For a more recent reading of the TRIPS amendment, see Frederick M. Abbott and Jerome H. Reichman, ‘Facilitating Access to Cross-Border Supplies of Patented Pharmaceuticals: The Case of the COVID-19 Pandemic’, (2020) 23 *Journal of International Economic Law*, 535 ff.

35 WTO, ‘Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights – Report of the Panel’ (16 June 2020) WT/DS567/R.

36 WTO, ‘Russia – Measures Concerning Traffic in Transit – Report of the Panel’ (5 April 2019) WT/DS512/R.

must establish the existence of an ‘emergency in international relations’, articulate the ‘essential security interests’ arising from it and take measures linked with those interests and plausibly not so remote from, or unrelated to, the situation of emergency.<sup>37</sup>

Finally, the TRIPS Agreement provides for exceptions addressing the specific needs of least-developed countries. In particular, under Article 66 these Members enjoy a transition period for the full implementation of binding IPRS standards of protection and enforcement obligation. This transition period has been recently extended until July 2034.<sup>38</sup> Moreover, the obligations under Article 70 (8) and (9) to provide a means for the filing of patents applications during the transition period and to grant exclusive marketing rights until the application is accepted or rejected are waived specifically for pharmaceutical products until January 2033.<sup>39</sup>

The submission of the 2020 Waiver Proposal has generated a lively confrontation within the WTO.<sup>40</sup> At time of writing, it is supported by least-developed countries, all Members from the African continent and a number of other developing countries. According to them, the above-mentioned flexibilities in trade law are unfit to combat COVID-19 and to secure a widespread access to vaccines, medicines and other health tools necessary for the prevention, treatment and containment of the pandemic. In particular, they point out that the scope of Article 31 *bis* of TRIPS covers only pharmaceutical products, not diagnostics or medical equipment, and that the procedural requirements set therein are too cumbersome and risk slowing down importation and exportation.<sup>41</sup> In addition, the regime for compulsory licences is considered inadequate to address the current “global” public health needs, as it would need to be activated by each State, on a case-by-case and product-by-product basis. Evidence of the inconvenience of compulsory licences system in the

37 WTO, Saudi Arabia – IPRS (n 35), para. 7.242.

38 WTO, ‘Extension of the Transition Period under Article 66.1 for Least Developed Country Members. Decision of the Council for TRIPS of 29 June 2021’ (29 June 2021) IP/C/88.

39 WTO, ‘Least-Developed Country Members – Obligations under Article 70.8 and Article 70.9 on the TRIPS Agreement with respect to Pharmaceutical Products. Decision of 30 November 2015’ (2 December 2015) WT/L/971.

40 For a critical view of the Waiver Proposal, see James Bacchus, ‘An Unnecessary Proposal. A WTO Waiver of Intellectual Property Rights for COVID-19 Vaccines’, *Cato Institute Free Trade Bulletin* n. 78 (16 December 2020).

41 See WTO, ‘Minutes of the Meeting held in the Centre William Rappard on 15–16 October and 10 December 2020’ (16 February 2021) IP/C/M/96/Add.1, paras. 860 and 870.

context of COVID-19 can be drawn by the fact that in 2020 no WTO Member notified of its intention to invoke Article 31 *bis* of TRIPS.<sup>42</sup>

With regard to Article 73 of TRIPS, in the context of existing case law, it can be argued that the current pandemic is an ‘emergency in international relations’, since it has caused an unprecedented severe disruption to societies and economies across the globe, where the protection of public health is an indisputable ‘essential security interest’. At the same time, the suspension of patent rights held by foreign companies clearly aiming at securing access to vaccines, medicines or medical devices necessary to combat COVID-19 would easily pass the “plausibility” test.<sup>43</sup> However, relevant domestic measures could always be challenged by the WTO dispute settlement organs, and this would not facilitate national policy makers in designing the most appropriate response to the lack of essential goods.

