



# Reconceptualizing Free Trade Agreements Through a Sustainable Development Lens

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**Table of Contents**

**I. Abstract ..... 1**

**II. About the New Markets Lab Trade and Development Program ..... 1**

**III. Executive Summary ..... 2**

**IV. Introduction: Rethinking FTAs from a Sustainable Development Perspective..... 11**

**V. Analysis of Key Areas under Trade Agreements from a Sustainable Developments  
Lens 14**

**A. Investment Law ..... 14**  
Table 1: Possible Regulatory/Policy Recommendations Relating to Investment Laws..... 17

**B. Intellectual Property Laws ..... 21**  
Table 2: Possible Regulatory/Policy Recommendations Relating to IP Laws..... 26

**C. Trade Facilitation ..... 31**  
Table 3: Summary of Recommendations for Trade Facilitation ..... 38

**D. Small and Medium-Sized Enterprises ..... 41**  
Table 4: Possible Regulatory/Policy Recommendations to Include SMEs Concerns in FTAs  
..... 49

**E. Gender ..... 52**  
Table 5: Possible Regulatory/Policy Recommendations to Include Gender Provisions ..... 54

**F. Circular Economy ..... 60**  
Table 6: Possible Regulatory/Policy Recommendations to Incorporate Provisions Relating to  
Circular Economy for Post COVID-19 Recovery ..... 67

**VI. Conclusion ..... 70**

**VII. List of References ..... 71**

## **Acronyms and Abbreviations**

AfCFTA	African Continental Free Trade Agreement
AfT	Aid for Trade
APEC	Asia-Pacific Economic Cooperation
BITs	Bilateral Investment Treaties
CAD	Canadian Dollar
CBD	Convention on Biological Diversity
CE	Circular Economy
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CIFTA	Canada-Israel Free Trade Agreement
COVID-19	Coronavirus Disease 2019
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DEPA	Digital Economy Partnership Agreement
e-Commerce	Electronic Commerce
EG	Environmental Goods
EGA	Environmental Goods Agreement
EGS	Environmental Goods and Services
EU	European Union
EU-Japan EPA	EU-Japan Economic Partnership Agreement
FDI	Foreign Direct Investment
FTAs	Free Trade Agreements
GATT	General Agreement on Tariffs and Trade
GBA+	Gender Based Analysis Plus
HS	Harmonized System
IAs	International Investment Agreements
ILO	International Labor Organization
IP	Intellectual Property
IPAs	Investment Promotion Agencies
ISDS	Investor-State Dispute Settlement
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
LDCs	Least Developed Countries
MC11	Eleventh WTO Ministerial Conference
Nagoya Protocol	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity
NGOs	Non-Governmental Organization
OECD	Organization for Economic Cooperation and Development

RTAs	Regional Trade Agreements
SADC	South African Development Community
SDGs	Sustainable Development Goals
SMEs	Small and Medium-sized Enterprises
STEM	Science, Technology, Engineering, and Mathematics
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
USMCA	United States-Mexico-Canada Agreement
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

## **I. Abstract**

The current global pandemic illustrates that existing trade agreement models, including free trade agreements (FTAs), present challenges when countries must deal with exogenous shocks. As economies reopen worldwide, the time is ripe to re-conceptualize trade agreements and align them with the United Nations Sustainable Development Goals (SDGs) in order to afford a recovery that is both inclusive and equitable. This team report draws from New Market Lab’s program on FTAs and the SDGs. The report incorporates reforms, targeted mainly at FTAs, that could better leverage international trade to drive sustainable development. The report’s recommendations will examine some of the mainstays of FTAs (e.g., trade facilitation, intellectual property rights, and investment) and integrate under-represented topics (e.g., gender, small and medium-sized enterprises, and circular economy), addressing gaps from a sustainable development perspective and thereby ensuring an inclusive road to recovery.

## **II. About the New Markets Lab Trade and Development Program**

The New Markets Lab, a law and development center focused on integrating economic and social considerations into the design and implementation of law and regulation, has launched a Trade and Development Program designed to re-think the role of economic development in law and trade agreements. This project focuses on building a more inclusive model for trade that better furthers economic development for all and assesses trade and economic law through the lens of the SDGs adopted under the 2030 Agenda for Sustainable Development by the United Nations Member States in 2015. Based on NML’s prior work and comparative experience, this new model will start with the “building blocks” of trade and development, which include traditional components of trade agreements (such as trade facilitation, sanitary and phytosanitary measures, investment, standards/technical barriers to trade, intellectual property, and dispute settlement) and integrate emerging issues as well (such as financial services, labor, environment, competition, anti-corruption, digital trade, gender, circular economy, and small and medium sized enterprises). NML’s program brings together analytical tools, good practices from around the world, and recommendations for the future, with engagement in Washington D.C., Europe, Africa, Asia, Latin America and elsewhere to operationalize more development-driven trade law and policy. In particular, consistent with NML’s mission, the program focuses on understanding law and trade agreements from the perspective of the users of the system, in particular those who may not have had a voice in shaping the rules. Overall, the initiative will produce a book on trade law and the SDGs and feed into a new digital tool on law and development that NML is developing, both of which could ultimately contribute to a new model trade agreement focused on inclusive and sustainable development.

### III. Executive Summary

When the novel coronavirus disease (COVID–19) first came to the world’s attention,<sup>2</sup> few would have been able to predict the chain of events that have unfolded to date. Over the course of the past seven months, a localized public health crisis has snowballed into a global pandemic whose effects have spilled over into the social, political, and economic spheres. It is perhaps one of the greatest cosmic ironies that a microscopic adversary, unseen to the naked eye, has laid bare the structural and substantive deficiencies of the international legal framework that undergirds the contemporary global order. The fallout from the pandemic has held up a mirror to both the strengths and collective inefficiencies of this framework, and the time is now ripe to reshape the existing model to a more inclusive and sustainable one.

It is perhaps comforting to note that we are not the first generation to attempt to reengineer the status quo. After all, social progress is iterative in the sense that the questioning of our pre-existing assumptions in the aftermath of such cataclysmic events forces us to rally together to envision a better, more resilient model for the future. The world order we take for granted today was predicated on the painful lessons learnt during the earlier parts of the 20<sup>th</sup> century, bookended by the two World Wars. Like the proverbial phoenix rising from the ashes, world leaders at the time came together at the 1944 Bretton Woods Conference to fashion an international economic order premised on multilateralism and the belief that open markets and trade liberalization would serve to mitigate the possibility of subsequent conflict.<sup>3</sup>

With regard to the international trading system, the General Agreement on Tariffs and Trade (GATT) ushered in a period of growth and prosperity through trade that the global community at large has benefited from. To a great extent, the World Trade Organization (WTO)<sup>4</sup> and its corresponding rules, contained in the Agreement establishing the World Trade Organization (WTO Agreements) and various multilateral initiatives, have been instrumental in maintaining stable, predictable, and equitable trading relations across the world.<sup>5</sup> However, the COVID-19 pandemic is proving to be the biggest threat yet to this *belle époque*, and the selfsame well-oiled institutions that have undergirded global peace through the promise of economic prosperity are starting to show signs of wear and tear, evinced most starkly by the trade impacts of COVID-19.

According to WTO statistics, merchandise trade contracted by 3 percent in the first quarter of 2020, and it is estimated that it will fall by 18.5 percent in the second quarter of 2020 (*See Figure 1*) due to COVID-19.<sup>6</sup> Experts predict that if the pandemic is not controlled, the decline in trade could be worse than the ‘great trade collapse’ in 2009,<sup>7</sup> with a fall in trade by 32 percent by the

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<sup>2</sup> *Timeline of WHO’s Response to COVID-19*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/detail/29-06-2020-covidtimeline> (last updated Jun. 30, 2020).

<sup>3</sup> *See generally* MATTHIAS HERDEGEN, *PRINCIPLES OF INTERNATIONAL ECONOMIC LAW* 195–201 (2d ed., 2016).

<sup>4</sup> The WTO is the successor to the General Agreement and Tariffs and Trade (which rose from the aftermath of the Bretton Woods Conference of 1944).

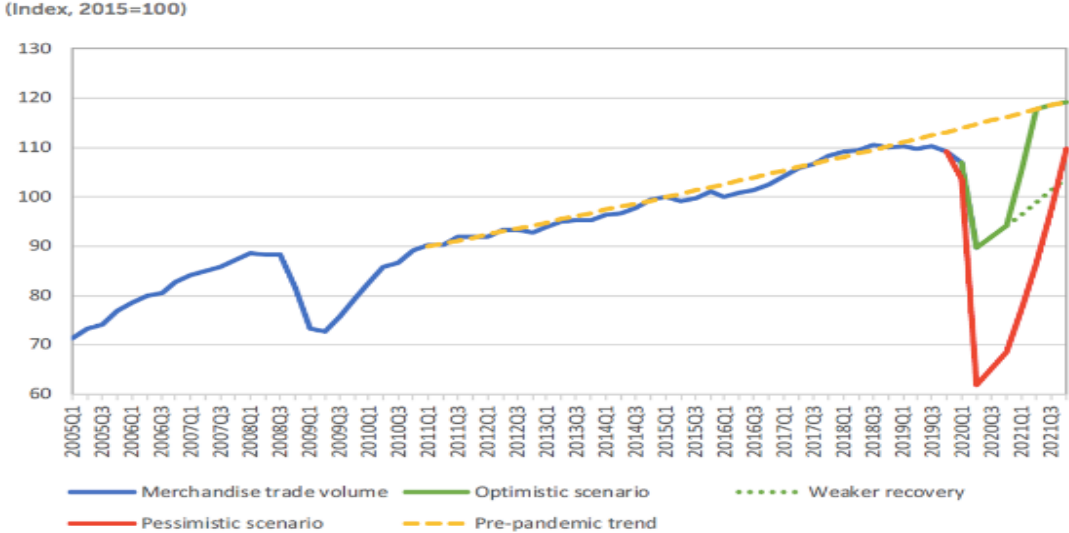
<sup>5</sup> *The WTO and the Sustainable Development Goals*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/coher\\_e/sdgs\\_e/sdgs\\_e.htm](https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm) (last visited Jul. 22, 2020).

<sup>6</sup> *Trade Falls Steeply in First Half of 2020*, WORLD TRADE ORGANIZATION (Jun. 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).

<sup>7</sup> The “great trade collapse” occurred between the third quarter of 2008 and the second quarter of 2009. The collapse was huge and was considered the steepest fall of world trade in recorded history and the deepest fall since the Great Depression till that point. *See* Richard Baldwin, *The Great Trade Collapse: What Caused it and What*

end of 2020. These grim prospects may be further exacerbated by a second wave of COVID-19 infections, lower than expected economic growth, and widespread implementation of protectionist measures by countries in response to the pandemic.

**Figure 1: World Merchandise Trade Volume<sup>8</sup>**



Source: WTO/UNCTAD and WTO Secretariat estimates.

On the services front, the statistics are similarly worrying. Trade in services is in decline as the adverse effects of social distancing practices have largely impacted services transacted through Modes 2, 3, and 4 which require some kind of physical proximity between suppliers and consumers.<sup>9</sup> Additionally, it is reported that at least half of the total services trade, amounting to nearly US\$7 trillion in value, stands to be compromised by COVID-19.<sup>10</sup> In sum, global trade has taken a deep plunge during the crisis, exposing countries to novel challenges that simply are not fit to be addressed by the legal and structural framework of the current multilateral system.<sup>11</sup>

At present, most countries have been primarily focused on adopting measures to contain the impact of COVID-19 on human health. Although trade in goods in itself does not present a veritable opportunity for the spread of the virus (as opposed to cross-border movement of people), trade is, in any case, slowing down due to domestic efforts to contain the virus (e.g., closure of industrial

*Does it Mean?*, VOX EU, CEPR (Nov. 27, 2009), <https://voxeu.org/article/great-trade-collapse-what-caused-it-and-what-does-it-mean>.

<sup>8</sup> *Trade Set to Plunge as COVID-19 Pandemic Upends Global Economy*, WORLD TRADE ORGANIZATION (Apr. 8, 2020), [https://www.wto.org/english/news\\_e/pres20\\_e/pr855\\_e.htm](https://www.wto.org/english/news_e/pres20_e/pr855_e.htm).

<sup>9</sup> See generally WORLD TRADE ORGANIZATION, *TRADE IN SERVICES IN THE CONTEXT OF COVID-19: INFORMATION NOTE* (2020), [https://www.wto.org/english/tratop\\_e/covid19\\_e/services\\_report\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/services_report_e.pdf).

<sup>10</sup> Anirudh Shingal, *Services Trade and COVID-19*, VOX EU, CEPR (Apr. 25, 2020), <https://voxeu.org/article/services-trade-and-covid-19>.

<sup>11</sup> Anirudh Shingal, *Services Trade and COVID-19*, VOX EU, CEPR (Apr. 25, 2020), <https://voxeu.org/article/services-trade-and-covid-19>.



plants and shelter-in-place orders, among others).<sup>12</sup> Furthermore, the uncertainty surrounding the health crisis has led countries to implement export restrictions, especially for food and medical supplies. Such measures stand to cause widespread economic losses, exacerbating the human suffering caused by the pandemic. These include losses that primarily affect the vulnerable members of society; for example, large-scale workplace closures have led to an estimated loss of 305 million jobs.<sup>13</sup> Many small and medium-sized enterprises (SMEs) are being forced out of business due to the shocks from both the supply and demand sides.<sup>14</sup> In addition to challenges faced by vulnerable populations, it is also reported that gender violence is likely to increase as security, health, and financial worries heighten tensions and put a strain on households.<sup>15</sup>

Emergency measures taken by governments are also giving rise to an unprecedented risk of foreign investors suing governments for breach of investment treaties,<sup>16</sup> and intellectual property (IP) measures could threaten the equitable supply of essential medicines and medical equipment and an eventual vaccine if multilateral flexibilities on access to medicines agreed upon in the midst of the HIV-AIDS crisis are not further expanded and made more functional.

On a more optimistic note, WTO Director-General Roberto Azevêdo has stated that the fall in trade is much less than expected, emphasizing the need for sound decision-making to help countries navigate the crisis.<sup>17</sup> In this context, international trade law and policy could be indispensable, not only in mitigating the losses that countries are suffering during the pandemic, but also in bolstering their economic recovery following the pandemic. For example, under the Declaration on Trade in Essential Goods for Combating the COVID-19 pandemic,<sup>18</sup> WTO Member States have agreed to eliminate tariffs on food supplies, vaccines, human medicines, and medicaments. Additionally, they have committed to revisit domestic policies that might stall the

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<sup>12</sup> Barbara Broussard, Ted Murphy, Arnoud R. Willems & Justine Fassion, *COVID-19: Global Trade Challenges and Opportunities*, SIDLEY (Mar. 24, 2020), <https://www.sidley.com/en/insights/newsupdates/2020/03/covid19-global-trade-challenges-and-opportunities>.

<sup>13</sup> This is calculated based on reduction in hours. Workplace closure around the world in response to the pandemic have led to reduction in hours of work of 10.7 percent in the second quarter of 2020, which translates to a loss of 305 million jobs, calculated on the basis of a 48-hour working week. (See INTERNATIONAL LABOR ORGANIZATION, *COVID-19 AND THE WORLD OF WORK: CONCEPT NOTE* (2020), [http://ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/meetingdocument/wcms\\_747931.pdf](http://ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/meetingdocument/wcms_747931.pdf).)

<sup>14</sup> See OECD, *CORONAVIRUS (COVID-19): SME POLICY RESPONSES 3–4*, [https://read.oecd-ilibrary.org/view/?ref=119\\_119680-di6h3qgi4x&title=Covid-19\\_SME\\_Policy\\_Responses\\_\(last\\_updated\\_Jul.\\_15,\\_2020\)](https://read.oecd-ilibrary.org/view/?ref=119_119680-di6h3qgi4x&title=Covid-19_SME_Policy_Responses_(last_updated_Jul._15,_2020)). (“*On the supply side, companies experience a reduction in the supply of labour, as workers are unwell or need to look after children or other dependents while schools are closed and movements of people are restricted. [...] On the demand side, a dramatic and sudden loss of demand and revenue for SMEs severely affects their ability to function, and/or causes severe liquidity shortages.*”)

<sup>15</sup> UN WOMEN, *COVID-19 AND ENDING VIOLENCE AGAINST WOMEN AND GIRLS* (2020), <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf?la=en&vs=5006>.

