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## The WTO and Pandemics

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# THE WTO AND PANDEMICS

PADIDEH ALA'I\* & CLEMENCE D. KIM\*\*

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The COVID-19 pandemic presented the world with a once-in-a-century public health challenge. At the height of the pandemic, measures to curb the disease shut down large swaths of the global economy while worldwide demand for international trade in medical products to fight the pandemic increased, as did dependence on global supply chains to source medical products.<sup>1</sup> The World Trade Organization (WTO) has played an important role in ensuring transparency and market access for trade in medical goods despite the

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*Authors' note: This article is based on a talk given in November 2020 on the Role of the WTO in Pandemics. Much has transpired from the date of that talk and subsequent drafting of this article generally on the pandemic, including discussions on the IP waiver of COVID-19 vaccines. Prior to publication the authors attempted to update some of this information but the situation continues to be evolving and fluid.*

1. See generally *Trade in Medical Goods in the Context of Tackling COVID-19: Developments in the First Half of 2020*, WORLD TRADE ORG. (Dec. 22, 2020), [https://www.wto.org/english/tratop\\_e/covid19\\_e/medical\\_goods\\_update\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/medical_goods_update_e.pdf) (last accessed Apr. 12, 2021) [hereinafter *Trade in Medical Goods: Developments*] (providing an overview of the surge in trade of medical goods such as personal protective equipment).

political, legal, and logistical difficulties COVID-19 and the rise of protectionism presented.<sup>2</sup> However, the WTO is positioned to do more by taking a more active role in securing the movement of medicines and medical supplies in this and future pandemics. The WTO is in need of a revised, twenty-first century mandate.<sup>3</sup> The world has changed not only since the Bretton Woods framework was set up in 1947,<sup>4</sup> but also since the conclusion of the Uruguay Round negotiations that led to the establishment of the WTO on January 1, 1995.<sup>5</sup> This public health challenge can help the WTO reassert and refine its mission at a time when its trade negotiations have been largely moribund and its dispute settlement mechanism under attack. It is significant that the WTO's new Director General, Ngozi Okonjo-Iweala, was previously the Chair of the Global Alliance for Vaccines and Immunizations (GAVI) and has made vaccine production and distribution a priority for the WTO.<sup>6</sup> On June 15, 2021, the Directors General of the WTO, World Health Organization (WHO), and World Intellectual Property Organization (WIPO) met to agree on further strengthened cooperation for access to medical technologies to tackle the COVID-19 pandemic.<sup>7</sup> This essay will explain briefly how the

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2. See *Trade in Medical Goods in the Context of Tackling COVID-19*, WORLD TRADE ORG. (Apr. 3, 2020), [https://www.wto.org/english/news\\_e/news20\\_e/rese\\_03apr20\\_e.pdf](https://www.wto.org/english/news_e/news20_e/rese_03apr20_e.pdf) [hereinafter *Trade in Medical Goods – COVID-19*] (listing WTO contributions to liberalizing the trade in medical goods).

3. See generally James McBride et al., *What's Next for the WTO?* COUNCIL ON FOREIGN REL. (last updated Feb. 16, 2021), <https://www.cfr.org/background/whats-next-wto> (last accessed Apr. 12, 2021) (summarizing recent challenges the WTO has faced including the COVID-19 pandemic and pressure from the United States).

4. See *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (last accessed Apr. 10, 2021) (explaining the process of establishing the GATT as the third Bretton Woods institution in 1947).

5. *Id.*

6. See Emma Farge, *WTO Boss Seeks Boost for COVID-19 Vaccine Production, Gets Backing*, REUTERS (Mar. 19, 2021), <https://www.reuters.com/article/us-trade-wto-vaccines/wto-boss-seeks-boost-for-covid-19-vaccine-production-gets-backing-idUSKBN2B12LO> (last accessed Apr. 10, 2021) (detailing Okonjo-Iweala pushing WTO members to implement measures facilitating COVID-19 vaccine production and distribution).

7. See WHO, WTO, WIPO, Joint Release - Directors General of WHO, WIPO and the WTO agree on intensified cooperation in support of access to medical

WTO, as a member-driven institution, has evolved and the challenges it faces that predate the COVID-19 pandemic. It then looks at some of the WTO mechanisms and actions that have already played a role during the COVID-19 pandemic and finally will discuss the potential future role for WTO in cases of future pandemics.

## I. FROM THE GATT TO THE WTO: AN INSTITUTION AT THE CROSSROADS.

The Bretton Woods Institutions were created in the aftermath of World War II in order to secure peace for future generations.<sup>8</sup> It was the belief of those who gathered at Bretton Woods, specifically John Maynard Keynes and Harry Dexter White, that protectionism and “beggar thy neighbor” policies contained in the Treaty of Versailles had ultimately led to the rise of fascism and the Great Depression.<sup>9</sup> “Never Again” was the mantra.<sup>10</sup> The Bretton Institutions originally envisioned included: the International Monetary Fund (the IMF), the International Bank for Reconstruction and Development (the World Bank) and the International Trade Organization (ITO).<sup>11</sup> The IMF and World Bank came into existence shortly thereafter, but the ITO did

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technologies worldwide to tackle the COVID-19 pandemic, WHO (Jun. 24, 2021), <https://www.who.int/news/item/24-06-2021-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> (detailing the meeting and messages from the Directors General of the WTO, WHO, and WIPO).

