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### **The WTO TRIPS Waiver and Essential Security Rights in 2022**

*By Dr. Alexander Beyleveld*

Almost two years have passed since the start of the COVID-19 pandemic, and we are still far from bringing the pandemic to an end. One of the main reasons for this is the fact that large vaccine inequities remain worldwide. In order to address this problem, a large subset of World Trade Organization (WTO) members are in favour of waiving certain obligations contained in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement). Against this backdrop, this article contemplates the legal necessity of such a waiver given that Article 73 of the TRIPS Agreement contains essential security exceptions which may render the obligations in question inapplicable under the interpretation that the pandemic affects law and public order interests.

#### **1. Introduction**

The World Health Organization (**WHO**) declared the outbreak of COVID-19 a public health emergency of international concern on 30 January 2020, and subsequently a pandemic on 11 March 2020. By early April 2020, the Directors-General of a variety of international organisations – including the World Trade Organization (**WTO**) – were being called on to treat access to certain products essential to combatting the pandemic as a matter of national and international security, a natural implication of which would be that economic interests – including those protected as intellectual property under national and international legal instruments – should not stand in the way of giving effect to healthcare rights and efforts to combat the disastrous effects of the pandemic.<sup>1</sup> In the months thereafter, the global academic community began to assess the extent to which a variety of international legal frameworks – including the Agreement on Trade Related Aspects of Intellectual Property Rights (**TRIPS Agreement**) – allowed for the temporary suspension of various economic law obligations in the name of security.<sup>2</sup> In early October 2020 however, India and South Africa circulated a communication to fellow WTO members proposing that certain provisions of the TRIPS Agreement be waived by the membership “in relation to prevention, containment or

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<sup>1</sup> See for example, the open letter dated 4 April 2020 from Carlos Correa, Executive Director of the South Centre, to the directors-general of the WHO, WTO and WIPO, available from <https://bit.ly/3mSVfK0>.

<sup>2</sup> See for example, Frederick Abbott, *The TRIPS Agreement Article 73 Security Exceptions and the COVID-19 Pandemic*, Research Paper No. 116 (Geneva, South Centre, August 2020), available from <https://bit.ly/3JHGmDV>. For a later paper, see Emmanuel Oke, “COVID-19, Pandemics, and the National Security Exception in the TRIPS Agreement”, (2021) 12 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 397.

treatment of COVID-19” (the **Proposed Waiver**) in terms of Article IX of the Agreement Establishing the WTO (**WTO Agreement**),<sup>3</sup> an upshot of which was that subsequent discussions in Geneva focused on the Proposed Waiver, which makes no direct reference to security and arguably eschews the issue entirely – whether deliberately or otherwise.

Against this backdrop, this article briefly revisits the question of the relationship between the Proposed Waiver and the essential security exceptions contained in the WTO TRIPS Agreement and offers brief thoughts on what the answer to this question might imply around two years after the Proposed Waiver was initially put on the table by India and South Africa (and two years since the declaration of the pandemic), and at a time when stark inequities in access to products and services necessary for combatting the pandemic – inequities that are not only rightly perceived as unjust, but are also harmful to global efforts to bring the pandemic to an end, especially as new variants of the virus emerge – continue to loom large.<sup>4</sup>

## 2. Article 73(b)(iii) of the TRIPS Agreement: Is the COVID-19 Pandemic an “Other Emergency in International Relations”?

The only essential security exception of interest here is the one contained in Article 73(b)(iii) of the TRIPS Agreement. It provides that “[n]othing in [the TRIPS Agreement] shall be construed ... to prevent a Member from taking any action which *it* considers necessary for the protection of *its* essential security interests ... taken in time of war or **other emergency in international relations**”.<sup>5</sup> The text of Article 73(b)(iii) is not framed in the language of rights – it simply asserts that nothing in the TRIPS Agreement shall be construed as **preventing** a Member from taking certain actions under certain circumstances. This should, however, be understood with reference to the positive rights of states as a more general proposition. As Dominik Eisenhut has put it, “[s]ecurity is at the core of a State’s right to **exist**”,<sup>6</sup> adding that “[t]he Hobbesian concept of a State as the protector against threats from inside or outside of its walls is one of the theoretical bases of State sovereignty” and that “[a]lthough the idea of unlimited State sovereignty today is no longer undisputed, **the pivotal obligation of a State to protect its citizens’ security makes the right to do so one of the bedrock features of this concept**”.<sup>7</sup> Indeed, it is for this very reason that treaties tend to contain security exceptions in the first place.<sup>8</sup>