<sup>16</sup> NATHALIE BERNASCONI-OSTERWALDER, SARAH BREWIN & NYAGUTHII MAYNA, *PROTECTING AGAINST INVESTOR-STATE CLAIMS AMIDST COVID-19: A CALL TO ACTION FOR GOVERNMENTS* (2020), <https://www.iisd.org/library/investor-state-claims-amidst-covid-19>.

<sup>17</sup> *Trade Set to Plunge as COVID-19 Pandemic Upends Global Economy*, WORLD TRADE ORGANIZATION (Apr. 8, 2020), [https://www.wto.org/english/news\\_e/pres20\\_e/pr855\\_e.htm](https://www.wto.org/english/news_e/pres20_e/pr855_e.htm).

<sup>18</sup> See full list at WORLD TRADE ORGANIZATION, *DECLARATION ON TRADE IN ESSENTIAL GOODS FOR COMBATING THE COVID-19* (2020), [https://www.unescap.org/sites/default/files/Declaration%20on%20Trade%20in%20Essential%20Goods%20for%20Combating%20the%20Covid-19%20Pandemic\\_3.pdf](https://www.unescap.org/sites/default/files/Declaration%20on%20Trade%20in%20Essential%20Goods%20for%20Combating%20the%20Covid-19%20Pandemic_3.pdf).

passage of goods and have committed to cutting taxes on COVID-related goods and services such as masks and medical services, among others.<sup>19</sup>

However, given the current nationalist political climate in many parts of the world and the global economic order's concomitant shift to a decentralized model, such instances of multilateral cooperation seem to be the exception to the norm. As part of this shift, the WTO has been undergoing an existential crisis since the failure of the Doha Development Round and the more-recent crippling of its Dispute Settlement Body brought about by the United States' decision to block the appointment of new Appellate Body members.<sup>20</sup> Given this stalemate at the multilateral level, FTAs are playing an increasingly prominent role in the international trading system at both the bilateral and plurilateral levels. The proliferation of new-age FTAs is helping to foster trade liberalization and economic development in ways that have been hitherto unaddressed by multilateral agreements.<sup>21</sup> One of these agreements is the landmark African Continental Free Trade Agreement (AfCFTA), which has been signed by 54 African Union nations and ratified by 30; when implemented, it will create the largest free trade area in terms of Member States, and has the potential to connect 1.2 billion people in a market estimated to total \$4 trillion.<sup>22</sup> Another interesting FTA model is the Agreement on Climate Change, Trade, and Sustainability (ACCTS) under negotiation between New Zealand, Finland, Norway, Fiji, and Costa Rica. Other recent FTAs contain provisions that are notable with respect to different issue areas, and relevant examples will be referenced in the substantive sections that follow.

During a crisis such as the current pandemic, the legal and structural framework under FTAs can be leveraged to deal with the negative externalities that may arise. Many FTAs have already laid the groundwork to keep trade flowing during crises and to promote trade thereafter, with the inclusion of provisions on the expedited flow of essential goods and services; establishment of requisite infrastructure (especially in relation to trade facilitation) that allows for more seamless cross-border trade; inclusion of provisions balancing standards of protection to investors to encourage foreign direct investment with state's right to regulate; and endorsement of the health solutions set out in the flexibilities carved out in the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to ensure equitable access to vital medicines.<sup>23</sup>

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<sup>19</sup> WORLD BANK GROUP, TRADE AND COVID-19 GUIDANCE NOTES: DO'S AND DON'TS OF TRADE POLICY IN THE RESPONSE TO COVID-19 (2020), <http://documents1.worldbank.org/curated/en/509521585605825305/pdf/Do-s-and-Don-ts-of-Trade-Policy-in-the-Response-to-COVID-19.pdf>.

<sup>20</sup> KATRIN KUHLMANN, CHANTAL LINE CARPENTIER, TARA FRANCIS & MALOU LE GRAET, TRADE POLICY FOR RESILIENT, INCLUSIVE, AND SUSTAINABLE DEVELOPMENT IN A NEW INTERNATIONAL ECONOMIC ORDER (2020), [https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963\\_4460da2de0e746dd81ad32e003cd0bce.pdf](https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_4460da2de0e746dd81ad32e003cd0bce.pdf).

<sup>21</sup> ROBERTO V. FIORENTINO, LUIS VERDEJA & CHRISTELLE TOQUEBOEUF, DISCUSSION PAPER NO. 12, THE CHANGING LANDSCAPE OF REGIONAL TRADE AGREEMENTS: 2006 UPDATE (2007), <http://www.oas.org/dsd/Toolkit/Documents/MOduleII/The%20Changing%20Landscape%20of%20Regional%20Trade%20Agreements%20-%20WTO%20discussion%20paper.pdf>.

<sup>22</sup> AFRICAN UNION & UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA, AFRICAN CONTINENTAL FREE TRADE AREA: UPDATED QUESTIONS AND ANSWERS (2020), [https://www.uneca.org/sites/default/files/uploaded-documents/ATPC/updated\\_q\\_a\\_21jan2020.pdf](https://www.uneca.org/sites/default/files/uploaded-documents/ATPC/updated_q_a_21jan2020.pdf). See also, Landry Signé, *Africa's Big New Free Trade Agreement, Explained*, THE WASHINGTON POST (Mar. 29, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/29/the-countdown-to-the-african-continental-free-trade-area-starts-now/?utm\\_term=.7ef4d48b47cc](https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/29/the-countdown-to-the-african-continental-free-trade-area-starts-now/?utm_term=.7ef4d48b47cc).

<sup>23</sup> Victoria Harker, *Free Trade Could Boost U.S. and U.K. Economies Post Pandemic*, CHAMBER BUSINESS NEWS (Jun. 1, 2020), <https://chamberbusinessnews.com/2020/06/01/free-trade-could-boost-u-s-and-u-k-economies-post>

While multilateral action remains ideal, FTAs can be a useful tool at the regional level to mitigate the fallout from a crisis.

However, it must also be acknowledged that despite having laid the foundations for trade in times of crises, it would be wholly myopic to posit that the FTAs currently in force have managed to adequately cushion the negative impacts of COVID-19 on international trade. This stems largely from the fact that the current FTAs simply were not designed to deal with exogenous shocks of the magnitude of the current pandemic. Therefore, a systems approach has to be adopted to rectify the structural inadequacies that exist. Currently, the public policy exception contained in the WTO Agreements and a number of FTAs is being used by states to impose protectionist measures that do more harm than good to the global economy as a whole. Border closures, export bans, and other restrictions are severely disrupting trade, including through global value chains (GVCs), and the tensions resulting from the economic fallout are threatening global security. This serves as the clarion call for FTAs be remodeled so as to achieve the two-fold objective of: (i) mitigating the negative impacts of the current pandemic and economic downturn; and (ii) promoting an inclusive path to recovery which helps to build a global economy that is more resilient in the face of future crises.

With the aim of achieving these objectives, this report analyzes and proposes modifications to FTA provisions relating to trade facilitation, investment, small and medium-sized enterprises (SMEs), gender, intellectual property, and circular economy (CE) from a sustainable development point of view. Trade facilitation, investment and intellectual property can play a key role in mitigating losses during the pandemic, but these provisions, if not carefully crafted or if misused, can also exacerbate the losses. On the other hand, provisions relating to SMEs, gender, and circular economy will help to rebuild a more inclusive post-pandemic trading system. A summary of the recommendations outlined in this report can be found in Box 1 below.

***Box 1: Summary of Regulatory and Policy Recommendations***

**I. Investment**

**A. ISDS Reform**

- Explore possible expedited mechanism to dismiss frivolous claims by investors in order to allow governments to effectively focus resources on pandemic mitigation and recovery.
- Consider adopting a consolidation procedure into International Investment Agreement (IIAs) to combine all claims that arise from the same circumstances so that host countries do not have to address such identical or similar claims before multiple forums.
- Examine the viability of implementing a moratorium on ISDS claims against emergency measures that have been adopted as a response to the pandemic so

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pandemic/. For an instance of FTA texts affirming TRIPS based flexibilities, *see* USMCA Article 20.6 expressly affirming the right of member countries to adopt health solutions set out under the Doha Declaration on TRIPS and Public Health.

that countries can implement these measures without the fear of being sued in return by investors.

- Consider adopting a complementary model for IIAs where claims arising out of emergency measures are adjudicated in local courts so that investors can be ensured that they will not be stripped of their rights especially in relation to non-discrimination under FTAs.
- Explore the costs and benefits of moving from an ISDS system to a state-state arbitration system that will allow states to better address development needs.

**B. Regulatory Transparency:** Include obligations in investment treaties to introduce an effective mechanism notifying investors of any emergency measures taken by state parties during exigencies such as the pandemic in order to minimize risk to investors and increase transparency.

**C. Force Majeure Clause:** Consider incorporating a force majeure clause in IIAs which subjects state parties to watered down obligations in relation to emergency measures as compared to what is commonly found in IIAs, but state parties should still be obligation to meet the standard of non-discriminatory treatment of investors.

**D. Facilitate Inclusion of Sustainable Development Objectives into IIAs:**

- Incorporate mechanism to allow non-disputing parties such as local government, local communities affected by the investment in dispute,<sup>24</sup> and non-profits to submit amici curiae in dispute settlement processes.
- Consider incorporating provisions that set out investor goals that align with SDGs in future IIAs.
- Include provisions in FTAs that provide wider policy space to member states to implement policies relating to sustainable development.

## II. Intellectual Property

### A. Innovation

- Consider alternative approaches to encouraging innovation outside of traditional IP rules, such as mechanisms for voluntary IP pooling in times of crisis or an innovation fund, to allow greater transparency and reduce inefficiencies and costs.
- Impart custodians of traditional knowledge with enforceable rights over their property and knowledge streams, and establish clear system of recording these rights.

### B. Access

- Avoid harmonizing exhaustion regimes in FTA texts. This can provide countries with the flexibility to decide on the regime of exhaustion that works best for

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<sup>24</sup> See e.g., Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania, Award, ICSID Case No. ARB/10/13, 2 March 2015 (hereafter Awdi v. Romania) (involving a case in which the rights of municipalities over their land was at the heart of the dispute).

their needs. International exhaustion would permit parallel importation, which can be a valuable source of essential medical supplies.

- Avoid obligations such as patent linkages, data exclusivity protection for test data and biologics, or provide a mechanism for suspension of such protection during health emergencies.
- Streamline and simplify the compulsory licensing regime set out in TRIPS Article 31bis by removing procedural hurdles and defining criteria to establish ‘adequate compensation’.
- Expand the ambit of goods covered by the Doha Declaration on the TRIPS Agreement and Public Health beyond pharmaceutical products to specifically include protective devices and assistive technology, along with other critical medical supplies.

### **III. Trade Facilitation**

- Overall, upcoming trade facilitation provisions should focus on sustainable development and on the GRIC (green, inclusive, resilient, and circular) recovery to reach the SDGs and Agenda 2030 to ensure that “no one is left behind and to recover better.”

#### **A. National Trade Facilitation Committee (NTFCs)**

- NTFCs, along with regional databases on trade facilitations measures, should be incorporated into regional and national emergency task forces and response programs to establish a coordinated approach for essential goods and comprehensive pandemic response strategies related to trade facilitation.
- Establish guidelines for NTFCs and regional databases to report and react fact on trade facilitation policies during crises.
- Ensure that national agencies such as Ministries of Trade and Commerce include NTFCs in their national emergency response.

#### **B. Investment in Digitalization**

- Increase investment in digital infrastructure at the borders, especially in developing countries
- Focus on the implementation of TFA provision to accelerate access to information and electronic payment. If technical assistance under category C of the TFA is needed, this should be prioritized.
- Set out specialized rules for vulnerable stakeholders such as SMEs and women to promote digital inclusivity.
- Increase paperless procedural measures and adopting a single window system.
- Invest in transit without transshipment for trade between neighboring and/or landlocked countries.
- Allow digitized certificates such as ePhyto to speed up certification.

### **C. Categories of goods**

- Include and boost the implementation of TFA provisions in future FTA to provide for expedited customs procedures for essential goods such as perishables and medical equipment.
- Consider measures focusing on simplifying and streamlining customs procedures for medicines and medical technologies and devices to avoid disparities in access to goods.

## **IV. Small and Medium-Sized Enterprises**

### **A. Single Window System**

- Include binding language for the implementation of a single window system so that State parties can be held accountable to their commitments to facilitate trade.
- Adapt best practices from existing single window systems, bearing in mind that it should provide ease of usage for all end-users, and SMEs in particular.
- Agree to a timeline for the rollout of the single window system to avoid unnecessary delays in implementation.

### **B. De Minimis Values**

- Establish *de minimis* values through side letters to FTAs that are subject to periodic review to better reflect changes in inflation rates and other macroeconomic factors.

### **C. Standards**

- Promote cooperation between State parties to improve transparency and accessibility in international standards for SMEs.
- Explore options to create additional *de minimis* exceptions such that small-value, low-risk goods will not be subjected to a prohibitively costly standards compliance regime.
- Promote cooperation at domestic policy level to defray compliance costs.

### **D. Information Sharing**

- Include binding language establishing a public communication channel that explains the preferential treatment guaranteed under the FTA in plain terms and provides summary texts and fact sheets created specifically for SMEs
- Require relevant government institutions to share periodic updates on any trade-related regulatory measures.

### **E. SME Committee**

- Provide for the establishment of an SME Committee that can advise on SME-specific matters during the implementation of the FTA and, together with other

committees or working groups, engage both public and private sector stakeholders in regular dialogue on issues relevant to SMEs so as to discern best policy approaches to meet their specific needs.

## **F. Trade Finance**

- Highlight trade finance as an area of cooperation between State parties to facilitate dialogue on SME financing needs and encourage exchange of best practices at the domestic policy level, including the promotion of innovative SME financing solutions such as blended finance and sustainable development bonds.

## **G. Digitalization**

- Foster greater participation of SMEs in e-commerce through the creation of an enabling environment for digital trade, which provides the requisite ICT infrastructure and capacity building.
- Remove barriers to digital trade such as data localization requirements and incongruous data protection regulations.

## **V. Gender**

- Fully integrate gender into FTAs, which should include not only a single provision or stand-alone gender chapter, but also references throughout the agreement, including explicit mention of gender in the preamble or the creation of a ‘GATT-like’ exception for gender.
- Ensure FTAs include minimum legal standards focused on key areas of law central to women’s participation in all aspects of economic activity. Also focus on minimum standards that will implement SDG Goal 5.6 on Sexual and Reproductive Health to ensure equitable and consistent access to health services.
- Include explicit references to the parties’ intention to adhere to relevant international agreements, including labor agreements.
- Encourage FTAs to incorporate provisions aimed at collecting sex-disaggregated data and promoting research into the relationship of trade and gender.
- Require impact assessment as an FTA is negotiated and implemented.
- Consider creating a ‘Gender Officer’ role in the context of a trade agreement.
- Promote the participation of women in future trade negotiations by holding open consultations at the national level or finding other ways to promote a public-private dialogue.
- Provide women access to education and skill development programs in FTAs.

## **VI. Circular Economy**

### **A. Trade in Environmental Goods and Services**

- Establish standardized definitions for environmental goods and services (EGS), along with adopting specific commitments to encourage facilitation of trade in EGS.
- Adapt best practices from other agreements and efforts regarding EGS, building upon them to achieve policy coherence.
- To account for the rapid development of technology in EGS, consider setting up a living agreement like the Digital Economy Partnership Agreement (DEPA) to periodically evaluate commitments on EGS.

### **B. Implementing Circular Economy Measures**

- Design a model for differentiated and staged implementation, perhaps based on the WTO Trade Facilitation Agreement (TFA), that identifies short-term, medium-term, and long-term goals that would require assistance in international trade agreements
- Incorporate and uphold disciplines on transboundary waste movement.

### **C. Non-Tariff Barriers**

- Establish internationally-recognized standards for waste and its regulation, building such definitions into FTAs until broader scale agreement can be reached.
- Resolve the discrepancies between the Basel Convention and Harmonized System.
- Establish a definition for secondary raw materials to avoid unnecessary export restrictions.

## **IV. Introduction: Rethinking FTAs from a Sustainable Development Perspective**

Re-conceptualize the enabling environment for global trade could build upon the foundation that has been established over the last seventy-five years, while responding to calls to make the post-pandemic world more just, balanced and resilient to exogenous disruptions.<sup>25</sup> A welcome development is the reimagining of trade along the lines of sustainable development. The seventeen SDGs with their 169 sub-goals and 232 targets establish useful benchmarks in designing a global trading system rooted in fair, equitable, sustainable and participatory development.<sup>26</sup> Designing a

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<sup>25</sup> See generally JEFFREY D. SACHS, GUIDO SCHMIDT-TRAUB, CHRISTIAN KROLL, GUILLAUME LAFORTUNE, GRAYSON FULLER & FINN WOELM, SUSTAINABLE DEVELOPMENT REPORT 2020: THE SUSTAINABLE DEVELOPMENT GOALS AND COVID-19 (2020), [https://s3.amazonaws.com/sustainabledevelopment.report/2020/2020\\_sustainable\\_development\\_report.pdf](https://s3.amazonaws.com/sustainabledevelopment.report/2020/2020_sustainable_development_report.pdf).