8. See generally *What are the Bretton Woods Institutions?* BRETTON WOODS PROJECT (Jan. 1, 2019), <https://www.brettonwoodsproject.org/2019/01/art-320747/#:~:text=The%20Bretton%20Woods%20Institutions%20are,to%20promote%20international%20economic%20cooperation> (last accessed Apr. 10, 2021) (describing the purpose of the Bretton Woods Institutions).

9. See generally JOHN MAYNARD KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* (1919) (providing a detailed overview of the negotiation of the peace treaty with Germany and the subsequent economic impacts on Germany); see also John Maynard Keynes, *National Self-Sufficiency*, 22 *STUD. IRISH Q. REV.* 177, 188–89 (1933) (referencing the contemporary political landscape and increasing efforts in European states to become nationally self-sufficient).

10. Martin Wolf, Opinion, *Why Agreeing a New Bretton Woods is Vital*, *FIN. TIMES* (Nov. 4, 2008), <https://www.ft.com/content/7cc47dfe-aa95-11dd-897c-000077b07658> (last accessed Apr. 10, 2021).

11. BRETTON WOODS PROJECT, *supra* note 8.

not.<sup>12</sup> The ITO was opposed by the United States Congress, largely due to concerns of potential ITO involvement in domestic U.S. economic issues.<sup>13</sup> Instead, the General Agreements of Tariff and Trade (GATT) 1947 was entered into by 23 countries as a provisional contractual arrangement so that barriers to trade, specifically tariffs, could be reduced until such time when the ITO can come into existence.<sup>14</sup> From 1948–1994 the GATT functioned under a provisional constitution and succeeded in reducing tariffs and, to some extent, other non-tariff barriers under successive rounds of trade negotiations.<sup>15</sup> Finally, under the Uruguay Round of negotiations (1986–1994) the ITO, now called WTO, was established and the text of GATT 1947 was incorporated with the WTO Agreements with additional 21 understandings and modifications.<sup>16</sup> By 1995, the world had changed significantly with the rise of the regulatory and administrative state in Europe and the United States.

Tariffs were no longer a serious impediment to trade among major

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12. See *id.* (explaining how plans for the ITO were not realized until the establishment of the WTO in the 1990s).

13. *Bretton Woods-GATT, 1941–1947*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1937-1945/bretton-woods> (last accessed Apr. 14, 2021); see also Memorandum by the Deputy Assistant Secretary of State for Economic Affairs (O’Gara) to the Director of the Executive Secretariat of the Department of State (McWilliams) (Oct. 12, 1950) (on file with the Office of the Historian <https://history.state.gov/historicaldocuments/frus1950v01/d286>) (documenting skepticism on part of U.S. officials during negotiations).

14. See generally Bruce Wilkinson, *General Agreement on Tariffs and Trade (GATT)*, THE CANADIAN ENCYCLOPEDIA (Feb. 7, 2006) <https://www.thecanadianencyclopedia.ca/en/article/general-agreement-on-tariffs-and-trade> (last updated Jan. 7, 2021) (providing an overview of the GATT’s purpose and the process of the WTO superseding the GATT).

15. See Roy Santana, *GATT 1947: How Stalin and the Marshall Plan Helped to Conclude the Negotiations*, WORLD TRADE ORG. [https://www.wto.org/english/tratop\\_e/gatt\\_e/stalin\\_marshall\\_conclude\\_negotiations\\_e.htm](https://www.wto.org/english/tratop_e/gatt_e/stalin_marshall_conclude_negotiations_e.htm) (last visited Apr. 10, 2021) (detailing how the GATT’s facilitation of international co-operation increased security and thereby predictability for those engaged in international trade); see also *The GATT Years: From Havana to Marrakesh*, *supra* note 4) (describing the series of trade negotiations and GATT efforts focused on reducing tariffs).

16. See generally *The Uruguay Round*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm) (last accessed Apr. 10, 2021) (providing an overview of the purpose, timeline, and aftermath of the Uruguay Round negotiations).

trading nations.<sup>17</sup> Tariffs had been supplanted by multitudes of regulations and regulatory bodies both at the border and within states.<sup>18</sup> The movement of goods across borders was increasingly impacted by diverse and complex domestic rules and regulations that functioned as non-tariff barriers.<sup>19</sup> Trade in services, such as financial services and telecommunications, were subject to regulatory agency authority.<sup>20</sup> As a result, domestic regulatory agencies found their jurisdictional authority subject to trade negotiations and increasingly impacted by trade rules within some WTO member states.<sup>21</sup> In turn, tensions arose between trade negotiating authorities and other domestic regulatory agencies.