Given that it is clear that States have the right to take measures in pursuit of their security interests broadly construed the only real question for current purposes is to what extent States elected to curtail their general right through agreeing to be parties to the TRIPS Agreement. A quick scan of the text of Article 73(b)(iii) suggests that States retain broad discretionary powers for themselves when it comes to defining what “essential security interests” **are**, as well as in relation to **what measures are necessary for their protection**. In its analysis of this provision, the Panel in *Saudi Arabia–Intellectual Property Rights* effectively confirmed this position, subject to the caveat that a given Member seeking to rely on Article 73(b)(iii) to justify a particular measure must do so in accordance with the WTO obligation of good faith.<sup>9</sup> Although the text leaves members with subjective discretion, it is

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<sup>3</sup> The communication and initial draft waiver decision text is available from <https://bit.ly/3HDQgF3>.

<sup>4</sup> The most pertinent example of such inequities arguably relates to access to vaccines. For a basic overview of the current extent of vaccine inequity and the consequent implications, see the United Nations Development Programme’s Global Dashboard for Vaccine Equity, available at <https://bit.ly/3pQGUj9>.

<sup>5</sup> Emphasis added.

<sup>6</sup> Dominik Eisenhut, “Sovereignty, National Security and International Treaty Law: The Standard of Review of International Courts and Tribunals with regard to ‘Security Exceptions’”, (2010) *Archiv des Völkerrechts* 431, 431. Emphasis added.

<sup>7</sup> Eisenhut (n 6) 431.

<sup>8</sup> See generally Eisenhut (n 6).

<sup>9</sup> See Panel Report, *Saudi Arabia – Intellectual Property Rights*, available at <https://bit.ly/3JGmBwI>, for example at paras 7.249-7.250.

also clear that the provision potentially contains so-called objective elements. Specifically, it can plausibly be argued that whether or not a given measure has been “taken in time of war or other emergency in international relations” is a question of fact and whether or not a “war” or “other emergency in international relations” exists is not something which is up to the subjective discretion of the member seeking to justify that measure. The Panel in *Saudi Arabia–Intellectual Property Rights* confirmed this position, too.<sup>10</sup>

More specifically, relying on the Panel Report in *Russia–Traffic in Transit*, the Panel in *Saudi Arabia–Intellectual Property Rights* adopted a four-step analytical framework to be used when disposing of matters under Article 73(b)(iii), that is, the Panel clarified that it must be determined:

- a. whether the existence of a “war or other emergency in international relations” has been established **in the sense of subparagraph (iii) to Article 73(b)**;
- b. whether the relevant actions were “taken in time of” that war or other emergency in international relations;
- c. whether the invoking member has articulated its relevant “essential security interests” sufficiently to enable an assessment of whether there is any link between those actions and the protection of its essential security interests; and
- d. whether the relevant actions are so remote from, or unrelated to, the “emergency in international relations” as to make it implausible that the invoking Member considers those actions to be necessary for the protection of its essential security interests arising out of the emergency.<sup>11</sup>

While the other steps are all important, the most crucial step for the issues under discussion here is step a. This is because, on the assumption that the Panel’s interpretation of the provision is correct,<sup>12</sup> if it is possible to establish objectively that the COVID-19 pandemic constitutes – or has brought about – a “war or other emergency in international relations **in the sense of subparagraph (iii)**”. Members would then have the right to ignore the entire TRIPS Agreement provided that whatever measures they would end up taking would be taken in good faith and tailored to comply with the remainder of the four-step analytical framework laid out by the Panel.