<sup>26</sup> KATRIN KUHLMANN, CHANTAL LINE CARPENTIER, TARA FRANCIS & MALOU LE GRAET, TRADE POLICY FOR RESILIENT, INCLUSIVE, AND SUSTAINABLE DEVELOPMENT IN A NEW INTERNATIONAL ECONOMIC ORDER, 3 (2020), <https://cb4fec8a-9641-471c-9042->.



new generation of FTAs benchmarked against the SDGs has the potential to create a roadmap for post COVID-19 recovery that delivers on precisely that vision.

As discussed earlier, even prior to the pandemic's disruptions, development-themed obligations have become more commonplace in recent FTAs.<sup>27</sup> For instance, the overarching commitments in the gender chapter of the Canada-Chile FTA and the Chile-Uruguay FTA are essential first steps in working towards SDG 5 (gender equality)<sup>28</sup> and reinforcing the affirmations made by 119 WTO Member States in the Joint Declaration on Trade and Women's Economic Empowerment.<sup>29</sup> Further, the provisions in the labor chapter of the USMCA make progress in some areas and include, among other things, enforceable obligations and measures against forced labor and discrimination by mandating domestic law reform in Mexico, indicate an inclination to move towards increased labor protection in FTAs<sup>30</sup> in alignment with the targets of SDG 8 which focuses on decent work and economic growth.<sup>31</sup> The recent New Zealand-Singapore Closer Economic Partnership Agreement is also a significant step forward, notably streamlining customs procedures and reducing regulatory barriers, with specific focus on pandemic necessities.<sup>32</sup> The reconceptualization of the rules of trade, made necessary by the pandemic, can build upon these and other similar developments.

During the immediate stages of crisis mitigation, the priority for policymakers should be to manage the fallout from both the health crisis and the consequent economic downturn. For the health crisis, key goals include containing the spread of the virus in all parts of the world by ensuring adequate and equitable access to medicines and medical equipment and the establishment of a robust public health system that can support interventions such as testing, contact tracing, and implementing

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<sup>27</sup> KATRIN KUHLMANN, CHANTAL LINE CARPENTIER, TARA FRANCIS & MALOU LE GRAET, TRADE POLICY FOR RESILIENT, INCLUSIVE, AND SUSTAINABLE DEVELOPMENT IN A NEW INTERNATIONAL ECONOMIC ORDER, 3 (2020), <https://cb4fec8a-9641-471c-9042->.

<sup>28</sup> KATRIN KUHLMANN, CHANTAL LINE CARPENTIER, TARA FRANCIS & MALOU LE GRAET, TRADE POLICY FOR RESILIENT, INCLUSIVE, AND SUSTAINABLE DEVELOPMENT IN A NEW INTERNATIONAL ECONOMIC ORDER, 3-4 (2020), <https://cb4fec8a-9641-471c-9042->.

<sup>29</sup> Under the Joint Declaration, the Member States affirmed the need for gender responsive trade policies that encourage women to become equal economic agents by removing barriers to their participation in national and international trade (See *Joint Declaration on Trade and Women's Economic Empowerment*, WORLD TRADE ORGANIZATION (Dec. 2017), [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/genderdeclarationmc11\\_e.pdf](https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf)).

<sup>30</sup> While this is a step forward, significant progress needs to be made to ensure adequate worker protection, including, among other things, the regulation of migration flows for all category of workers and conditioning of ISDS awards on labor reforms and compliance. See Álvaro Santos, *A North American Integration That Includes the People* (Jul. 8, 2020), NORTH AMERICAN PROJECT, <https://www.northamericanproject.com/stories/a-north-american-integration-that-includes-the-people>; Álvaro Santos, *Reimagining Trade Agreements for Workers: Lessons from the USMCA*, 113 AM. J. INT'L L. UNBOUND 407 (2019), <https://scholarship.law.georgetown.edu/facpub/2211/>.

<sup>31</sup> Álvaro Santos, *A North American Integration That Includes the People* (Jul. 8, 2020), NORTH AMERICAN PROJECT, <https://www.northamericanproject.com/stories/a-north-american-integration-that-includes-the-people>; Álvaro Santos, *Reimagining Trade Agreements for Workers: Lessons from the USMCA*, 113 AM. J. INT'L L. UNBOUND 407 (2019), <https://scholarship.law.georgetown.edu/facpub/2211/>. See also *Labor Rights and the United States-Mexico-Canada Agreement (USMCA)*, US DEPARTMENT OF LABOR, <https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca#:~:text=The%20USMCA%20has%20the%20strongest,and%20making%20them%20fully%20enforceable> (last visited Jul. 22, 2020).

<sup>32</sup> Ayman Falak Medina, *Singapore and New Zealand Ratify Upgraded Trade Agreement, ASEAN Briefing* (Feb. 2, 2020), <https://www.aseanbriefing.com/news/singapore-new-zealand-ratify-upgraded-trade-agreement/>.

quarantine measures.<sup>33</sup> At a global level, large scale collaboration should focus on accelerating the discovery of a vaccine and treatments.<sup>34</sup> SDGs 3 (health and wellbeing) and 9 (industry, innovation, and infrastructure) are of particular importance in mitigation efforts. Using the TRIPS access to medicines flexibilities to the full extent, in line with SDG 3, will also be vital to ensuring access to equitable supply of medicines and a potential vaccine at affordable prices.<sup>35</sup> Collaborative research to foster innovation (SDG 9) is also a crucial mitigation strategy.

For mitigation of the economic crisis, an important consideration includes the management of growing food insecurity, caused partly by disruptions of cross-border supply chains and quantitative restrictions.<sup>36</sup> It is essential that countries focus on measures such as streamlining customs procedures and reducing regulatory hurdles (in particular for medicines, medical equipment, perishable and staple foods, and seeds and agricultural inputs), reducing or suspending tariffs for a range of critical imports, digitalization of documents, and opening borders and maritime transport to avoid supply chain disruptions, especially concerning food and medicines.<sup>37</sup> Further, facilitating the digitalization of trade procedures will help to advance other SDGs, as it has the potential to reduce corruption (SDG 16), while having knock-on effects which foster gender equality (SDG 5) and reduction of inequalities overall (SDG 10) by making it easier to start a business, engage in economic activity, and ultimately, trade.

“Building back better” is the motto of the post-pandemic recovery strategies, and the SDGs can prove to be vital indicators here as well. Stakeholders urge that resilience, de-carbonization, and a sustainable growth trajectory be part of the post pandemic reality.<sup>38</sup> Building resilient communities requires addressing systemic inequalities and increasing opportunities for women and small businesses, among others, tying back to the SDGs. It also requires large-scale investment in healthcare, education, digital technologies, and sustainable cityscapes.<sup>39</sup> Furthermore, the importance of building resilience cannot be understated; alternative economic models like circular

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<sup>33</sup> JEFFREY D. SACHS, GUIDO SCHMIDT-TRAUB, CHRISTIAN KROLL, GUILLAUME LAFORTUNE, GRAYSON FULLER & FINN WOELM, SUSTAINABLE DEVELOPMENT REPORT 2020: THE SUSTAINABLE DEVELOPMENT GOALS AND COVID-19, 3 (2020).

<sup>34</sup> JEFFREY D. SACHS, GUIDO SCHMIDT-TRAUB, CHRISTIAN KROLL, GUILLAUME LAFORTUNE, GRAYSON FULLER & FINN WOELM, SUSTAINABLE DEVELOPMENT REPORT 2020: THE SUSTAINABLE DEVELOPMENT GOALS AND COVID-19, 4 (2020).

<sup>35</sup> KATRIN KUHLMANN, CHANTAL LINE CARPENTIER, TARA FRANCIS & MALOU LE GRAET, TRADE POLICY FOR RESILIENT, INCLUSIVE, AND SUSTAINABLE DEVELOPMENT IN A NEW INTERNATIONAL ECONOMIC ORDER, 4 (2020), <https://cb4fec8a-9641-471c-9042->.

<sup>36</sup> JEFFREY D. SACHS, GUIDO SCHMIDT-TRAUB, CHRISTIAN KROLL, GUILLAUME LAFORTUNE, GRAYSON FULLER & FINN WOELM, SUSTAINABLE DEVELOPMENT REPORT 2020: THE SUSTAINABLE DEVELOPMENT GOALS AND COVID-19, 9 (2020).

<sup>37</sup> See Mimi Alemayehou, *Preventing Covid-19 from becoming a hunger crisis in Africa*, MAIL & GUARDIAN (Jul. 2, 2020), <https://mg.co.za/africa/2020-07-02-preventing-covid-19-from-becoming-a-hunger-crisis-in-africa/>.

<sup>38</sup> Etienne Kechichian & Nidal Mahmoud, *The Circular Economy Can Support COVID-19 Response and Build Resilience*, PRIVATE SECTOR DEVELOPMENT BLOG (May 18, 2020), [https://blogs.worldbank.org/psd/circular-economy-can-support-covid-19-response-and-build-resilience?cid=ECR\\_TT\\_worldbank\\_EN\\_EXT](https://blogs.worldbank.org/psd/circular-economy-can-support-covid-19-response-and-build-resilience?cid=ECR_TT_worldbank_EN_EXT).

<sup>39</sup> JEFFREY D. SACHS, GUIDO SCHMIDT-TRAUB, CHRISTIAN KROLL, GUILLAUME LAFORTUNE, GRAYSON FULLER & FINN WOELM, SUSTAINABLE DEVELOPMENT REPORT 2020: THE SUSTAINABLE DEVELOPMENT GOALS AND COVID-19, 9 (2020).

economy, creative economies, and frugal innovation,<sup>40</sup> which lowers the cost and complexity of production, should all be considered in response to the pandemic. Alternative models of economic development that are green, inclusive, resilient, and circular will go a long way in promoting sustainable development and achieving the SDGs. By way of an example, circular innovation is already helping countries mitigate the effects of supply chain disruptions during the current pandemic through the re-sterilization and repeated usage of personal protective equipment,<sup>41</sup> thereby highlighting the importance of incorporating circular economy principles in designing the framework for longer-term recovery.

Aligning trade policy with the SDGs can address many of the shortcomings of the international system that COVID-19 has laid bare. That alone is reason enough for us to collectively re-envision a model for trade that not only attempts to mitigate the current fallout from the pandemic but also paves a way forward for more inclusive, and equitable, post-pandemic growth.

## V. Analysis of Key Areas under Trade Agreements from a Sustainable Developments Lens

### A. Investment Law

As the COVID-19 pandemic continues to evolve, the restrictive measures adopted are causing a deceleration in investment projects around the world. The unique circumstances are causing a decline in the foreign direct investment (FDI) essential to growth of global economies, especially in developing countries. UNCTAD has reported that global FDI flows are set to decline by 40 percent in 2020, bringing FDI below US \$ 1 trillion for the first time since 2005. It is further projected that FDI will decrease another 5 to 10 percent in 2021, with a possible recovery slated for 2022.<sup>42</sup> The numbers suggest that the immediate effects of the pandemic on FDI will be sizable, and countries have resorted to taking emergency measures prioritizing those that would reduce the human impairment and loss caused by the pandemic. To provide a few illustrative examples, India banned the export of 26 active pharmaceutical ingredients;<sup>43</sup> Spain and Ireland have opted to temporarily nationalize private hospitals, with the Spanish government taking over the management of private health care companies until the crisis ends;<sup>44</sup> and a majority of countries have adopted nationwide lockdowns and halted operations of businesses through emergency regulations, among others. A wide consensus is that these measures are justified and also necessary to curb the spread of the virus, but the collateral damage caused by these measures could catapult a consecution of claims under Bilateral Investment Treaties (BITs) and FTAs (collectively called “IIAs”), subjecting countries to the highly contentious Investor-State Dispute Settlement (ISDS) System.

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<sup>40</sup> Frugal innovation exhibits features of “substantial cost reduction, concentration on core functionalities, and optimized performance levels”. See Timo Weyrauch & Cornelius Herstatt, *What is Frugal Innovation? Three Defining Criteria*, 2 J. FRUGAL INNOV. 1 (2017), <https://link.springer.com/article/10.1186/s40669-016-0005-y>.

<sup>41</sup> See section IV.F below on circular economy.

<sup>42</sup> UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), WORLD INVESTMENT REPORT 2020 (2020), <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2769>.

<sup>43</sup> Prabhash Ranjan, *COVID-19: Why India Doesn't Need to Worry About Investor-State Dispute Settlement Claims*, HINDUSTAN TIMES (Apr. 1, 2020), <https://www.hindustantimes.com/analysis/covid-19-why-india-should-not-worry-about-investor-state-dispute-settlement-claims/story-iV8VHHoQGxMrc7Hao3Jj7L.html>.

<sup>44</sup> NATHALIE BERNASCONI-OSTERWALDER, SARAH BREWIN & NYAGUTHII MAYNA, PROTECTING AGAINST INVESTOR-STATE CLAIMS AMIDST COVID-19: A CALL TO ACTION FOR GOVERNMENTS (2020), <https://www.iisd.org/library/investor-state-claims-amidst-covid-19>.

Therefore, an intervention is warranted at all levels of the international legal framework, especially in relation to trade policy. This is because international trade and investment arbitration converge with each other at many levels: first, trade obligations and investment arbitration are often found in a single treaty;<sup>45</sup> second, BITs have provisions on non-discrimination and exceptions that sometimes are verbatim duplicated from GATT language;<sup>46</sup> third, the same set of facts may trigger both investment and trade claims (an import ban on good or services may give rise to a “colorable claim” of indirect expropriation under a BIT and a case on quantitative restrictions under the GATT or an FTA);<sup>47</sup> and fourth, some countries have tactfully been able to enforce arbitration awards under the guise of trade concessions.<sup>48</sup>

This section seeks to describe a list of reform options that could be implemented during and after the pandemic. First, in relation to the ISDS system, policy makers should (i) consider adopting a mechanism to dismiss unsubstantiated claims made by investors against emergency measures taken by countries to deal with the pandemic; (ii) consider implementing a moratorium on ISDS claims for these emergency measures, as many in the global community have called for;<sup>49</sup> (iii) consider getting into an arrangement with state parties of FTAs to domesticate claims that arise due to these emergency measures; (iv) consider incorporating ISDS through regional judicial organs such as the East African Court of Justice (EACJ), Common Market for Eastern Southern Africa (COMESA) Court of Justice or the Community Court of Justice of Economic Community of West African States (ECOWAS). Second, policymakers should consider adopting a notification system, either at an international level or regional level, to notify the emergency measures that they have taken so that investors can track them. Third, policymakers should consider incorporating force majeure clauses in FTAs that accommodate for extreme emergencies such as the pandemic.<sup>50</sup> Fourth and finally, policy makers should consider adopting measures in IIAs in line with achieving SDGs.

In relation to the first set of measures relating to ISDS reform, countries need to be able to take measures to control the spread of the pandemic and consequently mitigate the economic losses of the pandemic. Host countries are provided a certain level of deference under exception clauses in

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<sup>45</sup> Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 SANTA CLARA J. INT’L L. 35 (2014), <https://digitalcommons.law.scu.edu/scujil/vol12/iss1/3/>.

<sup>46</sup> The USMCA general exceptions clause is included verbatim from GATT Article XX.

<sup>47</sup> Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 SANTA CLARA J. INT’L L. 35 (2014), <https://digitalcommons.law.scu.edu/scujil/vol12/iss1/3/>.

<sup>48</sup> This has been done when a developed country threatens to remove preferential trade benefits for a developing country if that country does not honor its international arbitration commitments. For example, under the Generalized System of Preferences (GSP), the United States imposes conditions on the beneficiary that they recognize and enforce arbitral awards in favor of United States nationals (see Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 SANTA CLARA J. INT’L L. 35 (2014), <https://digitalcommons.law.scu.edu/scujil/vol12/iss1/3/> and 19 U.S.C § 2462 (b)(2)(E))

<sup>49</sup> This recommendation is based on a recommendation by the Columbia Centre on Sustainable Development (see *Call for ISDS Moratorium During COVID-19 Crisis and Response*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT (May 6, 2020), <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>).