By the conclusion of the Uruguay Round of trade negotiations, the scope of the WTO's mandate was far greater than the GATT. In addition to trade in goods, the WTO Agreements began to address trade in services, as well as trade-related aspects of intellectual property rights.<sup>22</sup> Other areas of domestic and regulatory governance such as food and product safety and technical standards were added to the WTO mandate, in addition to the traditional areas of customs valuation, import and export licensing and unfair trade remedies.<sup>23</sup>

Linkages of trade to areas such as environment, development and labor were reflected in the Preamble to the Marrakesh Agreement

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17. See *The GATT Years: From Havana to Marrakesh*, s note 4 (highlighting the GATT's successes in tariff reduction and corresponding world trade growth).

18. See *id.* (explaining how GATT's success in tariff reduction in part contributed to governments subsequently pursuing protective measures).

19. See *id.* (highlighting the complexity of trade in an increasingly globalized economy and the challenges to liberalizing areas of trade such as agriculture).

20. See *The Uruguay Round*, *supra* note 16 (citing both telecommunications and financial services as new areas of trade negotiated in the Uruguay Round and post-Uruguay Round agenda).

21. See Anne Kirchner & Joseph Rieras, *Why the United States-Mexico-Canada Agreement is Important to FDA*, FOOD & DRUG ADMIN., <https://www.fda.gov/news-events/fda-voices/why-united-states-mexico-canada-agreement-important-fda> (last accessed Apr. 13, 2021) (explaining the effect of WTO non-tariff agreements on FDA regulatory authority).

22. See *The Uruguay Round*, *supra* note 16 (listing services and intellectual property among the Uruguay Round agenda items designated for future work).

23. See generally *Implementation and Monitoring*, WORLD TRADE ORG. [https://www.wto.org/english/tratop\\_e/monitor\\_e/monitor\\_e.htm](https://www.wto.org/english/tratop_e/monitor_e/monitor_e.htm) (last accessed Apr. 12, 2021) (listing the various WTO councils and committees focused on areas of regulatory governance).

Establishing the WTO.<sup>24</sup> The Preamble of the GATT had been modified to state that WTO trade liberalization goals of market access and non-discrimination must be consistent with the “*goals of sustainable development seeking both to preserve and protect the environment.*”<sup>25</sup> The WTO preamble also recognized the “*need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade.*”<sup>26</sup> It is unclear what this new language means for the mandate of the WTO. There have been serious disagreements among WTO members about the inclusion of environmental and labor standards within the mandate of the WTO.<sup>27</sup> The WTO Appellate Body stated that the language of the preamble under the Vienna Convention on Interpretation of the Law of Treaties affects the interpretation of other provisions of the WTO Agreements.<sup>28</sup>

At the 2001 Ministerial Conference in Doha, Qatar, the WTO launched a Development Round.<sup>29</sup> The Doha Round was never concluded due to a lack of consensus among members.<sup>30</sup> The accession of China into the WTO that same year and the inability of the WTO to

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24. Marrakesh Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]; see also Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 141, 142, 153, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter *United States – Shrimp*] (finding the section at issue as “relating to” the conservation of natural resources under Article XX(g) annexed to the WTO Agreement).

25. WTO Agreement, *supra* note 24, pmbl.

26. *Id.*

27. See generally *United States – Shrimp*, *supra* note 24 ¶¶ 127–30 (detailing the disputes regarding terminology incorporated in the WTO Agreement provisions concerning environmental protections).

28. See *id.* ¶¶ 142, 153 (emphasizing that Article XX(g) should be read in context of the WTO Agreement preamble); see also Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 16–18, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996) (applying principles of treaty interpretation to Article XX(g)).

29. *The Doha Round*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm) (last accessed Apr. 12, 2021).

30. See McBride et al., *supra* note 3 (explaining the shifting political landscape and disagreements regarding subsidies that contributed to the end of the Doha talks).

restrain the Chinese economic model of state-run capitalism has undermined the utility of the WTO in the eyes of the United States and others.<sup>31</sup> We must, therefore, assess the role of the WTO against this backdrop. Is it possible for the WTO to use the COVID-19 pandemic to demonstrate its relevance and importance to the global community? The WTO is a member-driven institution. A lot will therefore depend on the vision and support of the membership and the leadership of the United States.

## II. IMPACT OF THE COVID-19 PANDEMIC ON TRADE AND THE ROLE OF THE WTO

The outbreak of the COVID-19 virus in 2019 has caused more than 3.95 million deaths globally<sup>32</sup> and has imposed physical and societal restrictions, with the global economy experiencing 4.3% contraction of global gross domestic product in 2020.<sup>33</sup> These restrictions and impacts on society transferred to trade in goods and services.

The 2020 WTO World Trade Statistical Review showed that the global Purchasing Manager Index (PMI) for new export orders of manufactured goods have dropped to 27.1 in April 2020 compared to the baseline of 50.<sup>34</sup> Specific industries, such as the clothing industry, experienced global demand decreasing by 37% in April 2020, in year-

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31. See generally *id.* (referring to China's accession to the WTO in 2001 and describing the numerous criticisms of the WTO the Trump Administration voiced regarding its response to China).