The COVID-19 pandemic is plainly not a “war”, at least not the kind contemplated in Article 73(b)(iii). It does, however, at least on the face of it, appear to be an “other emergency in international relations.” At the time of writing, COVID-19 had caused upwards of five million deaths globally.<sup>13</sup> It had also resulted in countries around the world closing their borders to international travel – or at least heavily restricting it – as part of attempts to protect their populations from the virus. Governments declared states of emergency or disaster, and imposed lockdowns. Export and import bans were implemented in various parts of the globe. These are but a few of many potential facts that suggest that we have been living through an

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<sup>10</sup> See Panel Report, *Saudi Arabia – Intellectual Property Rights*, available at <https://bit.ly/3JGmBwl>, for example at paras 7.244-7.245.

<sup>11</sup> Panel Report, *Saudi Arabia – Intellectual Property Rights*, available at <https://bit.ly/3JGmBwl>, para 7.242. Emphasis added.

<sup>12</sup> Here, I essentially assume that the Panel Report can be treated as having strong precedential value. There are, of course, good arguments against treating the Panel Report as having such. It is quite plausible that the Panel got things wrong. As such, it is also quite plausible that a different Panel would interpret the provision differently, and that the Appellate Body – should it cease being inoperative – could also interpret the provision in its own way (which would, of course, be a more authoritative interpretation and would arguably constitute precedent – or *de facto* precedent at the very least).

<sup>13</sup> For up-to-date statistics, see the WHO’s Coronavirus (COVID-19) Dashboard, available at <https://bit.ly/3znyld7>.

emergency in international relations since the onset of the pandemic. It would be prudent, however, to carefully examine the Panel Report in *Saudi Arabia–Intellectual Property Rights* for the simple reason that it could still be that the COVID-19 pandemic does not constitute, or has not resulted in, an “other emergency in international relations” **in the sense of subparagraph (iii) to Article 73(b)**. In this regard, the Panel recalled the Panel Report in *Russia–Traffic in Transit*, and adopted the same approach. It summarised as follows:

The panel also concluded that the term “emergency in international relations” refers generally “to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.” Such situations, in the panel’s view, “give rise to **particular types of interests for the Member in question, i.e., defence or military interests, or maintenance of law and public order interests.**” For the panel, while “political” and “economic” conflicts could sometimes be considered “urgent” and “serious” in a political sense, **such conflicts will not be “emergenc[ies] in international relations” within the meaning of subparagraph (iii) “unless they give rise to defence and military interests, or maintenance of law and public order interests.”**<sup>14</sup>

The COVID-19 pandemic does not appear to have given rise to “defence and military interests” as a general proposition, so the question then becomes whether the pandemic has given rise to “maintenance of law and public order interests” for WTO Member States. A problem that arises from both the Panel Report in *Saudi Arabia–Intellectual Property Rights* and the Panel Report in *Russia–Traffic in Transit* is that neither Panel gave guidance on what constitutes a “law and public order interest.” Moreover, it is not immediately apparent – as it was in the disputes before the two Panels mentioned above – that the COVID-19 pandemic has in fact given rise to “law and public order interests”. Even if this were true, the behaviour of a given member since the onset of the pandemic would have to make it clear that particular measures were in fact taken to protect a “law and public order interest.”

Consider the example of South Africa. Section 37(1) of the South African Constitution only permits the President to declare a state of **emergency** “in terms of an Act of Parliament, and only when ... the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency ... and ... the declaration is necessary to restore peace and order”. If the President had declared a state of emergency in response to the COVID-19 pandemic, then, that may well constitute evidence of the fact that South Africa saw the COVID-19 pandemic as giving rise to “law and public order interests”. In reality, however, a state of **emergency** was never declared. Instead, South Africa declared a state of national **disaster** in terms of the Disaster Management Act of 2002, the wording of which is far softer and does not as readily implicate “law and public order interests”. That said, South Africa did impose a number of strict lockdowns during the course of the pandemic. It also imposed curfews from time to time, restricted international travel to and from the country, and aggressively deployed the police (and even the military on occasion) in order to enforce emergency regulations enacted pursuant to the declaration of the state of disaster. South Africa (and other WTO members) could, moreover, as a general proposition, rely on United Nations Security Council (UNSC) resolutions, which, for example, indicate that “the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security” to illustrate that the pandemic and related events constitute an “other emergency in international relations” in the sense of