<sup>50</sup> The India-Czech BIT (now terminated) included the following language pertaining to “extreme emergencies”: “The provisions of this Agreement shall not in any way limit the right of either Contracting Party in cases of extreme emergency to take action in accordance with its laws applied in good faith, on a non discriminatory basis, and only to the extent and duration necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.”

IAs; however states usually have to meet multiple prong tests,<sup>51</sup> with measures being “necessary” to achieve a “legitimate government objective” in addition to being non-discriminatory in nature.<sup>52</sup> These tests are justifiable and often required to hold states accountable if they act in a discriminatory manner; however under circumstances such as the pandemic, states have resorted to taking hundreds of emergency measures which will warrant as many or even more ISDS claims against them spread out across multiple fora, amounting to millions and even billions of dollars. Many claims may be frivolous in nature, giving rise to significant challenges for already-taxed public institutions. For example, claims have previously been brought against states for alleged “indirect expropriation” which were ultimately found to be “bona fide regulatory measures;”<sup>53</sup> this way investors have brought claims against nondiscriminatory regulatory measures under the guise of indirect expropriation.

Further, the ISDS system has been marred by growing criticism due to issues such as excessive cost and jurisdiction of proceedings, lack of consistency in the interpretation of legal issues, incorrectness of decisions, and exorbitant monetary value of awards and damage calculations.<sup>54</sup> Measures taken by governments to protect their citizens from the spread of COVID-19 can lead to huge losses to businesses, which may allow foreign investors to allege breaches of a state’s obligation under IAs. Governments need to be able to take measures without fear of being sued by private investors<sup>55</sup> and, therefore, must be protected from such claims during the pandemic and beyond. Such a fear is not unfounded, as, during the 2007-2008 financial crisis, the Argentinian government took a range of measures to respond to the crisis, and by 2014 the country wound up being a respondent in over 50 ISDS cases, most of which were due to the emergency measures taken during the pandemic. A total amount of U.S. \$ 2 billion was paid in compensation.<sup>56</sup>

Additionally, with the adoption of the SDGs in 2015, a discussion has evolved into how IAs can be utilized to meet countries’ sustainable development objectives. IAs work as complementary tools to national policies by providing foreign investors adequate policy protections for their

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<sup>51</sup> For example, the general exception clause in USMCA (Article 32.1) is taken verbatim from the GATT Article XX which sets up a three prong test: (i) the measure in question must be connected to the issue named in the subparagraph, e.g. human health (policy objective); (ii) the measure should be “necessary” or “related to” achieve the objective; and (iii) the measure has to be non-discriminatory or should not constitute a disguised restriction on international trade. So far only one of 40 attempts to use the GATT Article XX “general exception” has succeeded (*see* PUBLIC CITIZEN, ONLY ONE OF 40 ATTEMPTS TO USE THE GATT ARTICLE XX/GATS XIV “GENERAL EXCEPTION” HAS EVER SUCCEEDED: REPLICATING THE WTO EXCEPTION WILL NOT PROVIDE FOR AN EFFECTIVE TPP GENERAL EXCEPTION, <https://www.citizen.org/wp-content/uploads/migration/general-exception.pdf>).

<sup>52</sup> *COVID-19 and Investment Treaties: Balancing the Protection of Public Health and Economic Interests*, JONES DAY (May 2020), <https://www.jonesday.com/en/insights/2020/05/covid19-and-investment-treaties>.

<sup>53</sup> UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), IIA ISSUES NOTE: ISSUE 4, REVIEW OF ISDS DECISIONS IN 2018, SELECTED IIA REFORM ISSUES (2019), [https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d6\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d6_en.pdf).

<sup>54</sup> United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session (Vienna, 27 November – 1 December 2017), A/CN.9/930/Rev.1, Dec. 19, 2017, <https://undocs.org/en/A/CN.9/930/Rev.1>.

<sup>55</sup> *Call for ISDS Moratorium During COVID-19 Crisis and Response*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT (May 6, 2020), <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>.

<sup>56</sup> NATHALIE BERNASCONI-OSTERWALDER, SARAH BREWIN & NYAGUTHII MAYNA, PROTECTING AGAINST INVESTOR-STATE CLAIMS AMIDST COVID-19: A CALL TO ACTION FOR GOVERNMENTS (2020), <https://www.iisd.org/library/investor-state-claims-amidst-covid-19>.

investments.<sup>57</sup> However, they can also hinder the growth of sustainable development objectives, as investors may often perceive policy and regulatory measures as unfavorable to their economic interests and resort to the dispute resolution processes set out in the IIAs.<sup>58</sup> In this context, IIAs can be tailored to accommodate measures relating to sustainable development, specifically the SDGs. One of the ways in which this can be done is by facilitating participation of stakeholders such as non-profits that can better represent sustainable development objectives. Further, IIAs can also include SDG elements in their provisions; this is not a novel approach as many IIAs have already incorporated provisions relating to sustainable development. For example, the South African Development Community (SADC) Model BIT clarifies that an investment should contribute to the host state’s development.<sup>59</sup> Further, the Drafting Committee of the SADC Model BIT recommended against the inclusion of FET provisions, or, in the alternate, recommended the inclusion of a standard of ‘Fair Administrative Treatment’ to ensure that the administrative, legislative and judicial process do not operate in a manner that is arbitrary manner and investors are not denied procedural due process.<sup>60</sup>

With this background, this part of the report proposes the following options that policymakers may consider in relation to investment regulation reforms during the pandemic and beyond.

**Table 1: Possible Regulatory/Policy Recommendations Relating to Investment Laws**

#	ISSUES	BEST PRACTICES AND OBSERVATIONS	RECOMMENDATIONS
<b>ISDS Reform</b>			
1.	IIAs expose countries to a plethora of claims arising as a result of emergency measures taken during the pandemic.	BITs, <sup>61</sup> international arbitration rules, <sup>62</sup> and FTAs have rules setting out procedures to dismiss cases at preliminary stages.	Policymakers may consider incorporating an expedited mechanism to dismiss claims by investors that are frivolous in nature.

<sup>57</sup> UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (2015), [https://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf).

<sup>58</sup> UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (2015), [https://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf).

<sup>59</sup> SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY (2012), <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>.

<sup>60</sup> SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY (2012), <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>.

<sup>61</sup> A tribunal may suspend any proceedings on the merits and focus on the issue of preliminary objections under Article 28 US Model BIT which is modeled on language of Rule 12 (b) (6) of the U.S. Federal Rules of Civil Procedure (see Tsai-Fang Chen, *Deterring Frivolous Challenges in Investor State Dispute Settlement*, 8 CONTEMP. ASIA ARB. J. 61 (2015)).

<sup>62</sup> Arbitration Rule 41(5) provides an expedited procedure to dispose of unmeritorious claims at the preliminary stage of a proceeding. The rationale for the Rule is to allow claims that manifestly lack legal merit to be dismissed early in the process before they unnecessarily consume the parties’ resources. It applies to objections to jurisdiction as well as objections on the merits. See *Manifest Lack of Legal Merit – ICSID Convention Arbitration*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <https://icsid.worldbank.org/en/Pages/process/Manifest-Lack-of-Legal-Merit.aspx> (last visited Jul. 22, 2020).

	<p>Duplicative cases concerning the same subject matter may be presented before multiple tribunals.</p> <p>States will have to defend themselves before multiple arbitral tribunals to defend claims made against them.</p>	<p>Certain IIAs have provisions that allow for consolidation of cases that arise from the same event or circumstances.</p> <p>Regional Courts such as the EACJ, COMESA Court of Justice, or ECCJ could be used to resolve ISDS cases.</p>	<p>Policymakers may consider adopting into IIAs a consolidation procedure to combine all claims that arise from the same circumstances.</p> <p>Policy makers may consider adopting regional courts to adjudicate ISDS cases. With the advent of the AfCFTA, steps could be taken to establish a pan-African Regional Investment Court.<sup>63</sup></p>
2.	<p>Countries should be able to take measures aimed at curbing the pandemic and not worry about defending themselves from ISDS claims during the pandemic.</p> <p>ISDS outcomes are unpredictable and can result in huge losses to the host state.</p>	<p>The USMCA provides a complementary model where legacy investment claims can be brought before an ISDS system<sup>64</sup> for a period of three years after which disputes between two of the State Parties (United States and Canada) will be subject to domestic procedures.</p> <p>The South African Development Community (SADC) Model BIT recommends state-to-state dispute settlement, with preference given to alternative dispute mechanism other than arbitration, including mediation through recognized institutions.<sup>65</sup></p>	<p>Policymakers may consider imposing a moratorium on ISDS claims based on emergency measures that have been adopted as a response to the pandemic.</p> <p>Policymakers may consider a complementary model where claims arising out of emergency measures are subject to domestic procedures.</p> <p>Policymakers may consider moving from an ISDS system to a state-state arbitration system that will allow states to better address respective development needs.</p>

<sup>63</sup> Makane Moïse Mbengue, Africa's Voice in the Formation, *Shaping and Redesign of International Investment Law*, 34 ICSID REV. – FOREIGN INV. L. J. 455 (2019).

<sup>64</sup> USMCA, Annex 14-C.

<sup>65</sup> Katrin Kuhlmann & Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward A New Legal Model for Trade and Development*, 51 GEO. J. INT'L L. 4 (forthcoming, 2020).

<b>Regulatory Transparency</b>			
3.	IAs do not have a system in place that can notify investors of emergency measures that might affect the investment.	National Investment Promotion Agencies (IPAs) have adopted differing responses to the crisis, with European IPAs offering comprehensive COVID-related content and services online, whereas many developing country IPAs do not have such mechanisms in place or only notify the investor of measures such as office closures and lockdowns. <sup>66</sup> This reduces transparency on pandemic-related emergency measures that may impact investors so that they can take appropriate measures to mitigate expected losses.	Policymakers may consider introducing effective mechanisms in IAs to notify investors of any emergency measures that have been taken to address exigencies such as the pandemic so that they can anticipate the risks they face due to such measures.
<b>Force Majeure Clause</b>			
4.	Even though this is a staple in contract drafting, most FTAs do not have provisions addressing “force majeure” events.	Several Indian BITs allow for the host state to deviate from treaty obligations in situations of “extreme emergencies” (subject to the non-discriminatory treatment of foreign investor) <sup>67</sup> .	Policymakers should consider incorporating provisions that will allow countries to implement measures in “extreme emergencies” or “force majeure events” such as the pandemic (subject to non-discriminatory treatment) which are not subject to multiple-prong tests as usually set out under IAs

<sup>66</sup> UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), INVESTMENT POLICY MONITOR, INVESTMENT POLICY RESPONSES TO THE COVID-19 PANDEMIC (2020), [https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf).

<sup>67</sup> Prabhash Ranjan, *COVID-19: Why India Doesn't Need to Worry About Investor-State Dispute Settlement Claims*, HINDUSTAN TIMES (Apr. 1, 2020), <https://www.hindustantimes.com/analysis/covid-19-why-india-should-not-worry-about-investor-state-dispute-settlement-claims/story-iV8VHHoQGxMrc7Hao3Jj7L.html>.



<b>Facilitate Inclusion of Sustainable Development Objectives into IIAs</b>			
5.	SDG-related interests are not adequately represented in IIAs.	ISDS arbitration does not adequately allow for representation of actors related to sustainable development.	Participation should not be limited to investors who have an economic interest. Rather, non-disputing parties, such as non-profits who can better present public goals, should also be allowed to participate in the proceedings by submitting <i>amicus curiae</i> .
6.	FTAs should set out investors' obligations when investing in host states.	IIAs contain provisions that require investors to comply with domestic law. <sup>68</sup>  Recent FTAs like the USMCA contain provisions on promotion of corporate social responsibility (CSR) and responsible business content; parties are encouraged to adopt and implement best practices of CSR related to environment. <sup>69</sup> These obligations, however, are not enforceable. <sup>70</sup>	Policy makers should consider incorporating provisions in future IIAs that set out investor goals that align with SDGs.
7.	Inclusion of provisions relating to SDGs	The SADC Model BIT no longer include provisions on Fair and Equitable Treatment which provides great policy space to SADC member states. <sup>71</sup> Further, the SADC Model BIT has incorporated elements of sustainable development in other provisions.	Policy makers may consider including such provisions in FTAs, which provides wider policy space to member states to implement policies relating to sustainable development. This will especially be essential during the pandemic.

<sup>68</sup> Common Market for Eastern and Southern Africa, Article 13.

<sup>69</sup> Voluntary best practices include internationally recognized standards and guidelines (see USMCA Article 24.14) such as the Equator Principles which is a risk management framework adopted by financial institutions to determine the environmental risks in projects (see also Samuel L. Brown, *The USMCA, Trade and the Environment*, LEXOLOGY (Jul. 2 2020), <https://www.lexology.com/library/detail.aspx?g=2f1dab0a-31a4-47e7-96fb-a5fffb3df2c8>).

<sup>70</sup> USMCA, Art. 24.13.

<sup>71</sup> Katrin Kuhlmann & Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward A New Legal Model for Trade and Development*, 51 GEO. J. INT'L L. 4 (forthcoming, 2020).

## B. Intellectual Property Laws

The TRIPS Agreement is credited with bringing protection for IP rights into the mainstream trade agenda. However, the uneasy compromise between the developed and developing worlds crystallized in the TRIPS Agreement, which has subsequently been challenged by both blocs, led to TRIPS plus obligations and (less frequently) TRIPS plus flexibilities in subsequent FTAs.<sup>72</sup> Nevertheless, the TRIPS Agreement establishes an international minimum standard<sup>73</sup> in many areas and is a useful comparator in analyzing IP provisions of FTAs.

The pandemic has thrown into sharp relief the fault lines in the prevailing system of IP protection through the TRIPS-based network of FTAs. Long standing debates on patent protection for pharmaceuticals affecting equitable access to medicines, harmonization of exhaustion regimes, efficacy of the TRIPS compulsory licensing system, and the expansion of rights for traditional knowledge all acquire even greater significance in the COVID-19 crisis mitigation and resolution phases. Comprehensive strategies proposed both for the mitigation of the health crisis and long-term economic recovery have a substantial IP component. Initiatives taken at the national, regional, and international levels include the creation of a voluntary pool of IP rights, establishment or modification of compulsory licensing regimes, and information sharing mechanisms.<sup>74</sup> There is broad international consensus that priorities in pandemic mitigation and recovery include, *inter alia*, rapid innovation to ensure the quick and efficient development of vaccines and treatment, and equitable access to medical technologies.<sup>75</sup>

FTAs can be useful instruments in achieving the abovementioned goals and, in particular, can ensure that the system is made more resilient to future pandemics and related exogenous shocks. This section proposes reforms to the existing framework of IP rights protection, aimed at enhancing innovation and improving access. The COVID-19 pandemic serves, in its way, as a case study on the creation of an enabling legal framework for innovation balanced with equitable access. While the conventional wisdom underlying the TRIPS Agreement proposes strong intellectual property protection as the key to enhancing innovation across the globe, the pandemic responses highlight the need for a collaborative approach to ensure efficient research and rapid solutions.<sup>76</sup> The TRIPS plus obligations conferring enhanced IP protection cannot, therefore, be looked upon as the panacea for post-pandemic innovation.

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<sup>72</sup> See generally Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215 (Lorand Bartels & Federico Ortino eds. 2006).

<sup>73</sup> Rafael Pastor, *The Impact of Free Trade Agreements on Intellectual Property Standards in a Post-TRIPS World*, BILATERALS.ORG, <https://www.bilaterals.org/?the-impact-of-free-trade> (last visited Jul. 20, 2020).

<sup>74</sup> See *Solidarity Call to Action: Making the Response to COVID-19 a Public Common Good*, WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/covid-19-technology-access-pool/solidarity-call-to-action> (last visited Jul. 22, 2020). National initiatives for investment strategies taken by member countries compiled by the WTO Secretariat are made 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).

<sup>75</sup> See *Solidarity Call to Action: Making the Response to COVID-19 a Public Common Good*, WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/covid-19-technology-access-pool/solidarity-call-to-action> (last visited Jul. 22, 2020).

<sup>76</sup> See *Solidarity Call to Action: Making the Response to COVID-19 a Public Common Good*, WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/covid-19-technology-access-pool/solidarity-call-to-action> (last visited Jul. 22, 2020).