32. See WHO, WHO Coronavirus Dashboard, <https://covid19.who.int/> (accessed Jul. 02, 2021) (showing that as of 12:21pm CEST, 2 July 2021, there have been 3,954,324 deaths)

33. See *Impact of the COVID 19 Pandemic on Trade and Development: Transitioning to a New Normal*, UNITED NATIONS (2020), 8 [https://unctad.org/system/files/official-document/sg2020d1\\_en.pdf](https://unctad.org/system/files/official-document/sg2020d1_en.pdf) (estimating global contraction at 4.3% in 2020 and acknowledging the widespread socioeconomic pandemic impacts); see generally *Global Economic Prospects*, WORLD BANK GRP. (Jan. 2021), <https://www.worldbank.org/en/publication/global-economic-prospects> (providing an overview of COVID-19's global economic impact).

34. *World Trade Statistical Review 2020*, WORLD TRADE ORG. (2020), 26 [https://www.wto.org/english/res\\_e/statis\\_e/wts2020\\_e/wts2020\\_e.pdf](https://www.wto.org/english/res_e/statis_e/wts2020_e/wts2020_e.pdf); see also *How the World's Purchasing Managers See Current Business Conditions*, BLOOMBERG, <https://www.bloomberg.com/graphics/global-pmi-tracker/?srnd=economics-vp> (last accessed Apr. 12, 2021) (demonstrating that all listed countries had deteriorating PMIs in the period of "April 2020").



on-year terms.<sup>35</sup> In nations such as Bangladesh, where exports of clothing account for 33% of its total exports, cancellations of export orders amounted to US \$3.18 billion in April 2020, with exports 81% lower than in April 2019.<sup>36</sup> At the height of the COVID-19 pandemic wave in the first half of 2020, the volume of global merchandise trade shrank by 3% year-on-year in the first quarter and experienced an 18.5% year-on-year drop.<sup>37</sup>

Trade in services also faced stagnation due to the restrictions and encumbrances imposed by the pandemic.<sup>38</sup> International travel, air transport, cultural events, sporting events, recreational activities, and hospitality services account for more than 40% of world services exports.<sup>39</sup> According to the *WTO Statistical Report*, economies that accounted for more than half of global services exports in 2019 had experienced a 15% average decrease in services exports by March 2020.<sup>40</sup> Some members, such as Italy, experienced up to a 40% decrease in services exports.<sup>41</sup> Global commercial flights dropped from nearly 120,000 per day in January 2020 to approximately 20,000 in April 2020.<sup>42</sup>

With the COVID-19 spread around the globe, there was also a severe shortage of medical personal protective equipment (PPE).<sup>43</sup> With the sudden increase in demand, coupled with the disruption of global supply chains for medical supplies and devices, facilitating the trade of COVID-19 -related products was critical.<sup>44</sup> While total global

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35. *World Trade Statistical Review 2020*, *supra* note 34, at 52.

36. *Id.*

37. Press Release, Trade Falls Steeply in First Half of 2020, World Trade Organization (June 22, 2020), [https://www.wto.org/english/news\\_e/pres20\\_e/pr858\\_e.htm](https://www.wto.org/english/news_e/pres20_e/pr858_e.htm) [hereinafter Trade Falls Steeply].

38. *World Trade Statistical Review 2020*, *supra* note 34, at 31.

39. *Id.*

40. *Id.*

41. *Id.*

42. See Trade Falls Steeply, *supra* note 37 (charting the daily number of commercial flights from January 2020 to June 2020).

43. See *Trade in Medical Goods: Developments*, *supra* note 1, at 1, 8 (citing the shortages in medical equipment and coinciding high demand and high tariff rates for personal protective equipment).

44. See generally *id.* (highlighting the increased trade in medical goods amid the COVID-19 pandemic and pertinent WTO efforts to facilitate this trade).

trade volume declined by 14% in the first half of 2020, imports and exports of medical goods increased by 16% and amounted to 1.139 billion US dollars in value.<sup>45</sup>

The WTO already has several monitoring and notification systems for trade-related measures under various covered agreements such as the Agreements on Technical Barriers to Trade (TBT), The Agreement on Sanitary and Phytosanitary Measures (SPS), Trade-Related Intellectual Property Rights (TRIPS), Trade Facilitation Agreement (TFA), Government Procurement Agreement (GPA), and Agreement on Agriculture(AA).<sup>46 47</sup> The notification requirements contained in WTO Agreements are imperative in maintaining transparency in the pandemic. The record-keeping nature of the notification and monitoring systems provides WTO members with a repository of information to reference during crucial decision-making.<sup>48</sup> Thus, these transparency obligations under the WTO agreements enable the WTO to gather information about trade measures related to COVID-19.<sup>49</sup>

From mid-October 2019 to mid-May 2020, 363 new trade and trade-related measures were notified, with 198 of them trade-facilitating and 165 trade-restrictive.<sup>50</sup> Two hundred and fifty-six of these measures were COVID-19-related measures.<sup>51</sup> In May 2020, at the General Council meeting of the WTO, the WTO urged the members to exercise “maximal restraint in the use of export

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45. *Trade in Medical Goods: Developments*, supra note 1, at 1.