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<sup>14</sup> Panel Report, *Saudi Arabia – Intellectual Property Rights*, available from <https://bit.ly/3JGmBwl>, para 7.245. Emphasis added. See also Panel Report, *Russia – Traffic in Transit*, available from <https://bit.ly/3mVfkPF>, paras 7.75-7.76.

subparagraph (iii).<sup>15</sup> Ultimately – as always – whether or not a claim would be sustainable would depend on the facts of the given case. That said, there is clearly scope for an argument to be made that Article 73(b)(iii) of the TRIPS Agreement could be invoked to justify actions taken in good faith by States exercising their essential security rights and that the availability of such justifications may serve the interests of WTO members in case the Proposed Waiver is not adopted or, if adopted, it ends up with a narrow scope (e.g. limited only to vaccines as reportedly proposed by the USA) or subject to conditions that limit its use.

### 3. Implications: On Rights, Permission and the Need for Cooperation *in 2022*

Of course, the fact that the Article 73 route may be available to proponents of the Proposed Waiver does not necessarily imply that this would be an optimal approach to adopt. The waiver approach offers distinct advantages. It would offer legal certainty during a time when the Appellate Body is inquorate and reduce the likelihood of the WTO dispute settlement system having to deal with what could potentially be highly controversial disputes. The draft text of the Proposed Waiver, for example, recognises that “the COVID-19 global pandemic requires a global response based on unity, solidarity and multilateral cooperation” – there is no doubt that such an approach would be preferable, and it seems at least plausible that going the Article 73 route could undermine the likelihood of members cooperating with one another given the propensity of raising security exceptions to result in tit-for-tat behaviour. Other questions also remain, regardless of whether one goes the waiver or Article 73 route: for example, do the WTO members have the necessary domestic laws in place to take the necessary actions?<sup>16</sup>

What is clear, however, is that the Proposed Waiver has not been adopted and, more importantly, that two years have passed since the start of the pandemic. The availability of Article 73 raises several questions. First among these is whether proponents of the waiver approach would not have been better off asserting their **rights** as opposed to essentially seeking **permission** to take actions which they were entitled to take regardless. Perhaps the risks were too great, and the waiver route was preferable. But it has been two years and we have failed to see the kind of solidarity which waiver proponents had initially hoped for, and the pandemic remains far from over. Moreover, vast vaccine inequities remain, which renders the globe as a whole more vulnerable to new variants and makes bringing the pandemic to an end all the more difficult. While different Members may have different views on the issues at hand, and although some may consider that it is too late to take a security-based approach which relies on the existence of an emergency in international relations at this point in time, Members seeking to take measures pursuant to the Proposed Waiver may want to ask themselves whether a more direct rights-based approach is necessary or could be complementary to a waiver, if eventually adopted with limitations. Article 73(b)(iii) of the TRIPS Agreement arguably allows them to do just that.

**Author:** Dr. Alexander Beyleveld, Senior Researcher, Mandela Institute, University of the Witwatersrand. E-mail: [alexander.beyleveld@wits.ac.za](mailto:alexander.beyleveld@wits.ac.za)

**Note:** This article has been produced following a joint research project and webinar series conducted by the [Health Justice Initiative](#) and the [Mandela Institute](#) on vaccine equity and intellectual property law. Recordings of the three webinars are available [here](#), [here](#) and [here](#). This article is based on the author’s presentation during the third webinar.

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<sup>15</sup> See UNSC resolution 2532 (2020), available from <https://bit.ly/3HwKF2Z>. See also UNSC resolution 2565 (2021), available at <https://bit.ly/3EMBsID>.

<sup>16</sup> South Africa does not seem to have its domestic laws in order, for example. See further Caroline Ncube speaking at the first of the Health Justice Initiative-Mandela Institute webinars referred to earlier. A recording of the webinar is available from <https://bit.ly/34r8J9r>.

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Email [abernardo@southcentre.int](mailto:abernardo@southcentre.int), or telephone +41 22 791 8050.**

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