FTA models should instead create enabling frameworks for collaboration and data sharing. There have been several regional and international initiatives to pool intellectual property, data, and research to ensure faster innovation.<sup>77</sup> Building on the Medicine Patent Pool established in 2010 to deal with the HIV/AIDS epidemic, Costa Rica has proposed a voluntary pool for IP and research, an initiative which, in addition to promoting equitable access, could provide an impetus to R&D by providing opportunities to combine research, data and treatments.<sup>78</sup> A related proposal is the creation of incentives other than patent protection for innovation; these might include, for instance, the creation of funds to offer financial prizes offered to innovators.<sup>79</sup> Such approaches would foster collaborative conditions for research, since these prizes can be offered to all companies that contribute to the research.<sup>80</sup> While these initiatives occupy the realm of soft law, FTAs could incorporate them into treaty language that would lead to future regional or international initiatives. This enabling environment can include (i) overarching language underscoring the need for collaborative research and innovation in case of global crises, (ii) mechanisms for information and data sharing, (iii) terms of the information exchange; and (iv) mechanisms for pooling government funds during times of health emergencies, to reward companies that create preventative/therapeutic products which can then be mass produced by other companies.

Further, sustainable innovation requires the delineation of rights in hitherto under-recognized streams of intellectual property and a clear system for recording these rights. The most relevant to a discussion of reforms for post-pandemic realities is the protection of genetic resources and traditional knowledge, where the rights of custodians of such property and knowledge streams remain limited. The development and use of traditional medicine have gained significant attention in recent months, with several countries exploring the efficacy of traditional preparations in the fight against COVID-19.<sup>81</sup> The increased attention may translate to greater use of traditional knowledge and genetic resources as therapeutics and preventative drugs/vaccines are developed to respond to this and future health crises.<sup>82</sup> The pandemic, therefore, presents an opportune moment to revisit the protection afforded to genetic resources and traditional knowledge. Currently, genetic resources are covered under the Convention on Biological Diversity (CBD), the Nagoya Protocol

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<sup>77</sup> See e.g., Ed Silverman, *WHO is Asked to Create a Voluntary Intellectual Property Pool to Develop COVID-19 Products*, STAT (Mar. 24, 2020), <https://www.statnews.com/pharmalot/2020/03/24/covid19-coronavirus-costa-rica-intellectual-property/>.

<sup>78</sup> Ed Silverman, *WHO is Asked to Create a Voluntary Intellectual Property Pool to Develop COVID-19 Products*, STAT (Mar. 24, 2020), <https://www.statnews.com/pharmalot/2020/03/24/covid19-coronavirus-costa-rica-intellectual-property/>.

<sup>79</sup> Simon Lester & Bryan Christopher Mercurio, *We Need a Coronavirus Vaccine. Patents Might Slow the Process*, CATO INSTITUTE (Apr. 8, 2020), <https://www.cato.org/publications/commentary/we-need-coronavirus-vaccine-patents-might-slow-process>.

<sup>80</sup> Simon Lester & Bryan Christopher Mercurio, *We Need a Coronavirus Vaccine. Patents Might Slow the Process*, CATO INSTITUTE (Apr. 8, 2020), <https://www.cato.org/publications/commentary/we-need-coronavirus-vaccine-patents-might-slow-process>.

<sup>81</sup> Charlene Tsitsi Musiza, *The 'Madagascar Cure' for COVID-19 Puts Traditional Medicine in the Spotlight*, AFRONOMICSLAW (Jun. 19, 2020), <https://www.afronomicslaw.org/2020/06/19/the-madagascar-cure-for-covid-19-puts-traditional-medicine-in-the-spotlight/>.

<sup>82</sup> Charlene Tsitsi Musiza, *The 'Madagascar Cure' for COVID-19 Puts Traditional Medicine in the Spotlight*, AFRONOMICSLAW (Jun. 19, 2020), <https://www.afronomicslaw.org/2020/06/19/the-madagascar-cure-for-covid-19-puts-traditional-medicine-in-the-spotlight/>.

on Access and Benefit Sharing (Nagoya Protocol),<sup>83,84</sup> and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). Protection for such resources and knowledge streams is largely limited to access and benefit sharing.<sup>85</sup> However, in recent years, there have been calls for increased rights-based protection to traditional knowledge and genetic resources to ensure that the need for innovation would not lead to rampant bio-piracy.<sup>86</sup> Elevated protection for traditional knowledge would be a significant step in ensuring that innovators (from both developed and emerging economies) can tap into vast systems of knowledge while protecting the rights of the holders of the knowledge. The ITPGRFA lays the groundwork for a move in this direction by (i) setting out farmers' rights (including the right of participation in decision making at the national level);<sup>87</sup> (ii) requiring member states to protect traditional knowledge;<sup>88</sup> and (iii) explicitly prohibiting IP claims on the resources accessed and used under the mechanisms established pursuant to the terms of the treaty.<sup>89</sup> Making the most of the momentum for reform, and building on the provisions included in the ITPGRFA, future FTAs could include provisions to allow for enforceable rights to custodians of traditional knowledge and genetic resources, and establish, at the minimum, mandatory disclosure requirements for the use of traditional knowledge, and a registry for traditional knowledge.<sup>90</sup> A clear and up-to-date registry or other forms of recording traditional knowledge that establishes chain of ownership or attribution, including digital databases or libraries will also be essential in protecting these resources and rights.<sup>91</sup> Documenting traditional knowledge will allow for its preservation and can promote wider collaboration between innovating companies and the custodians of the resources on more equitable terms.<sup>92</sup>

Reforms are also required to improve the access to medicines provisions set out in the TRIPS-based universe of FTAs. At the time of its negotiation, the TRIPS Agreement sought to balance the rights of manufacturers and innovators seeking to reap the benefits of their investment in R&D with the general public interest of obtaining low cost access to drugs.<sup>93</sup> Therefore, while defining the minimum terms of IP protection, the TRIPS Agreement also created public health oriented

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<sup>83</sup> Charlene Tsitsi Musiza, *The 'Madagascar Cure' for COVID-19 Puts Traditional Medicine in the Spotlight*, AFRONOMICSLAW (Jun. 19, 2020), <https://www.afronomicslaw.org/2020/06/19/the-madagascar-cure-for-covid-19-puts-traditional-medicine-in-the-spotlight/>.

<sup>84</sup> The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity sets out mechanisms for sharing the benefits of the use of traditional knowledge on an equitable manner with the custodians of the knowledge. See Nagoya Protocol, Art. 5.

<sup>85</sup> See CBD, Arts. 1 & 15; Nagoya Protocol, Arts. 5, 6 & 7; ITPGRFA, Arts. 10, 12 & 13.

<sup>86</sup> Charlene Tsitsi Musiza, *The 'Madagascar Cure' for COVID-19 Puts Traditional Medicine in the Spotlight*, AFRONOMICSLAW (Jun. 19, 2020), <https://www.afronomicslaw.org/2020/06/19/the-madagascar-cure-for-covid-19-puts-traditional-medicine-in-the-spotlight/>.

<sup>87</sup> ITPGRFA, Art 9.2 (c).

<sup>88</sup> ITPGRFA, Art. 9.2 (a).

<sup>89</sup> ITPGRFA, Art. 12.3 (d).

<sup>90</sup> Katrin Kuhlmann & Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward A New Legal Model for Trade and Development*, 51 GEO. J. INT'L L. 4, 31 (forthcoming, 2020).

<sup>91</sup> India's traditional knowledge digital library is an important initiative in this regard, and it digitizes and records traditional medical knowledge for use by patent offices to prevent misappropriation. See WIPO, DOCUMENTING TRADITIONAL KNOWLEDGE – A TOOLKIT, 22 (2017), [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1049.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1049.pdf)

<sup>92</sup> See WIPO, DOCUMENTING TRADITIONAL KNOWLEDGE – A TOOLKIT, 9 (2017), [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1049.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1049.pdf).

<sup>93</sup> Brin Anderson, *Better Access to Medicines: Why Countries are Getting Tripped Up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 165 (2010).

flexibilities in the form of a compulsory licensing regime.<sup>94</sup> However, later years proved this balance was not quite struck, as the prices of essential drugs were driven up, largely because of IP protection delaying market access for generics.<sup>95</sup> Since the compulsory licensing regime only allowed the issue of licenses for a domestic market, countries which lacked manufacturing capabilities required for a flourishing generics industry bore the brunt of this imbalance.<sup>96</sup> Policymakers sought to address these imbalances during the Doha Round of negotiations, and created the ‘Doha Paragraph 6 system’ that was eventually incorporated as an amendment to the TRIPS agreement.<sup>97</sup> This system allowed for the issue of compulsory licenses for the benefit of an importing market which lacked sufficient manufacturing capabilities.<sup>98</sup> While a significant improvement, the unwieldy procedural requirements make the system unsuitable to address the immediate needs arising during a health emergency; these inefficiencies are evidenced by very limited use of these measures over the years.<sup>99</sup>

Certain TRIPS plus obligations in FTAs have been heavily criticized as creating market barriers to generic medical technologies, which are vital to ensuring equitable access to low cost drugs.<sup>100</sup> Of particular concern are provisions such as patent term extensions, data protection for test data and biologics,<sup>101</sup> and patent linkage. Patent linkage is the type of protection whereby during the terms of a patent, the relevant regulatory body cannot grant market approval for a generic version of that drug without permission from the patent holder.<sup>102</sup> While prohibited in the EU and therefore absent in any EU FTA,<sup>103</sup> the IP chapter of several US treaties include patent linkage in its menu of TRIPS plus obligations.<sup>104</sup> Linking patent protection to the grant of regulatory approval not only

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<sup>94</sup> Brin Anderson, *Better Access to Medicines: Why Countries are Getting Tripped Up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 165, 167 (2010).

<sup>95</sup> Brin Anderson, *Better Access to Medicines: Why Countries are Getting Tripped Up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 165, 165–166 (2010).

<sup>96</sup> Brin Anderson, *Better Access to Medicines: Why Countries are Getting Tripped Up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 165, 171 (2010).

<sup>97</sup> The compulsory licensing mechanism now incorporated in the TRIPS Agreement has been referred to in this section as the ‘Doha Paragraph 6 System’, the usage derived from WHO, WIPO & WTO, PROMOTING ACCESS TO MEDICAL TECHNOLOGIES AND INNOVATION: INTERSECTIONS BETWEEN PUBLIC HEALTH, INTELLECTUAL PROPERTY AND TRADE (2013).

<sup>98</sup> Brin Anderson, *Better Access to Medicines: Why Countries are Getting Tripped up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 165, 171-172 (2010).

<sup>99</sup> WHO, WIPO & WTO, PROMOTING ACCESS TO MEDICAL TECHNOLOGIES AND INNOVATION: INTERSECTIONS BETWEEN PUBLIC HEALTH, INTELLECTUAL PROPERTY AND TRADE 179 (2013).

<sup>100</sup> See e.g. Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 224–237 (Lorand Bartels & Federico Ortino eds. 2006).

<sup>101</sup> Biologics is a term used to denote large molecule medical preparations derived from living organisms, including, significantly, vaccines and therapeutic proteins. In an earlier draft of the USMCA, enhanced data exclusivity protection for biologics, which makes clinical trials for biosimilars during the term of the protection prohibitively costly, was proposed. Following wide opposition, reference to biologics was removed from the final text of the USMCA. See CONGRESSIONAL RESEARCH SERVICE, INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE 36 (2020), <https://crsreports.congress.gov/product/pdf/RL/RL34292>.

<sup>102</sup> See CONGRESSIONAL RESEARCH SERVICE, INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE 34–35 (2020), <https://crsreports.congress.gov/product/pdf/RL/RL34292>.

<sup>103</sup> See Deborah Gleeson, Joel Lexchin, Ronald Labonté, Belinda Townsend, Marc-André Gagnon, Jillian Kohler, Lisa Forman & Kenneth C. Shadlen, *Analyzing the Impact of Trade and Investment Agreements on Pharmaceutical Policy: Provisions, Pathways and Potential Impacts*, 15 GLOBALIZATION & HEALTH 78 (2019).

<sup>104</sup> See CONGRESSIONAL RESEARCH SERVICE, INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE 34–35 (2020), <https://crsreports.congress.gov/product/pdf/RL/RL34292>.

delays the entry of generic drugs (which then have to wait out the full patent term to obtain their regulatory approval), but also shifts some enforcement obligations from the patent holder to the regulatory entity granting market approval.<sup>105</sup> Patent linkage is also incongruous with the compulsory licensing regime set out under TRIPS.<sup>106</sup> Generic drugs which are manufactured under a compulsory license may, by any patent linkage provision set out under a relevant FTA, be denied regulatory approval during the patent term.<sup>107</sup> Further, data exclusivity protection for test data and biologics requires generics manufacturers to conduct their own tests instead of relying on the tests conducted by the patent holder, an added cost in generics production that manufacturers could try to recoup by raising the price of their drugs.<sup>108</sup> Patent term extensions for regulatory approval also delay the market entry of generics by effectively lengthening the term of the patent, beyond the TRIPS prescribed minimum.<sup>109</sup> In addition to the above provisions that prevent or delay competition from generics, definition of exhaustion regimes in FTAs prevent access to medicine through parallel importation.<sup>110</sup> The TRIPS Agreement allows member states to decide upon their own regimes of exhaustion, an important flexibility that has significant impact on access to medicines. A system of international exhaustion allows for parallel importation, enabling the importation and resale of patented products without infringing on the rights of the patent holders.<sup>111</sup>

At the same time, the compulsory licensing mechanism set forth under the TRIPS Agreement (as amended), and as affirmed in many recent FTAs, remains cumbersome and costly, limiting its efficacy to developing and least developed economies.<sup>112</sup> The procedural requirements of this mechanism include the notification of intent by the users of the regime, issue of licenses by both the exporter and the importer, payment of an undefined ‘adequate compensation’, and prevention by the importer of the re-export of these drugs.<sup>113</sup> The mechanisms of the compulsory licensing regime makes it a ‘drug by drug’, ‘country by country’ process, thus severely limiting its efficacy,<sup>114</sup> making it particularly unsuitable to global crisis like the COVID-19 pandemic. A related question arises in the context of the pandemic regarding whether those countries that

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<sup>105</sup> Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 224–227 (Lorand Bartels & Federico Ortino eds. 2006).

<sup>106</sup> Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 226 (Lorand Bartels & Federico Ortino eds. 2006).

<sup>107</sup> Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 226 (Lorand Bartels & Federico Ortino eds. 2006).

<sup>108</sup> Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 226–229 (Lorand Bartels & Federico Ortino eds. 2006).

<sup>109</sup> Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 229–231 (Lorand Bartels & Federico Ortino eds. 2006). While term adjustments are usually for ‘unreasonable’ delays, the lack of definition of ‘unreasonable’ allows for abuse of this provision in favor of the pharmaceutical companies. See Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 229–230 (Lorand Bartels & Federico Ortino eds. 2006).

<sup>110</sup> Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 232–234 (Lorand Bartels & Federico Ortino eds. 2006).

<sup>111</sup> Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 232–234 (Lorand Bartels & Federico Ortino eds. 2006).

<sup>112</sup> See generally Brin Anderson, *Better Access to Medicines: Why Countries are Getting Tripped Up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 165 (2010).

<sup>113</sup> Brin Anderson, *Better Access to Medicines: Why Countries are Getting Tripped Up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 165, 172–173 (2010).

<sup>114</sup> Brin Anderson, *Better Access to Medicines: Why Countries are Getting Tripped Up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 165, 174 (2010).

specifically opted out of the Doha Paragraph 6 six system, can now opt back in.<sup>115</sup> This is important given that these countries, while advanced economies, will likely lack the manufacturing capability to effectively deal with the breadth of the crisis.<sup>116</sup> Access reforms in future FTAs should, therefore, focus on a more balanced approach to TRIPS plus obligations that will affect the market and TRIPS plus flexibilities needed to ensure an efficient licensing mechanism.

With this background, this part of the report proposes the following options that policymakers might consider in relation to IP reforms during the pandemic and beyond. Where no suitable IP base provisions exist in most trade agreements (for example, the case of the innovation-themed recommendations), possible reforms are derived from regional or national mechanisms or good practices. The USMCA, which is both recent and provides a template for the negotiation priorities for the United States that will likely be replicated in future treaties, is used as a benchmark in the below annotations for access-oriented recommendations. The USMCA is also useful as a template for a comprehensive agreement including developed and developing countries. However, while it contains important developments in some areas, it does not capture the full set of possible options described below.