46. While the differences and details of these agreements are significant, for the purpose of this article, the author will not explain the differences between these agreements.

47. See *Implementation and Monitoring*, supra note 23 (listing WTO councils and committees tasked with monitoring trade agreements).

48. See *id* (explaining how the notification and monitoring system works at the WTO).

49. See *id* (discussing the importance of the transparency obligation and the “regular global trade monitoring reports” on trade practices implemented in response to global events impacting the economy).

50. See Trade Policy Review Body, *Report to the TPRB from the Director-General on Trade-Related Developments*, WT/TPR/OV/W/14, at 2–7 (July 10, 2010),

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/OVW14.pdf&Open=True> (detailing the key findings of the new trade measures).

51. See *id* at 7–9, 31–36, 176–228 (detailing the large volume of COVID-19-related measures and their necessity for protecting global trade of goods and services).

restrictions and other measures that could disrupt supply chains” and called on members to improve transparency on new COVID-19-caused trade-related measures.<sup>52</sup> At the meeting, sixty-five WTO members dedicated themselves exclusively to information and view sharing on COVID-19 trade-related measures.<sup>53</sup> By October 2020, WTO members repealed 39% of restrictive measures on trade in goods adopted immediately after the start of the pandemic, while most of the remaining 124 COVID-19-related measures in the heavily impacted services sector continue to facilitate trade.<sup>54</sup>

This constant monitoring, notification, and collection of regulatory information by the WTO led to the establishment of the COVID-19 Trade Facilitation Repository – a joint platform created by the partnership of the WTO, WHO, United Nations Conference on Trade and Development (UNCTAD), the Commonwealth, the International Trade Centre (ITC), World Customs Organization (WCO), and the Global Alliance for Trade Facilitation.<sup>55</sup> The Repository consolidates information on trade-facilitation measures adopted by key stakeholders and provides access to this information by making it user-friendly and searchable within a single database.<sup>56</sup> The Repository contains a useful listing of all initiatives by organization, type of measure, and subject matter.<sup>57</sup>

Countries such as Chile took steps, as early as March, 2020, to

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52. World Trade Organization, *Export Prohibitions and Restrictions: Information Note*, 2 (Apr. 23, 2020), [https://www.wto.org/english/tratop\\_e/covid19\\_e/export\\_prohibitions\\_report\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf).

53. See *id* (describing the increased necessity during the COVID-19 pandemic of transparency between WTO members).

54. Trade Policy Review Body, *Overview of Developments in the International Trading Environment: Annual Report by the Director-General*, 4, WTO Doc. WT/TPR/OV/23 (Nov. 30, 2020).

55. See Press Release, World Customs Org., *WCO partners with stakeholders to launch a COVID-19 Trade Facilitation Repository* (May 19, 2020), <http://www.wcoomd.org/en/media/newsroom/2020/may/wco-partners-with-stakeholders-to-launch-a-covid-19-trade-facilitation-repository.aspx> (describing the collaboration between the organizations and the overall goal of the repository).

56. See *id* (explaining the goal of the repository).

57. See generally *COVID-19 Trade Facilitation Toolkit*, WORLD TRADE ORG., <https://www.tfafacility.org/covid19-trade-facilitation> (providing measures ranging from zero tariffs on pandemic related goods, PPEs, and international air transport association measures; also showing lack of notification from certain countries to the agreement).

permit compulsory licensing for COVID-19 vaccines and medicines utilizing the WTO system.<sup>58</sup> While compulsory licensing is often described as ‘heavy-handed’ due to concerns of the intellectual property interests of patent holders even within TRIPS and the WTO regime,<sup>59</sup> Article 31 of the TRIPS does allow Members to enact measures that allow for compulsory licensing on a case-by-case basis if they satisfy (1) making an effort to obtain authorization for use from the patent holder on ‘reasonable commercial terms’ before opting for a compulsory licensing measure,<sup>60</sup> except in cases of “NATIONAL EMERGENCY or OTHER CIRCUMSTANCES OF EXTREME URGENCY”; (2) ensuring the measure is time-limited; and (3) paying the patent holder “adequate remuneration.”<sup>61</sup> While compulsory licensing is generally implemented to address the needs of a WTO member’s domestic market, it may also be used to export the relevant product to developing countries or least developed countries (LDCs) that lack the capacity to produce the product.<sup>62</sup> This provision of TRIPS shows that the drafters were concerned with the public health interests of all WTO members. Most notably, WTO members have qualified “a national emergency or circumstances of extreme urgency” as “public health crises including those related to HIV/AIDS, tuberculosis, malaria, and OTHER EPIDEMICS.”<sup>63</sup> By the end of July

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58. See Luis Gil Abinader, *Chilean Chamber of Deputies approves resolution for compulsory licenses for patents relating to the coronavirus*, KNOWLEDGE ECOLOGY INT’L, (Mar. 17, 2020), <https://www.keionline.org/32385> (discussing the measures implemented by Chile, in particular, in response to the pandemic’s impact on trade).