On their side, pharmaceutical companies claim that in general terms any derogation of exclusive rights should be limited because it could destabilize profit expectations and reduce future research and development investments in the pharmaceutical sector. However, it should not be forgotten that unprecedented public funding has heavily supported medical research for COVID-19, while at the same time advanced market commitments by governments have lowered the risk of unprofitable investments.<sup>44</sup>

Reversing its initial position,<sup>45</sup> the US administration does not fully back the view voiced by pharmaceutical companies. Indeed, in 2021 the US Trade Representative declared that the United States ‘believes strongly in intellectual property protections, but in service of ending this pandemic, supports the waiver of those protections for COVID-19 vaccines’.<sup>46</sup> On the contrary, the opposite stance has been taken by the EU Commission since the very first discussions in the WTO TRIPS Council. Indeed, according to the EU, the existing

42 The information is available at <[https://www.wto.org/english/tratop\\_e/covid19\\_e/trade\\_related\\_ip\\_measure\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/trade_related_ip_measure_e.htm)>.

43 See Frederick Abbott, ‘The TRIPS Agreement Article 73 Security Exceptions and the COVID-19 Pandemic’, South Centre Research Paper 116 (August 2020) <[ssrn.com/abstract=3682226](https://www.ssrn.com/abstract=3682226)>.

44 For a critique to the claims raised by pharmaceutical companies, see Joseph E. Stiglitz, Lori Wallach, ‘Will Corporate Greed Prolong the Pandemic?’ (6 May 2021), available at <<https://www.project-syndicate.org/onpoint/big-pharma-blocking-wto-waiver-to-produce-more-covid-vaccines-by-joseph-e-stiglitz-and-lori-wallach-2021-05>>.

45 WTO, Minutes (n 41), para. 1049: ‘The United States does not support the waiver proposal of India and South Africa’.

46 Statement from Ambassador Katherine Tai on the Covid-19 Trips Waiver (5 May 2021) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/state-ment-ambassador-katherine-tai-covid-19-trips-waiver>>.

TRIPS flexibilities are fit for purpose, and the efforts to ensure access for all to essential treatments and medical tools should be articulated along four directions:<sup>47</sup> (1) the development of vaccines; (2) the improvement of worldwide manufacturing capacity in this sector; (3) the removal of obstacles to a smooth function of global supply chains (also through the above-mentioned Trade and Health Initiative); and (4) the support of concerted actions pursuing worldwide access to COVID-19 vaccines, such as the COVAX Facility, led by the WHO together with the Coalition for Epidemic Preparedness Innovations and GAVI – the Global Alliance for Vaccines and Immunization.

### 3.3 *The Legitimacy of COVID-19-Related Financial Support Programmes*

In the medium term, it is possible that trade disputes may arise with respect to the financial programmes addressing the severe downturn suffered by national economies. According to available information,<sup>48</sup> as of 15 July 2021 WTO Member have introduced almost one thousand support measures, either on a temporary or on a permanent basis, to support specific impacted businesses and economic sectors. WTO agreements provide for an articulated regime on subsidies for industrial goods, agricultural products and services, with a view to limiting their potential detrimental impact on the competitiveness of domestic markets. Exploring the legitimacy of the COVID-19-related state aid programmes deserves a careful examination on a case-by-case basis and is beyond the purposes of the present contribution. However, it is worth outlining the basic characters of the relevant WTO law, highlighting the general legal framework against which the legitimacy of financial measures designed to support the economic recovery for the pandemic can be measured.

As a general feature, WTO law does not provide for a general exception to its discipline on subsidies as a result of natural or man-made hazards. In that respect, it departs from other international regimes concluded on a bilateral or regional basis. For instance, according to Article 107 of the Treaty on the Functioning of the European Union, state aid ‘to make good the damage

47 See WTO doc. IP/C/M/96/Add.1 (16 February 2021) paras. 1029 ff. See also the EU submission of 4 June 2021 in WTO doc. IP/C/W/680. The United Kingdom is aligned with the EU Commission position: see the statement by the UK Ambassador, made at the WTO TRIPS Council meeting of 8–9 June 2021, available at <<https://www.gov.uk/government/news/wto-trips-council-june-2021-uk-statements>>. To the contrary, the European Parliament affirmed its ‘support for proactive, constructive and text-based negotiations for a temporary waiver of the WTO TRIPS Agreement, aiming to enhance global access to affordable COVID-19-related medical products and to address global production constraints and supply shortages’ (European Parliament resolution of 10 June 2021, P9\_TA(2021)0283).