**Table 2: Possible Regulatory/Policy Recommendations Relating to IP Laws**

#	ISSUES/REGULATORY ELEMENTS	OBSERVATIONS	RECOMMENDATIONS
<b>Innovation</b>			
1.	Insufficient Platforms for Innovative Collaboration During Exigent Events	An important proposal for collaborative innovation during COVID-19 is Costa Rica’s solidarity call for voluntary IP pooling, now supported by 38 countries. <sup>117</sup> A key limitation of this and similar initiatives is their voluntary nature. <sup>118</sup> However, the initiative is definitely a	Policy makers could consider options for collaborative innovation through FTAs, perhaps building these mechanisms into FTA language: <ul style="list-style-type: none"> <li>• A mandatory IP pool, even limited to health</li> </ul>

<sup>115</sup> Several countries such as Australia, Canada, the EU member States, Iceland, Japan, New Zealand, Norway, Switzerland, and the United States specifically opted out of the system. See Henning Grosse Ruse-Khan, *Access to COVID-19 Treatment and International Intellectual Property Protection – Part I: Patent Protection, Voluntary Access and Compulsory Licensing*, EJIL: TALK! (Apr. 15, 2020), <https://www.ejiltalk.org/access-to-covid19-treatment-and-international-intellectual-property-protection-part-i-patent-protection-voluntary-access-and-compulsory-licensing/>.

<sup>116</sup> Henning Grosse Ruse-Khan, *Access to COVID-19 Treatment and International Intellectual Property Protection – Part I: Patent Protection, Voluntary Access and Compulsory Licensing*, EJIL: TALK! (Apr. 15, 2020), <https://www.ejiltalk.org/access-to-covid19-treatment-and-international-intellectual-property-protection-part-i-patent-protection-voluntary-access-and-compulsory-licensing/>.

<sup>117</sup> See Endorsements of the Solidarity Call to Action, WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/covid-19-technology-access-pool/endorsements-of-the-solidarity-call-to-action> (last visited Jul. 21, 2020).

<sup>118</sup> SUDIP CHAUDHURI, SOUTH VIEWS NO. 200, MAKING COVID-19 MEDICAL PRODUCTS AFFORDABLE: VOLUNTARY PATENT POOL AND TRIPS FLEXIBILITIES 7 (2020), <https://www.southcentre.int/wp-content/uploads/2020/06/SouthViews-Chaudhuri.pdf>.

		<p>step towards collaborative innovation which could be replicated in FTAs.</p> <p>Another example is a form of incentive for innovation other than patent protection, such as the creation of a fund to offer financial prizes to innovators.<sup>119</sup></p>	<p>emergencies,<sup>120</sup> could be modeled on the national initiatives related to open source data and licensing options.<sup>121</sup> Pooling could encourage regional collaboration and allow for faster collaboration during times of crisis as well as reduce inefficiencies and associated information costs.</p> <ul style="list-style-type: none"> <li>• An innovation fund could also encourage cross-country collaboration and reduce market inefficiencies.</li> </ul>
2.	Limited Rights Available to Custodians of Traditional Knowledge and Genetic Resources	<p>Heightened attention garnered by traditional medicine in the response to the pandemic, and their potential inclusion in future preventive/therapeutic drugs, necessitates an examination of the protection of IP rights associated with these resources and knowledge streams. This may require creation of rights and a way to clearly record them, building upon the access and benefit sharing framework set out in the CBD, the Nagoya Protocol, and the ITPGRFA.</p>	<p>Given the expanded definition of patentability in recent FTAs, protecting the rights of custodians of traditional knowledge and genetic resources is significant. The custodians of traditional knowledge should have enforceable rights to protect their knowledge streams in order to ensure their inclusion in the process of innovation, in addition to access and benefit sharing. Further, provisions such as mandatory disclosure requirements, and the creation of a traditional knowledge registry would serve to create a clear process for recording and protecting these resources.<sup>122</sup></p>

<sup>119</sup> Simon Lester & Bryan Christopher Mercurio, *We Need a Coronavirus Vaccine. Patents Might Slow the Process*, CATO INSTITUTE (Apr. 8, 2020), <https://www.cato.org/publications/commentary/we-need-coronavirus-vaccine-patents-might-slow-process>.

<sup>120</sup> SUDIP CHAUDHURI, SOUTH VIEWS NO. 200, MAKING COVID-19 MEDICAL PRODUCTS AFFORDABLE: VOLUNTARY PATENT POOL AND TRIPS FLEXIBILITIES 7 (2020), <https://www.southcentre.int/wp-content/uploads/2020/06/SouthViews-Chaudhuri.pdf>.

<sup>121</sup> See national initiatives for investment strategies taken by member countries compiled by the WTO Secretariat and made 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).

<sup>122</sup> Katrin Kuhlmann & Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward A New Legal Model for Trade and Development*, 51 GEO. J. INT'L L. 4, 31 (forthcoming, 2020).



<b>Access</b>			
1.	Access Obstacles Presented by the Harmonization of Exhaustion Regimes	While the differences in exhaustion regimes across regions pose challenges for access to medicine through parallel importation, a more concerning development is the definition of exhaustion regimes in FTAs, a move that significantly curtails an important TRIPS flexibility. In a positive development, the USMCA does not set out a specific exhaustion regime. <sup>123</sup> However, earlier US FTAs such as those negotiated with Australia, Morocco and Singapore, expressly disallow parallel importation. <sup>124</sup>	FTAs should move away from defining exhaustion regimes in order to allow nations the flexibility they need to regulate parallel importation at a national level. <sup>125</sup> International exhaustion regimes allow for parallel importation, often a vital source for medicines in several regions of the globe. <sup>126</sup> A more useful development would be an express sanction of parallel importation to address health emergencies. <sup>127</sup>
2.	TRIPS plus measures affecting market entry and participation of generics	TRIPS plus provisions found in recent FTAs such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the USMCA include terms that make the production of generics prohibitively costly and delay their market entry. <sup>128</sup> Relevant TRIPS plus FTA provisions include the extension of patent terms of	In order to avoid prohibitively high costs for generic drug manufacturers, FTAs should exclude provisions like: <sup>130</sup> <ul style="list-style-type: none"> <li>• Patent term adjustments to compensate for the delays in acquiring market approvals, which delay the entry of generics;</li> <li>• Patent linkage;</li> <li>• Data exclusivity provisions for test data; and</li> </ul>

<sup>123</sup> USMCA, Art. 20.11.

<sup>124</sup> See CONGRESSIONAL RESEARCH SERVICE, INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE 39 (2020), <https://crsreports.congress.gov/product/pdf/RL/RL34292>.

<sup>125</sup> See Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 233–234 (Lorand Bartels & Federico Ortino eds. 2006).

<sup>126</sup> Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 231–234 (Lorand Bartels & Federico Ortino eds. 2006).

<sup>127</sup> While ‘health emergency’ may be defined in future FTAs, for the purpose of this section, health emergency refers public health problems/crises, specifically provisioned for in the Doha Declaration.

<sup>128</sup> Deborah Gleeson, Joel Lexchin, Ronald Labonté, Belinda Townsend, Marc-André Gagnon, Jillian Kohler, Lisa Forman & Kenneth C. Shadlen, *Analyzing the Impact of Trade and Investment Agreements on Pharmaceutical Policy: Provisions, Pathways and Potential Impacts*, 15 GLOBALIZATION & HEALTH 78 (2019).

<sup>130</sup> See the table 2 summarizing the TRIPS plus FTA protections and their effects in Deborah Gleeson, Joel Lexchin, Ronald Labonté, Belinda Townsend, Marc-André Gagnon, Jillian Kohler, Lisa Forman & Kenneth C. Shadlen, *Analyzing the Impact of Trade and Investment Agreements on Pharmaceutical Policy: Provisions, Pathways and Potential Impacts*, 15 GLOBALIZATION & HEALTH 78 (2019).

		pharmaceutical products to compensate for the time consumed in market approval and testing, patent linkage, and data exclusivity provisions for biologics. <sup>129</sup>	<ul style="list-style-type: none"> <li>• Data exclusivity protection for biologics.</li> </ul> <p>Alternatively, a suspension of TRIPS plus IP protection for biologics and test data during health emergencies could be proposed in future treaty language, in order to respond to developed country and pharmaceutical sector priorities.</p>
3.	Simplifying the procedural elements of the TRIPS Article 31bis regime for issuing compulsory licenses.	In its Article 20.6 (understanding regarding certain public health measures), the USMCA specifically affirms the Doha Declaration on the TRIPS Agreement and Public Health. The language of this article also affirms that the IP chapter of the USMCA should not prevent the parties from the effective utilization of the TRIPS Agreement's health solutions. This is a significant step forward, since political pressure and fear of sanctions from developed countries have impeded the use of the TRIPS compulsory licensing regime. <sup>131</sup>	<p>FTAs should aim to reduce the procedural complexity of the TRIPS compulsory licensing regime, by inter alia:<sup>133</sup></p> <ul style="list-style-type: none"> <li>• Eliminating the notification requirement of intent to use the compulsory licensing regime.</li> <li>• Defining adequate compensation or setting out objective criteria for identifying compensation to be paid to the license holder.</li> <li>• Reducing procedural complexity (one measure could be to eliminate the requirement of both the importing and exporting country to issue</li> </ul>

<sup>129</sup> See Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 224–234 (Lorand Bartels & Federico Ortino eds. 2006).

<sup>131</sup> Brin Anderson, *Better Access to Medicines: Why Countries are Getting Tripped Up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 165, 175, 176 (2010). While Article 31bis itself attempts to cover any adverse political consequences of the use of the regime, commentators fear that the threat of sanctions and political pressure both from the pharmaceutical lobby and developed countries have not been adequately assuaged. Affirmative stances in FTAs recognize the parties' rights to make full use of TRIPS flexibilities help to further dispel concerns about political pressure.

<sup>133</sup> For a detailed understanding of the inefficiencies of the TRIPS Article 31bis compulsory licensing regime which form the basis of these recommendations, see generally Brin Anderson, *Better Access to Medicines: Why Countries are Getting Tripped Up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 165 (2010).

		<p>However, cumbersome procedural requirements limit the functionality of the compulsory licensing regime set out in the TRIPS Agreement and affirmed in FTAs. In fact, Canada, one of the member countries of the USMCA, imposes additional requirements in its domestic legislation setting out a compulsory licensing regime by requiring parties to negotiate with patent holders for voluntary licenses before issuing a compulsory license.<sup>132</sup></p>	<p>compulsory licenses, requiring instead that only the exporting country issue a compulsory license).</p> <ul style="list-style-type: none"> <li>• Ensuring that national legislation setting out a framework for compulsory licensing does not impose TRIPS plus conditions for eligibility.</li> </ul>
4.	Expanding the ambit of Article 31bis to include medical devices	<p>The compulsory licensing regime established by Article 31bis applies to all ‘pharmaceutical products’<sup>134</sup>, a term that specifically includes diagnostic kits. While this definition is broad enough to include all medical technologies (medicine, vaccines and medical technology such as diagnostic kits), its application to equipment and devices which are a necessary part of the health infrastructure but may not qualify as pharmaceutical products is unlikely. Such devices include protective equipment for health workers, and assistive machinery, such as ventilators. The coverage</p>	<p>FTA texts should expressly define (in a non-exhaustive manner) the ambit of pharmaceutical products to cover ancillary medical equipment, to ensure their adequate and equitable supply, or otherwise expand the coverage of the Doha Paragraph 6 based system of compulsory licensing. Particular efforts should be taken to include protective equipment which may not ordinarily be construed as pharmaceutical products.</p>

<sup>132</sup> Brin Anderson, *Better Access to Medicines: Why Countries are Getting Tripped Up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 165, 175 (2010).

<sup>134</sup> ‘Pharmaceutical products’ as defined in the annex to the TRIPS Agreement refers to any “*patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address the public health problems as recognized in paragraph 1 of the Declaration on the TRIPS Agreement and Public Health*”.

		<p>of the Doha Paragraph 6 system should be expanded to specifically include such equipment and supplies which are have proved critical in responses to health crises. While FTA texts, including the USMCA affirms the right to effectively use the “TRIPS health solutions”<sup>135</sup> set out under TRIPS Article 31bis, they do not clarify the ambiguities of the agreement.</p>	
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### C. Trade Facilitation

COVID-19 has resulted in trade restrictive measures that have caused transport, logistics and supply chain disruptions; these, coupled with additional border controls, documentary requirements, and health inspections, are impacting the smooth flow of trade across borders during the pandemic.<sup>136</sup> It is reported that rising trade costs due to border controls account for up to a third of the decline in trade.<sup>137</sup> Efficient cross-border trade during the pandemic will depend upon reconciling the fast movement of goods and services across borders with control measures adopted to curb the pandemic (and additional trade costs incurred as a result of these restrictions).<sup>138</sup> Trade facilitation rules, i.e., the laws and regulations that simplify and harmonize trade procedures for exports, imports, and goods in transit, are particularly important. Empirical data has shown that trade facilitation measures correlate with a reduction in the costs of trade and an increase in export and import flows.<sup>139</sup>

Multilaterally, trade facilitation was prioritized in the Doha Ministerial Declaration,<sup>140</sup> with the landmark WTO Agreement on Trade Facilitation (TFA) finalized in 2017.<sup>141</sup> Overall, the TFA lays the groundwork for streamlining and digitizing trade formalities so that the physical touch points at the border are kept to the bare minimum. The ethos behind the TFA is to implement measures in the most transparent, simplified, and streamlined way, with the procedural rules set

<sup>135</sup> See USMCA, Art. 20.6.

<sup>136</sup> OECD, TRADE FACILITATION AND COVID-19 PANDEMIC (2020), <http://www.oecd.org/coronavirus/policy-responses/trade-facilitation-and-the-covid-19-pandemic-094306d2/>.

<sup>137</sup> OECD, TRADE FACILITATION AND COVID-19 PANDEMIC (2020), <http://www.oecd.org/coronavirus/policy-responses/trade-facilitation-and-the-covid-19-pandemic-094306d2/>.

<sup>138</sup> OECD, TRADE FACILITATION AND COVID-19 PANDEMIC (2020), <http://www.oecd.org/coronavirus/policy-responses/trade-facilitation-and-the-covid-19-pandemic-094306d2/>.

<sup>139</sup> See EUGENIA GO, CONTRIBUTION AND EFFECTIVENESS OF TRADE FACILITATION MEASURES: A STRUCTURED LITERATURE REVIEW (2018).

[https://ieg.worldbankgroup.org/sites/default/files/Data/reports/tradefacilitation\\_literaturereview.pdf](https://ieg.worldbankgroup.org/sites/default/files/Data/reports/tradefacilitation_literaturereview.pdf).

<sup>140</sup> World Trade Organization, Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1, Nov. 20, 2001, ¶ 27, [https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm).

<sup>141</sup> World Trade Organization, Agreement on Trade Facilitation, WT/L/931, Jul. 15, 2014, [https://www.wto.org/english/docs\\_e/legal\\_e/tfa-nov14\\_e.htm](https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm) (hereinafter, “WTO TFA”).

out in Section I of the TFA providing much-needed guidance. Particularly relevant during the COVID-19 crisis is the obligation of the Member States to, inter alia, notify and publish their respective procedures for the import and export of goods,<sup>142</sup> develop measures that allow for expedited shipments and facilitate trade in perishable goods,<sup>143</sup> promote cooperation between border agencies,<sup>144</sup> and adopt common customs procedures.<sup>145</sup> Further, Section II of the TFA contains a unique feature which accords special and differential treatment (SDT) for developing and least developed countries (LDCs),<sup>146</sup> allowing them to categorize the various provisions for staggered implementation.<sup>147</sup> SDT provisions in Section II of the TFA provide for three categories of measures: (i) Category A: Specific provisions that LDC Member States can implement within a year of signing the TFA (therefore by 22 February 2018); (ii) Category B: Provisions: Measures that LDCs Member States can implement after a transitional period following the entry into force of the TFA; and (iii) Category C: Provisions that LDC Member can implement after a transitional period and when accompanied by assistance and capacity building support for implementation. Currently, the rate of implementation of the TFA is at 66.2 percent amongst WTO Members.<sup>148</sup>

Before COVID-19, according to UNCTAD, developing countries and LDCs had requested human resources and training support, legal assistance, and assistance with acquisition of information and communication technologies (ICT).<sup>149</sup> Post COVID-19, developing countries and LDCs should intensify their requests under category C for more assistance. The UNCTAD Automated System for Customs Data (ASYCUDA) is a perfect example of such technical assistance, as it helps developing countries to establish an integrated customs management system for international trade and transport operations. The goal of ASYCUDA is to modernize customs operations, facilitate trade efficiency and competitiveness, and improve security of global supply chains by streamlining procedures of cargo control, transit of goods, and clearance of goods.<sup>150</sup> Such programmes are needed to implement trade facilitations measures adapted to crises and help countries implement the TFA provisions and incorporate them in future FTA provisions. According to the TFA database, countries like Burkina Faso, Egypt, and Madagascar have listed expedited clearance for perishable goods under Category C of the TFA.<sup>151</sup> Therefore, there is a call to speed up technical assistance in relation to trade in perishable goods, which is especially important now and in the case of any future crises such as the pandemic.