59. See e.g., NINA M. HART, CONG. RES. SERV., LSB10436, COVID-19: INTERNATIONAL TRADE AND ACCESS TO PHARMACEUTICAL PRODUCTS 2 (2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10436> (noting the pervasiveness of the “heavy-handed” critique of compulsory licensing regimes).

60. See *id.* (“except in cases of ‘national emergency or other circumstances of extreme urgency’”).

61. The Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

62. See HART, *supra* note 59 (discussing the ways in which compulsory licensing can be used by WTO members to aid developing countries with product production).

63. World Trade organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002), [https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm) [hereinafter Doha Declaration].

2020, WTO trade monitoring activities recorded forty-seven COVID-19-related measures regarding trade-related IP rights taken by twenty-four members.<sup>64</sup> Scholars such as Hilary Wong from the University of California, Berkeley, have also made a case for compulsory licensing during COVID-19.<sup>65</sup> Now, more members are calling for compulsory licensing, or an intellectual property waiver of COVID-19 vaccines.<sup>66</sup>

In sum, the WTO provided systems for its members that facilitated trade and provided transparency in the chaos that the pandemic presented in 2020. However, with reports of the increasing likelihood of future pandemics,<sup>67</sup> the multilateral trading system must expand beyond the notification system to further secure and strengthen the global trade flow of essential medical goods, equipment, and supplies.

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64. *WTO issues report on measures to expedite access to COVID-19 critical goods, services*, WORLD TRADE ORG. (September 16, 2020), [https://www.wto.org/english/news\\_e/news20\\_e/serv\\_16sep20\\_e.htm](https://www.wto.org/english/news_e/news20_e/serv_16sep20_e.htm).

65. See Hilary Wong, *The case for compulsory licensing during COVID-19*, J. OF GLOBAL HEALTH (May 15, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7242884/> (proposing that countries should plan for the possibility that compulsory licensing will be necessary as a public health tool in the future).

66. See e.g., Nasos Koukakis, *Countries worldwide look to acquire the intellectual property rights of Covid-19 vaccine makers*, CNBC (Jan. 22, 2021), <https://www.cnbc.com/2021/01/22/countries-look-to-acquire-the-ip-of-vaccine-makers-to-fight-pandemic.html>; Manvi Rathod, *India and South Africa's COVID Vaccine Proposal to the WTO: Why Patent Waiver Must Be Considered Over Compulsory Licensing*, IPWATCHDOG (Jan. 2, 2021), <https://www.ipwatchdog.com/2021/01/02/india-south-africas-covid-vaccine-proposal-wto-patent-waiver-must-considered-compulsory-licensing/id=128652/>; but see David Lawder, *World Bank opposes vaccine intellectual property waiver as WTO talks resume*, Reuters (Jun. 8, 2021), <https://www.reuters.com/business/healthcare-pharmaceuticals/world-bank-chief-says-does-not-support-vaccine-intellectual-property-waiver-wto-2021-06-08/> (detailing the World Bank opposition to the IP waiver of COVID-19 vaccines via TRIPS Agreement).

67. See Meera Senthilingam, *Seven reasons we're at more risk than ever of a global pandemic*, CNN (Apr. 10, 2017) (suggesting that public health experts have been forecasting a global pandemic since the stemming of the Ebola epidemic in 2014-16).

### III. ENHANCING THE ROLE OF WTO IN CONTEXT OF CURRENT AND FUTURE PANDEMICS.

While the WTO's notification system enabled the facilitation of trade through the difficulties presented by the pandemic, there is a clear need for further facilitating trade in medical goods and supplies, particularly essential goods in the event of pandemics.<sup>68</sup> Healthcare workers need a consistent, uninterrupted stream of medical supplies so that the impacts of future pandemics are addressed efficiently and effectively.<sup>69</sup> This section explores the efforts that the WTO can make to meet that need, apart from the notification system and the contentious issue of intellectual property waivers.

The 1994 Agreement on Trade in Pharmaceutical Products (Pharmaceutical Agreement) is a pre-existing agreement that can be expanded to help facilitate the trade of medical supplies. In 1995, twenty-two members created the WTO Pharmaceutical Agreement which eliminated tariffs on around 7,000 pharmaceutical products, their derivatives, and chemical intermediates.<sup>70</sup> As of 2016, thirty-four members control 65% of the global pharmaceutical trade and are covered under this agreement.<sup>71</sup>

In April 2020, the Association of German Chambers of Industry and Commerce (DIHK) published an idea paper on the 1994 Agreement on Trade in Pharmaceutical Products that extended the scope of the Agreement to not just pharmaceuticals but also medical supplies, medical equipment and technology, and personal protective

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68. See Report from the office of the Secretary-General of the Organisation for Economic Co-operation and Development, COVID-19 and International Trade: Issues and Actions, at 5 (June 12, 2020), [https://read.oecd-ilibrary.org/view/?ref=128\\_128542-3ijg8kfswh&title=COVID-19-and-international-trade-issues-and-actions](https://read.oecd-ilibrary.org/view/?ref=128_128542-3ijg8kfswh&title=COVID-19-and-international-trade-issues-and-actions) (outlining the OECD's proposals for trade facilitation in crisis).