48 See <[https://www.wto.org/english/tratop\\_e/covid19\\_e/trade\\_related\\_support\\_measures\\_e.htm#fnt-1](https://www.wto.org/english/tratop_e/covid19_e/trade_related_support_measures_e.htm#fnt-1)>.

caused by natural disasters or exceptional circumstances' is *de jure* compatible with the internal market (paragraph 2 (b)), while the European Commission is given the mandate to assess the legitimacy of financial support remedying a generally defined 'serious disturbance' in the economy of a Member of the EU (paragraph 3 (b)).<sup>49</sup> Similarly, some recent trade agreements expressly include a waiver to their provisions on subsidies so as not to obstruct the compensation for damages due to natural hazards or other exceptional events.<sup>50</sup> Comparably, original WTO law did not apply to industrial subsidies granted in order to provide assistance to disadvantaged regions. However, this carve-out expired in 2000 and it cannot any longer be invoked as a justification for support programmes.<sup>51</sup> However, a careful reading of relevant rules discloses that WTO Members enjoy a certain margin to act in designing financial aid for recovering from the pandemic.

First, the discipline on industrial subsidies covers exclusively "specific" state aid, i.e. granted on a selective basis to a particular enterprise or industry, to a group of enterprises or industries, or to certain enterprises located within a designated geographical region.<sup>52</sup> Accordingly, general programmes supporting industrial production horizontally do not suffer legal constraints. Subsidies are prohibited if they are contingent in law or in fact upon export performance or upon the use of domestic over imported products in the production process<sup>53</sup> (as could be the case for access to public financial resources conditioned upon compliance with "buy national" clauses). In all other cases, subsidies can only be challenged by other WTO Members if they can provide sufficient evidence that their interests are adversely affected according to a predetermined set of indicators.<sup>54</sup>

49 In 2020, the European Commission provided an extensive guidance to EU Members on how these flexibilities could be used to effectively help affected undertakings during the COVID-19 outbreak, whilst limiting undue distortions to the internal market: see Communication from the Commission of 19 March 2020, C(2020)1863 (*OJ C* 91I, 20 March 2020), as later modified (*OJ C* 112I, 4 April 2020, 1; *OJ C* 164, 13 May 2020, 3; *OJ C* 218, 2 July 2020, 3).

50 Among the others, see para. 2, let. *b*) of Annex 11-A to the free trade agreement between the European Union and Singapore (*OJ L* 204, 14 November 2019), entered into force on 21 November 2019.

51 Agreement on Subsidies and Countervailing Measures, articles 8 and 31. But see WTO, 'Implementation-related Issues and Concerns. Decision of 14 November 2001' (20 November 2001) WT/MIN(01)/17, para. 10.2.

52 Agreement on Subsidies and Countervailing Measures, articles. 1 and 2, paragraphs 1 and 2.

53 *Ibid.*, article 3.

54 *Ibid.*, articles 5 and 6.

With regard to agricultural subsidies, WTO Members are bound by a strict regime on export subsidies<sup>55</sup> and domestic support measures. As a result, financial support to the agricultural sector is justified in the very limited circumstance of 'a natural or like disaster (including disease outbreaks [...])' formally recognized by government authorities and to recover from the losses of income.<sup>56</sup>

Unlike the legal regime for industrial and agricultural subsidies, WTO law does not provide for a comprehensive regulation on subsidies to the service sector. It merely recognizes that they may have distorting effects on trade in services, and therefore negotiations are envisaged in order to establish multilateral disciplines in this area.<sup>57</sup> However, after 26 years, scant progress can be reported in these negotiations. Accordingly, financial support programmes in favour of service sector which suffered losses from the current pandemic are not subject to a strict legal regime under the multilateral trading system.<sup>58</sup>

### 3.4 *Transparency of Trade Policies*

For a long time, transparency in domestic policies has not been a major concern discussed within the WTO or by trade law scholars, even though the WTO agreements include several transparency provisions, mainly framed as notification requirements and publication obligations.<sup>59</sup> Their overall purpose is to share information on domestic measures that come under the scope of WTO agreements, fostering access to the laws and regulations that affect trade flows in goods and services. Compliance with transparency requirements also favours dialogue among Members, with a view to clarifying controversial issues without resorting to adjudicatory procedures by helping States to identify new problems and find a solution to them.