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<sup>142</sup> See generally WTO TFA, Art. 1.

<sup>143</sup> See generally WTO TFA, Art. 7.

<sup>144</sup> See generally WTO TFA, Art. 8.

<sup>145</sup> See generally WTO TFA, Art. 10.

<sup>146</sup> Providing developing countries and LDCs the autonomy to decide on their own implementation schedule is a welcome development as it lends much needed flexibility for countries to address their particular challenges, keeping in mind their specific development goals and countries specificities.

<sup>147</sup> World Trade Organization, *Implementing the Trade Facilitation Agreement*, in AID FOR TRADE AT A GLANCE 2015: REDUCING TRADE COSTS FOR INCLUSIVE, SUSTAINABLE GROWTH (2015), [https://www.wto.org/english/res\\_e/booksp\\_e/aid4trade15\\_chap4\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/aid4trade15_chap4_e.pdf).

<sup>148</sup> According to the Trade Facilitation Agreement Database, available at <https://tfadatabase.org/> (last visited on 26-07-2020)

<sup>149</sup> UNCTAD, *Implementation of the WTO Trade Facilitation Agreement: Not a sprint but a marathon*, [https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2283&Sitemap\\_x0020\\_Taxonomy=Trade%20Facilitation](https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2283&Sitemap_x0020_Taxonomy=Trade%20Facilitation);

<sup>150</sup> Customs Automation – ASYCUDA at <https://unctad.org/en/Pages/DTL/TTL/ASYCUDA-Programme.aspx>

<sup>151</sup> TFA database, <https://tfadatabase.org/notifications/list> (last visited on July 26, 2020)

Despite the wide adoption of the TFA around the world,<sup>152</sup> it is not a panacea for every trade hurdle, especially those arising during the current pandemic. Therefore, targeted actions need to be adopted by countries, regional bodies, and the international community to address the challenges put forth by COVID-19. Challenges include quotas on imports and exports that limit international trade volumes, stricter border controls, and social distancing measures. These are affecting the flow of goods and services across countries, and the rapid changes in government policies are proving costly for compliance. For instance, the early weeks of the pandemic ushered in widespread export restrictions and bans on essential supplies including personal protection equipment<sup>153</sup> and other medical goods.<sup>154</sup> Border controls and closures continue to cause food shortages and rapid price surges.<sup>155</sup> Unpredictable policy shifts and incomplete notifications of new measures have further exacerbated the problems.<sup>156</sup> These problems need to be addressed for two main reasons: (a) implementation of efficient trade facilitation measures are critical in ensuring that countries around the world have adequate access to essential goods such as medical equipment and agricultural products to mitigate the impacts of the pandemic on public health and improve food security in a time of global crisis;<sup>157</sup> and (b) the inclusion of trade facilitation in the pandemic response agenda not only helps to catalyze the process of economic recovery, but also allows countries to deliver on their SDG commitments.<sup>158</sup>

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<sup>152</sup> As of writing, 152 Member States of the WTO have ratified the TFA, with 66.2% of commitments having been implemented to date. For the latest data, *see Trade Facilitation Agreement Database, Implementation Dashboard*, WORLD TRADE ORGANIZATION, <https://tfadatabase.org/implementation> (last visited July 18, 2020).

<sup>153</sup> The European Union and the United States both imposed bans or restrictions on various category of personal protective equipment, requiring at the minimum special authorization or licenses to export such goods. *See* BUNDESVERBAND DER DEUTSCHEN INDUSTRIE (BDI), EXPORT CONTROLS AND EXPORT BANS OVER THE COURSE OF THE COVID-19 PANDEMIC 2, 3 (2020), [https://www.wto.org/english/tratop\\_e/covid19\\_e/bdi\\_covid19\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/bdi_covid19_e.pdf).

<sup>154</sup> For instance, India imposed export restrictions on vitamins and pharmaceutical drugs and components, most controversially temporarily banning the export of hydroxychloroquine, a drug suspected to have some effect in treatment of COVID-19.

<sup>155</sup> For instance, month long closures of the Pakistan-Afghanistan border check posts led to a steep decline in bilateral trade between the two countries, causing acute shortages in Afghanistan. *See* Aamir Latif, *Pakistan Reopens 2 Routes for Trade with Afghanistan*, ANADOLU AGENCY (Jun. 20, 2020), <https://www.aa.com.tr/en/asia-pacific/pakistan-reopens-2-routes-for-trade-with-afghanistan/1884146>.

<sup>156</sup> *See* BUNDESVERBAND DER DEUTSCHEN INDUSTRIE (BDI), EXPORT CONTROLS AND EXPORT BANS OVER THE COURSE OF THE COVID-19 PANDEMIC 2, 3 (2020), [https://www.wto.org/english/tratop\\_e/covid19\\_e/bdi\\_covid19\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/bdi_covid19_e.pdf).

<sup>157</sup> *See Statement on COVID-19 by APEC Ministers Responsible for Trade*, ASIA-PACIFIC ECONOMIC COOPERATION (May 5, 2020), [http://apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Trade/2020\\_trade](http://apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Trade/2020_trade). *See also* Nassim Oulmane, Mustapha Sadni Jallab, and Patrice Rélouendé Zidouemba, *The African Continental Free Trade Area and Measures to Facilitate Trade Could Significantly Mitigate COVID-19's Economic Impact in Africa*, THE BROOKINGS INSTITUTION (May 22, 2020), <https://www.brookings.edu/blog/africa-in-focus/2020/05/22/the-african-continental-free-trade-area-and-measures-to-facilitate-trade-could-significantly-mitigate-covid-19s-economic-impact-in-africa/>.

<sup>158</sup> *Keeping Trade Open Amid COVID-19 Crisis Central to Achieving SDGs and Economic Recovery*, WORLD TRADE ORGANIZATION (Jul. 13, 2020), [https://www.wto.org/english/news\\_e/news20\\_e/sdgs\\_13jul20\\_e.htm](https://www.wto.org/english/news_e/news20_e/sdgs_13jul20_e.htm).

In light of the above, we propose the following to better facilitate trade across borders during the pandemic and beyond: (i) inclusion of National Trade Facilitation Committees (NTFCs) in national emergency task forces to devise comprehensive pandemic response strategies which include trade facilitation measures to mitigate the possibility of shortages in essential food and medical supplies; (ii) investment in digital infrastructure at the borders, especially in developing countries, to benefit vulnerable stakeholders such as SMEs and women; and (iii) focus on expediting customs procedures for COVID-19 essential goods such as perishables and medical equipment.

In relation to the first recommendation, TFA mandates the establishment of NTFCs. NTFCs underpin the pivotal role played by public institutions in facilitating cross-border trade by promoting cooperation between the various government agencies and the business community at large.<sup>159</sup> From the onset of COVID-19, NTFCs have largely been left out of the conversation surrounding the pandemic response plan since the national emergency task forces have mostly been led by the respective domestic health and transport ministries, who have borne the brunt of the impact of the pandemic.<sup>160</sup> Generally housed within a trade ministry, NTFCs have instead operated separately from these ministries to develop economic recovery plans for the post-pandemic phase.<sup>161</sup> However, as the COVID-19 experience has shown, the pandemic response plan itself requires the support of NTFCs, since the availability of essential food and medical supplies is premised on the efficient flow of goods across borders. During the current pandemic, governments should consider including NTFCs in their national emergency task force so that a coordinated approach to trade facilitation and logistics could be devised to address the immediate domestic demands with respect to food and pharmaceutical products.<sup>162</sup> Beyond the pandemic, NTFCs should broaden their scope to establish a cross-sectoral crisis management working group that is in charge of devising emergency trade facilitation policies which can be implemented to minimize disruptions to trade flows during future crises.<sup>163</sup> Further, NTFCs should be given more financial and capacity building support from national agencies.<sup>164</sup> Currently, NTFCs are involved in implementation but not in the planning process. This needs to change, since COVID-19 has highlighted that NTFCs and ministries are too often disconnected. Ultimately, NTFCs have the knowledge, skills, and network to boost crisis management.

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<sup>159</sup> Poul Hansen and Céline Bacrot, *The Role of the National Trade Facilitation Committees in the Global Economic Recovery following COVID-19*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) (Jul. 7, 2020), <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2420>.

<sup>160</sup> Poul Hansen and Céline Bacrot, *The Role of the National Trade Facilitation Committees in the Global Economic Recovery following COVID-19*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) (Jul. 7, 2020), <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2420>.

<sup>161</sup> Poul Hansen and Céline Bacrot, *The Role of the National Trade Facilitation Committees in the Global Economic Recovery following COVID-19*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) (Jul. 7, 2020), <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2420>.

<sup>162</sup> Poul Hansen and Céline Bacrot, *The Role of the National Trade Facilitation Committees in the Global Economic Recovery following COVID-19*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) (Jul. 7, 2020), <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2420>.

<sup>163</sup> Poul Hansen and Céline Bacrot, *The Role of the National Trade Facilitation Committees in the Global Economic Recovery following COVID-19*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) (Jul. 7, 2020), <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2420>.

<sup>164</sup> See *Empowerment Programme for National Trade Facilitation Bodies*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, <https://unctad.org/en/DTL/TLB/Pages/TF/Committees/Empowerment-Programme-for-National-Trade-Facilitation-Bodies.aspx> (last visited Jul. 22, 2020).

Second, border controls imposed to curb the spread of COVID-19 have highlighted the importance of investing in information and communications technology (ICT) and leveraging digital infrastructure to facilitate trade.<sup>165</sup> The shift from paper-based to paperless trade should be accelerated by using techniques such as “business process modeling,” which involves the documentation of business processes in a graphical manner to create a simplified understanding on the working norms and procedures of business processes. This will allow stakeholders such as legal practitioners to adopt adequate regulations that improve the efficiency of cross border flow of goods.<sup>166</sup> During a climate where stay-at-home orders and border closures restrict the flow of goods and services, single window systems and paperless trade mechanisms can also prove to be a vital lifeline to ensure that trade in essential goods does not grind to a halt. These two measures can work in tandem to allow for import and export formalities to be streamlined at a single, electronic point of entry. By digitalizing paperwork, payments, and border controls involved in moving goods from one country to another, governments will be able to limit human touch points along the supply chain. This will allow trade to continue to flow even during pandemics like COVID-19 when the physical work-force manning border and customs inspection points may be greatly reduced in an effort to limit the impact on public health. Currently, most paperwork is still done manually at the border. That is why it is necessary to improve access to technology and to educate border staff on digital processes. Furthermore, the digitalization process should also account for digital inclusivity by improving access to digital facilities for vulnerable stakeholders like those discussed below for SMEs and women, thereby ensuring that they too can benefit from the improvements in trade facilitation.

The investment in a digitally enabled trade facilitation infrastructure also has the potential to bolster food security for vulnerable communities across the world.<sup>167</sup> Trade in agricultural products tends to involve a number of regulatory measures, including sanitary and phytosanitary (SPS) measures. While important in ensuring food safety, the process of obtaining and clearing these requirements and certifications can become lengthened when more restrictive border controls are implemented in times of crisis like the COVID-19 pandemic.<sup>168</sup> Here, a shift away from paper-based approaches to a digitized mechanism has the potential to not only cut down costs for traders<sup>169</sup> but also to reduce the time spent in transit for perishable goods. As discussed above, WTO Member States have called for implementation-related technical assistance regarding expedited clearance for perishable goods. FTA states parties should also provide assistance to signatories based on such requests. Further, if technical assistance is needed or requested under category C by WTO Members States, funds should be disbursed towards these requests by trade

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<sup>165</sup> See Adam Sachs, *The Rise of Digital Economy: Silver Lining Amid COVID-19*, CENTER FOR INTERNATIONAL PRIVATE ENTERPRISE (May 5, 2020), <https://www.cipe.org/blog/2020/05/05/the-rise-of-digital-economy-silver-lining-amid-covid-19/>.

<sup>166</sup> *Module 2: BPA for Trade Facilitation – Unified Modeling Language*, UNITED NATIONS ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC (UNESCAP), <https://www.unescap.org/our-work/trade-investment-innovation/trade-facilitation/bpa-course/module-2> (last visited Jul. 22, 2020).

<sup>167</sup> THE AFRICAN CONTINENTAL FREE TRADE AREA : ECONOMIC AND DISTRIBUTIONAL EFFECTS, WORLD BANK (2020), <https://openknowledge.worldbank.org/handle/10986/34139>.

<sup>168</sup> *Enhancing Food Security Through Trade Facilitation*, GLOBAL ALLIANCE FOR TRADE FACILITATION (Jun. 20, 2019), <https://www.tradefacilitation.org/insights/enhancing-food-security-trade-facilitation/>.

<sup>169</sup> *Implementing Digital Trade Facilitation Could Cut Trade Costs in Asia-Pacific by \$673 Billion Annually*, Says UN Report, UNITED NATIONS ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC (UNESCAP) (Mar. 23, 2018), <https://www.unescap.org/news/implementing-digital-trade-facilitation-could-cut-trade-costs-asia-pacific-673-billion-annually>.



development programmes such as Aid for Trade (AfT). Currently, the implementation timeframe under Category C is at the discretion of countries; however, nations and institutions could press to prioritize the implementation of provisions relating to perishable goods, especially for developing countries and LDCs.

An example of the importance of such digitization is the electronic phytosanitary certificate (ePhyto) developed by the International Plant Protection Convention (IPPC).<sup>170</sup> EPhyto offers an avenue for traders to clear their goods through borders more efficiently under a harmonized, digital system without the need for physical interaction, thereby lowering the risk of exposure to communicable diseases like COVID-19.<sup>171</sup> Notably, such innovative trade facilitation approaches, which can allow for trade in agricultural products to continue flowing even in times of crisis, can go a long way in improving the food and nutrition security of vulnerable communities,<sup>172</sup> thereby ensuring that governments can focus their efforts on mitigating the public health effects of the pandemic without having to simultaneously stretch their limited resources to address disruptions in their food supply.

Further, investment in digital infrastructure for food supply chains will directly have an impact on SDG 9 (Industry, Innovation and Infrastructure) and SDG 2 (Zero Hunger), as it will help build resilient infrastructure, promote inclusive and sustainable industrialization, and improve access to food. During COVID-19, food supply chains were heavily impacted because of logistics, digital, and transport network challenges. An option to address these challenges and build resiliency for future crises would be to use and digitize data analysis to determine more efficient transport channels which either limit or eliminate transshipment. This would contribute to food security by reducing time spent in transit for perishable goods, which is crucial in times of crisis. As seen these past months, border controls resulted in heightened wait times for clearance of goods, along with multiple additional costs and health risks. Another option would be for neighboring countries and/or landlocked countries to invest in transit without transshipment. This will save time and money and decrease health risks and paperwork. For example, a transshipment hub has been created between Turkey and Syria at Bab al-Hawa to avoid borders congestion and ensure the quick transfer and delivery of humanitarian goods.<sup>173</sup> Another example is the acceleration of the implementation of automatic gates for trucks at the Gothenburg Port Authority.<sup>174</sup>

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<sup>170</sup> See *The IPPC ePhyto Solution*, INTERNATIONAL PLANT PROTECTION CONVENTION, <https://www.ippc.int/en/ephyto/> (last visited Jul. 19, 2020).

<sup>171</sup> See *Harmonization*, IPPC EPHYTO SOLUTIONS, <https://www.ephytoexchange.org/landing/harmonization/index.html> (last visited Jul. 19, 2020).

<sup>172</sup> See Nassim Oulmane, Mustapha Sadni Jallab, and Patrice Rélouendé Zidouemba, *The African Continental Free Trade Area and Measures to Facilitate Trade Could Significantly Mitigate COVID-19's Economic Impact in Africa*, THE BROOKINGS INSTITUTION (May 22, 2020), <https://www.brookings.edu/blog/africa-in-focus/2020/05/22/the-african-continental-free-trade-area-and-measures-to-facilitate-trade-could-significantly-mitigate-covid-19s-economic-impact-in-africa/>.