69. See *id.* at 2 (noting the particular impact a less-than-optimal medical supply stream has on "lower income countries with weaker healthcare systems").

70. General Agreement on Tariffs and Trade: Trade in Pharmaceutical Products, Mar. 25, 1994, L/7430, <https://docs.wto.org/gattdocs/q/GG/L7599/7430.PDF> [hereinafter WTO Pharma-Agreement].

71. See *id.* (34 members include: Canada, 27 EU member states, United Kingdom, Japan, Norway, Switzerland, USA, and Macau [China]).

equipment.<sup>72</sup> The paper also suggests that the Pharmaceutical Agreement implement transparency obligations for relevant regulations and increase the number of signatories by providing additional special support to LDCs to facilitate their participation.<sup>73</sup>

At the moment, more than half of WTO members levy zero tariffs on medicine and no member tariff levels exceed 15%.<sup>74</sup> Medical supplies have an average tariff rate of 6.2%.<sup>75</sup> Nineteen members apply zero tariffs on medical equipment while three members levy more than 10%.<sup>76</sup> WTO Members have also negotiated the Information Technology Agreement (ITA) in 1996, which covers eighty percent of medical equipment traded<sup>77</sup>; however, essential equipment such as respirators and ventilators are not covered by the ITA.<sup>78</sup> PPEs also vary widely in terms of tariffs.<sup>79</sup> Twenty-nine members apply 5% or less whereas forty-seven members apply at least 15%.<sup>80</sup> Hand soaps average at 17% with some members going above 50%.<sup>81</sup> Face masks have an average WTO tariff of 9.1%.<sup>82</sup> As noted in the idea paper,

“Seventy-five percent of the medical tariffs have been bound through WTO-agreements. There is a large gap between bound and actually applied tariffs of WTO-Members: Many countries partially apply lower or no tariffs but have not bound them in WTO-agreements at this level. At short notice, these tariffs can thus be increased up to the tariff ceilings bound in WTO-agreements. 29 WTO-Members have an average bound rate of 50% or more. Extending the WTO Pharma-Agreement is important for business

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72. See *Idea Paper Extension WTO Pharmaceutical Agreement*, DEUTSCHER INDUSTRIE- UND HANDELSKAMMERTAG, 1–3 (Apr. 24, 2020), [https://www.wto.org/english/tratop\\_e/covid19\\_e/dihk\\_extension\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/dihk_extension_e.pdf) (discussing the scope of the WTO Pharma-Agreement).

73. See *id.* at 1 (“transparency obligations for relevant regulation as well as best practice exchanges should be included in the agreement in order to prevent discriminatory trade barriers”).

74. See *id.* at 2 (discussing the WTO member levies on medical equipment); see also *Trade in Medical Goods – COVID-19*, *supra* note 2, at 6–8 (noting that over half of WTO members impose tariffs below 5% on medical products).

75. *Trade in Medical Goods – COVID-19*, *supra* note 2, at 7.

76. *Id.* at 7–8.

77. *Id.* at 7–9.

78. *Id.*

79. *Id.* at 9.

80. *Id.*

81. *Id.*

82. *Id.* at 8.

to have planning certainty in medical goods trade by reducing global tariff ceilings.”<sup>83</sup>

Expanding the Pharmaceutical Agreement to medical supplies and essential pandemic supplies may provide a solution for WTO members. The current contentious debate surrounding the intellectual property waiver of COVID-19 vaccines is largely due to the impact that such a waiver would have on pharmaceutical companies. The compulsory taking of intellectual properties run the risk of reducing the innovation, research, and development in the pharmaceutical sector. The expansion of the Pharmaceutical Agreement circumnavigates the intellectual property concern and instead targets tariff rates, a direct barrier to trade and cause of increased pricing.<sup>84</sup>

In addition to the expansion of the Pharmaceutical Agreement, the WTO could further strengthen its cooperation with the WHO Pandemic Influenza Preparedness (PIP) Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits.<sup>85</sup> The PIP Framework enables the global sharing of benefits and management of related intellectual property.<sup>86</sup> The Framework has the ability to extend its benefits to intellectual properties of medical supplies and equipment. The Standard Material Transfer Agreements (SMTA) under the PIP Framework stipulate that participating laboratories should not seek to obtain intellectual property rights on PIP biological materials, but rather enter into benefit-sharing agreements.<sup>87</sup> This allows laboratories from different members to

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83. *Idea Paper Extension WTO Pharmaceutical Agreement*, *supra* note 72.

84. *See Trade in Medical Goods – COVID-19*, *supra* note 2 at 7 (noting the proposal for a “zero-for-zero plurilateral sectoral initiative on pharmaceutical products” that dates back to the Uruguay Round negotiations in 1994).