Noting that transparency obligations have not been implemented across WTO Members, a number of proposals have been recently put forward with

55 See Agreement on Agriculture, Part v, and WTO, 'Export Competition. Ministerial Decision of 19 December 2015' (21 December 2015) WT/L/980, paras. 6–11.

56 Agreement on Agriculture, Annex 2, para. 8. Payments under this provision may also be disbursed to cover losses of livestock, land or other productions factors.

57 General Agreement on Trade in Services, at. xv, para. 1.

58 On the potential impact on market access and non-discrimination duties under the WTO General Agreement on Trade in Services, see Giovanna Adinolfi, 'Natural Disasters and Trade. Study II. A Legal Mapping' (WTO 2019) 60 ff.

59 On transparency of trade policies under WTO law and the related issues mentioned in the text, see Leonardo Borlini, 'A crisis looming in the dark: Some remarks of the reform proposals on notifications and transparency' (2019) *Questions of International Law, Zoom-Out*, 83.

the aim of strengthening compliance.<sup>60</sup> The issue has become even more crucial in the context of the current pandemic, when as a first response many States resorted to trade-restricting and trade-facilitating measures, as discussed above. In view of these developments, the WTO Secretariat has boosted its efforts to promote transparency. Indeed, analytical information has been provided on the WTO website, where trade measures related to COVID-19 are collected and regularly updated, on the basis of either Members' notifications or of other official sources.<sup>61</sup> Furthermore, within the mandate established under the Trade Policy Review Mechanism, these measures have been the object of an overall assessment in the November 2020 report issued by the Director-General overviewing the policy developments in trade in goods and services in the previous twelve months, largely focusing on the response to the pandemic.<sup>62</sup> Finally, thematic reports have been prepared by the Secretariat, providing basic legal information about that Members can use to evaluate their measures and to explore the health crisis' impact on trade and economic players.<sup>63</sup>

Whether this practice paves the way for a more active role of the Secretariat in fostering transparency in trade policy is open to question. Nevertheless, it helps emphasize that response measures adopted in the event of a hazard and justified by the need to guarantee assistance to the population are of interest not only to the affected State, but also to its trading partners. In particular, the availability of reliable information on trade facilitating measures can smooth foreign assistance, while strengthened transparency on trade restrictions can help prevent measures introduced for emergency reasons from turning into undue barriers to trade.

60 Among the others, see WTO, 'Procedures to enhance transparency and strengthen notification requirements under WTO Agreements' (15 July 2021) JOB/GC/204/Rev.6; European Commission, 'Reforming the WTO: Towards a sustainable and effective multilateral trading system', annexed to COM (2021) 66 final (18 February 2021); WTO, 'China's Proposal on WTO Reform' (13 May 2019) WT/GC/W/773; 'Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements', Statement delivered by Ambassador Dennis C Shea in the WTO Council for Trade in Goods (11 April 2019) <<https://geneva.usmission.gov/2019/04/12/procedures-to-enhance-transparency-and-strengthen-notification-requirements-under-wto-agreements>>.

61 See <[https://www.wto.org/english/tratop\\_e/covid19\\_e/covid19\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm)> under the headings 'COVID-19: Trade and trade-related measures' and 'Covid-19: Support measures'.

62 See WTO, 'Overview of the Developments in the International Trading Environment. Annual Report by the Director-General (Mid-October 2019 to mid-October 2020)' (30 November 2020) WT/TPR/OV/23. See also WTO, 'Report on G20 Trade Measures (Mid-October 2020 to Mid-May 2021)' (28 June 2021).

63 See <[https://www.wto.org/english/tratop\\_e/covid19\\_e/covid\\_reports\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/covid_reports_e.htm)>.