85. *See generally* Report by the Director-General, *Pandemic Influenza Preparedness Framework for the sharing of influenza viruses and access to vaccines and other benefits*, World Health Organization (2020), [https://cdn.who.int/media/docs/default-source/pip-framework/governance/wha72-12-op1a-report-edited\\_en1a2d0386-152a-4bbd-b801-9ec5d71e8930.pdf?sfvrsn=80f75c02\\_16&download=true](https://cdn.who.int/media/docs/default-source/pip-framework/governance/wha72-12-op1a-report-edited_en1a2d0386-152a-4bbd-b801-9ec5d71e8930.pdf?sfvrsn=80f75c02_16&download=true) (outlining the WHO’s proposed preparedness framework).

86. *See id.* at 4 (suggesting as an example of sharing benefits that “viruses with human pandemic potential . . . should also be shared with WHO Collaborating Centres” in order to facilitate a watch-dog approach to preventing future outbreaks).

87. *See id.* at 5 (suggesting that benefit-sharing agreements could help facilitate research).



simultaneously develop needed supplies.<sup>88</sup> For example, members could streamline copper-lined mask development with specialized fabrics with antimicrobial characteristics.<sup>89</sup> An integration of PIP framework participation in trade agreements or the Pharmaceutical Agreement would not only increase member participation in the framework but also foster multinational innovation in medical supplies and equipment.

The crucial task for the WTO to address is to balance the domestic needs versus the global needs of members. In times of pandemic, members need to secure domestic supplies and lower domestic prices of pharmaceuticals and pandemic-related products and services. This need can incentivize members to pass domestic measures that encumber the export of their medical supplies via tariff rates or absolute prohibition. The increased amount of export prohibitions and simultaneous lack of multilateral transparency of these measures is concerning because restrictions initiated by one member-state may trigger a domino effect and result in lower overall supply and higher prices for essential goods.<sup>90</sup> Members also require predictable access of pharmaceutical products and pandemic-related products and services to peoples of all WTO members. Through the expansion of the Pharmaceutical Agreement and further integration of the WHO PIP Framework, the WTO can support a predictable and affordable access of pandemic-related products and services without infringing on the rights of private companies or the sovereignty of members.

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88. See *id.* (noting that simultaneous supply development could aid in stemming future outbreaks).

89. See Surjith Kumaran et al., *Photopolymerizable, Universal Antimicrobial Coating to Produce High-Performing, Multifunctional Face Masks*, AMERICAN CHEMICAL SOCIETY (Apr. 26, 2021), <https://pubs.acs.org/doi/pdf/10.1021/acs.nanolett.1c00525> (suggesting a potential avenue for facemask improvement and research); but see Katherine J. Wu, *Copper Won't Save You From Coronavirus*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/article/copper-coronavirus-masks.html> (suggesting that public health experts have found no evidence to support the utility of copper-infused mask development).

90. See *COVID-19: 80 countries prohibit, restrict export – WTO*, LAUD BUS. (Apr. 27, 2020), <https://laudbusiness.com/2020/04/27/covid-19-80-countries-prohibit-restrict-export-wto/> (noting the scope of the detrimental effects from a potential domino cascade in the supply chain for essential goods).

#### IV. CONCLUSION

The WTO is under strain and stress.<sup>91</sup> The Doha development round of negotiations is dead because of a lack of trust and cooperation among its member governments. But the COVID-19 pandemic is a global pandemic. More than at any other time in recent memory, the interests of its members are aligned. The challenges posed by the COVID-19 pandemic provide an opportunity for the WTO, as a consensus-driven institution, to succeed and demonstrate its relevance.

In recent months, WTO has moved to collaborate more closely with WHO and WIPO and with International Monetary Fund (IMF) and World Bank to call for increased access to vaccines building up on the global vaccine access program. This cooperation should be applauded. This cooperation of economic international institutions with those advocating for social rights is an important step and the WTO stands at the border of economic and social rights and has for the past two decades attempted to balance those interests through its dispute settlement mechanism. In addition, WTO has mechanisms in place already, including but not limited to, the transparency provisions, such as notification of new restrictions on flow medical supplies and a pharmaceutical agreement that could be amended. As Director of WTO IP Division, Antony Taubman recently stated, “right to health is a fundamental human right and the WTO’s constitution dating back to GATT days of 1946 recognizes that achievement in health for one state benefits the whole international community and necessary prerequisite for the goal of sustainable development”.<sup>92</sup>

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91. See generally Charles Riley, *A woman will oversee global trade for the first time*, CNN (Oct. 8, 2020), <https://edition.cnn.com/2020/10/08/business/wto-director-general-trade/index.html> (noting that the new Director-General “has described the WTO as ‘being at a crossroads’ . . . [t]he global economy is under tremendous strain.”).

92. Antony Taubman, Dir., Intell. Prop. Div. WTO, Remarks at Am. U. Wash. Coll. L. WTO and US Trade Law and Policy Seminar (July 1, 2021).

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