<sup>173</sup> *COVID-19 Mitigation Measures – Bab-al-Hawa Transshipment*, LOGISTICS CLUSTER (Apr. 13, 2020), [https://logcluster.org/document/bab-al-hawa-transshipment-covid-19-mitigation-measures-april-2020\\_](https://logcluster.org/document/bab-al-hawa-transshipment-covid-19-mitigation-measures-april-2020_)

<sup>174</sup> PORT OF GOTHENBURG, <https://www.portofgothenburg.com/> (last visited Jul. 22, 2020).

Third, TFA specifically recognizes the importance of expedited clearance for perishable goods, requiring their clearance in the shortest possible time on a priority basis.<sup>175</sup> Expanding such provisions for expedited clearance to other critical goods would go a long way in pandemic-proofing FTA provisions on trade facilitation. In particular, reform measures should focus on simplifying and streamlining customs procedures for ‘time-critical’<sup>176</sup> medical technologies and devices, affording them priority treatment on par with perishables.<sup>177</sup> Here, FTA provisions can be modeled on national best practices where countries have reduced border interventions on certain critical goods. For instance, Brazil passed legislation allowing for priority and expedited clearance for medical goods such as diagnostic kits and other articles used in combating the COVID-19 pandemic.<sup>178</sup> China adopted policies to ensure the coordination between border agencies for the expedited clearance of essential medical supplies.<sup>179</sup> New Zealand and Singapore implemented joint measures aimed at facilitating the trade in health products critical to combating COVID-19.<sup>180</sup>

Prior to COVID-19, eyes were already trained on the AfCFTA, which heralds a new era of FTAs aimed at promoting inclusive and sustainable trade. Trade facilitation measures have a strong impact on Africa’s intra-regional trade.<sup>181</sup> If the losses caused through trade disruptions are not mitigated as the crisis unfolds, the African continent’s health and food security will be heavily compromised. The implementation of the AfCFTA has now been delayed till January 2021. COVID-19 has shown the importance of uniform implementation of trade facilitation measures in order for countries to be efficient and competitive.<sup>182</sup> However, the AfCFTA could set an example for how post COVID-19 GRIC recovery can be facilitated regionally by implementing effective trade facilitation measures to boost regional trade.<sup>183</sup> The TFA provisions in AfCFTA could help to support “trade corridors” throughout the continent which could facilitate the free

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<sup>175</sup> WTO TFA, Art. 7.9.

<sup>176</sup> OECD, TRADE FACILITATION AND COVID-19 PANDEMIC (2020), <http://www.oecd.org/coronavirus/policy-responses/trade-facilitation-and-the-covid-19-pandemic-094306d2/>.

<sup>177</sup> WORLD BANK GROUP, TRADE AND COVID-19 GUIDANCE NOTE: TRADE FACILITATION BEST PRACTICES IMPLEMENTED IN RESPONSE TO THE COVID-19 PANDEMIC (2020), <http://documents1.worldbank.org/curated/en/824081587487261551/pdf/Trade-and-COVID-19-Guidance-Note-Trade-Facilitation-Best-Practices-Implemented-in-Response-to-the-COVID-19-Pandemic.pdf>.

<sup>178</sup> WORLD BANK GROUP, TRADE AND COVID-19 GUIDANCE NOTE: MANAGING RISK AND FACILITATING TRADE IN THE COVID-19 PANDEMIC (2020), <http://documents1.worldbank.org/curated/en/751981585606039541/pdf/Trade-and-COVID-19-Guidance-Note-Managing-Risk-and-Facilitating-Trade-in-the-COVID-19-Pandemic.pdf>.

<sup>179</sup> WORLD BANK GROUP, TRADE AND COVID-19 GUIDANCE NOTE: TRADE FACILITATION BEST PRACTICES IMPLEMENTED IN RESPONSE TO THE COVID-19 PANDEMIC (2020), <http://documents1.worldbank.org/curated/en/824081587487261551/pdf/Trade-and-COVID-19-Guidance-Note-Trade-Facilitation-Best-Practices-Implemented-in-Response-to-the-COVID-19-Pandemic.pdf>.

<sup>180</sup> Kelly Buchanan, *New Zealand; Singapore: New Declaration on Trade in Essential Goods for Combating the COVID-19 Pandemic*, LIBRARY OF CONGRESS (Apr. 17, 2020), <https://www.loc.gov/law/foreign-news/article/new-zealand-singapore-new-declaration-on-trade-in-essential-goods-for-combating-the-covid-19-pandemic/>.

<sup>181</sup> Nassim Oulmane, Mustapha Sadni Jallab, and Patrice Rélouendé Zidouemba, *The African Continental Free Trade Area and Measures to Facilitate Trade Could Significantly Mitigate COVID-19’s Economic Impact in Africa*, THE BROOKINGS INSTITUTION (May 22, 2020), <https://www.brookings.edu/blog/africa-in-focus/2020/05/22/the-african-continental-free-trade-area-and-measures-to-facilitate-trade-could-significantly-mitigate-covid-19s-economic-impact-in-africa/>.

<sup>182</sup> THE AFRICAN CONTINENTAL FREE TRADE AREA: ECONOMIC AND DISTRIBUTIONAL EFFECTS, WORLD BANK (2020), <https://openknowledge.worldbank.org/handle/10986/34139>.

<sup>183</sup> Annex 3 on Customs Co-operation and Mutual Administrative Assistance; and Annex 4 on Trade Facilitation.

flow of essential commodities. Further, the sub-committee on Trade Facilitation, Customs Cooperation and Transit would be able to oversee implementation of harmonized customs processes leading to reductions in time and costs for traders.

Trade facilitation measures are integral in (a) ensuring that regional and global supply chains continue to function even during crises on the scale of the COVID-19 pandemic and (b) emphasizing a Green, Resilient, Inclusive and Circular (GRIC)<sup>184</sup> recovery after the pandemic which allows countries to deliver on their SDG commitments. The table below contains proposed options that policymakers might consider in relation to trade facilitation reforms during the pandemic and beyond.

**Table 3: Summary of Recommendations for Trade Facilitation**

#	ISSUES	BEST PRACTICES AND OBSERVATIONS	RECOMMENDATIONS
1.	Inclusion of NTFCs in national emergency task forces to accommodate trade facilitation measures in the COVID-19 recovery process	International agencies such as the United Nations, WTO, and OECD have laid down various proposals for countries to coordinate on notifications of trade-related COVID-19 measures and have established databases to share information on COVID-19 related measures. <sup>185</sup> While these notifications may be facilitated by NTFCs, they have generally been left out of national emergency task forces that are involved in formulating a COVID-19 response and recovery plan.	At the international level, policy makers may consider setting out guidelines for NTFCs to coordinate in establishing and maintaining national or regional databases through which changes to trade policy and processes can be communicated in a timely and transparent manner.  National agencies such as Ministries of Trade and

<sup>184</sup> Green, Resilient, Inclusive and Circular (GRIC) recovery is a term used by the United Nations to shift the post COVID-19 recovery agenda to include socio-economic recovery that focuses on sustainable development, on vulnerable groups and promotes the circular economy to recover better while maintaining the focus on achieving the SDGs and Agenda 2030.

<sup>185</sup> See for e.g., Recommendations for Truck Drivers During COVID-19, INTERNATIONAL ROAD TRANSPORT UNION (Mar. 27, 2020), <https://www.iru.org/system/files/IRU+COVID-19+truck+driver+checklist.pdf>; INTERNATIONAL MARITIME ORGANIZATION (IMO) & UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), CIRCULAR LETTER No.4204/ADD.21, JOINT STATEMENT IMO-UNCTAD – CALL FOR COLLABORATIVE ACTION IN SUPPORT OF KEEPING SHIPS MOVING, PORTS OPEN AND CROSS-BORDER TRADE FLOWING DURING THE COVID-19 PANDEMIC (2020), <http://www.imo.org/en/MediaCentre/HotTopics/Documents/COVID%20CL%204204%20adds/Circular%20Letter%20No.4204-Add.21%20-%20Joint%20Statement%20Imo-Unctad%20-%20Call%20For%20Action%20Keeping%20Ships%20Moving.pdf>; INTERNATIONAL MARITIME ORGANIZATION (IMO) & WORLD HEALTH ORGANIZATION (WHO), CIRCULAR LETTER No. 4204/ADD.2, JOINT STATEMENT IMO-WHO ON THE RESPONSE TO THE COVID-19 OUTBREAK (2020), [http://www.imo.org/en/MediaCentre/HotTopics/Documents/Circular%20Letter%20No.4204-Add.2%20-%20Joint%20Statement%20Imo-Who%20On%20The%20Response%20To%20The%20Covid-19%20Outbreak%20\(Secretariat\).pdf](http://www.imo.org/en/MediaCentre/HotTopics/Documents/Circular%20Letter%20No.4204-Add.2%20-%20Joint%20Statement%20Imo-Who%20On%20The%20Response%20To%20The%20Covid-19%20Outbreak%20(Secretariat).pdf).

			<p>Commerce should include NTFCs in their national emergency response, as NTFCs have the skills, knowledge, and network to gather information and improve coordination with the public and private sector.</p>
2.	<p>Investment in digital infrastructure and processes to facilitate trade procedures</p>	<p>UN agencies are focusing on paperless procedures such as business process modelling to allow trade to flow without physical contact to avoid the spread of the virus.<sup>186</sup></p> <p>However, currently, most paperwork is still done manually at the border.</p>	<p>Policy makers could consider:</p> <p>Focus on the implementation of TFA provisions to accelerate access to information and electronic payment systems. If technical assistance under category C of the TFA is needed, this should be prioritized.</p> <p>Increasing paperless procedural measures and adopting a single window system could help mitigate the losses caused by disruptions of cross-border trade exchanges during crises.</p> <ul style="list-style-type: none"> <li>• Set out specialized rules for vulnerable stakeholders such as SMEs and women to promote digital inclusivity. The focus should be on checking to determine whether the measures are sustainable and inclusive to ensure that “no one is left behind and to recover better”.</li> </ul>

<sup>186</sup> See UN Global Survey on Digital and Sustainable Trade Facilitation, UNITED NATIONS, <https://untfsurvey.org/> (last visited Jul. 22, 2020).

			<ul style="list-style-type: none"> <li>• Adopt digitized certificates such as ePhyto that will help expedite the process of certification and decrease the risk of spread of communicable diseases and thereby increase food security.</li> <li>• Further, if beneficial, policymakers should invest in transit without transshipment for trade between neighboring and/or landlocked countries.</li> </ul>
3.	Expansion of categories of goods for expedited clearance	The World Customs Organization has established an essential goods list during a disaster. <sup>187</sup>	<p>Policymakers should prioritize provisions and implementation efforts that focus on the expedited clearance of perishable goods in the shortest possible time.</p> <p>The implementation of TFA provisions on expedited release of perishable goods should be prioritized and highlighted in future FTAs in order to prevent disruption during future crises.</p> <p>Reform measures should focus on simplifying and streamlining customs procedures for medical technologies and devices (similar to provisions on expedited release for</p>

<sup>187</sup> WORLD CUSTOMS ORGANIZATION, WCO SECRETARIAT NOTE: HOW TO ESTABLISH AND UTILIZE ESSENTIAL GOODS LISTS DURING A DISASTER (2020), [http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/natural-disaster/covid\\_19/essential-goods-lists\\_guidance.pdf?la=en](http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/natural-disaster/covid_19/essential-goods-lists_guidance.pdf?la=en).

			<p>perishable agriculture) to improve access to essential goods.</p> <p>FTA provisions could be modeled on national best practices where countries have reduced border interventions on certain critical goods.</p>
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**D. Small and Medium-Sized Enterprises**

The impact of COVID-19 on SMEs is cause for concern for any policymaker.<sup>188</sup> While the various measures implemented to contain the pandemic present headwinds for all businesses, SMEs are particularly vulnerable owing to their small size, financial constraints, and operational limitations.<sup>189</sup> With 9 out of 10 businesses around the world being classified as SMEs,<sup>190</sup> domestic economies stand to be crippled if such enterprises are unable to weather the crisis. Moreover, with SMEs collectively accounting for one half of the global employment,<sup>191</sup> negative externalities will be realized in the social sphere as well, with widespread unemployment already making headlines.<sup>192</sup> To avoid complete socio-economic collapse, policymakers will not only have to take immediate steps to strengthen the position of SMEs during the pandemic, but also draft a clear plan which accounts for SME interests in the post-pandemic recovery phase.

Historically, international economic law has not been particularly concerned with SMEs,<sup>193</sup> with few FTAs concluded before the turn of the century containing provisions which explicitly address

<sup>188</sup> There is no universally accepted definition of SMEs since the parameters used to categorize such firms depend on the size of the domestic economy in question. The OECD broadly categorizes firms employing fewer than 250 people as SMEs (see *Glossary of Statistical Terms, SMEs*, OECD, <https://stats.oecd.org/glossary/detail.asp?ID=3123> (last visited Jul. 13, 2020)). Some states and organizations further distinguish SMEs from micro-enterprises, thereby giving rise to the related acronym, MSMEs. In this report, the term SMEs is used generically.

<sup>189</sup> See Floriana Borino and Valentina Rollo, *Quantifying the Effect of COVID-19 on Small Business Around the World*, INTERNATIONAL TRADE CENTRE (May 28, 2020), <https://www.intracen.org/covid19/Blog/Quantifying-the-effect-of-COVID-19-on-small-business-around-the-world-the-world/>. See also WORLD TRADE ORGANIZATION, *HELPING MSMES NAVIGATE THE COVID-19 CRISIS: INFORMATION NOTE* (2020), [https://www.wto.org/english/tratop\\_e/covid19\\_e/msmes\\_report\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/msmes_report_e.pdf).

<sup>190</sup> *SME Finance, Overview*, THE WORLD BANK, <https://www.worldbank.org/en/topic/smefinance> (last visited Jul. 13, 2020).

<sup>191</sup> *SME Finance, Overview*, THE WORLD BANK, <https://www.worldbank.org/en/topic/smefinance> (last visited Jul. 13, 2020).

<sup>192</sup> See *COVID-19: Impact Could Cause Equivalent of 195 Million Job Losses, Says ILO Chief*, UN NEWS (Apr. 8, 2020), <https://news.un.org/en/story/2020/04/1061322>. See also Jonathan Rothwell, *The Effects of COVID-19 on International Labor Markets: An Update*, THE BROOKINGS INSTITUTION (May 27, 2020), <https://www.brookings.edu/research/the-effects-of-covid-19-on-international-labor-markets-an-update/>.

<sup>193</sup> Thilo Rensmann, *Introduction*, in *SMALL AND MEDIUM-SIZED ENTERPRISES IN INTERNATIONAL ECONOMIC LAW* (Thilo Rensmann ed., 2017) 1. The OECD was one of the first multilateral fora to address the role of SMEs in international trade with the adoption of the Bologna Charter (see *Bologna Charter on SME Policies*, OECD (Jun. 15, 2000), <https://www.oecd.org/cfe/smes/thebolognacharteronsmepolicies.htm>).

the barriers to trade faced by SMEs.<sup>194</sup> However, newer FTAs like the CPTPP<sup>195</sup> and USMCA<sup>196</sup> function as a barometer of the changing policy agenda of various states, signaling their desire to improve the participation of SMEs in international trade.<sup>197</sup>

Engagement of SMEs in international trade, be it directly through cross-border exports or indirectly through GVCs, has been repeatedly highlighted as one of the drivers of the SDGs.<sup>198</sup> In fact, it is noted that improving investment in SMEs can contribute to 60 percent of the 169 SDG targets, with the bulk of the contribution furthering SDG 8, (Decent Work and Economic Growth), and SDG 9, (Industry, Innovation, and Infrastructure).<sup>199</sup> In addition, SMEs can also contribute to furthering SDG 5 (Gender Equality), as they employ a disproportionately large share of disadvantaged groups, including women.<sup>200</sup> However, despite their potential to contribute to sustainable development, the participation of SMEs in international trade has historically been low due to internal constraints relating to financing and human resources and external constraints relating to barriers to trade and investment.<sup>201</sup> To make matters worse, the current pandemic has exacerbated the situation. The trade finance gap for SMEs, which currently stands at over US\$ 5 trillion,<sup>202</sup> is expected to widen due to the credit crunch. Furthermore, cross-border exports and participation in GVCs by SMEs have also declined sharply in light of export and import quotas, changes to customs procedures, and restrictive border controls, which have been introduced to mitigate the effects of COVID-19.<sup>203</sup>

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<sup>194</sup> JOSÉ-ANTONIO MONTEIRO, WTO WORKING PAPER ERSD-2016-12, PROVISIONS ON SMALL AND MEDIUM-SIZED ENTERPRISES IN REGIONAL TRADE AGREEMENTS (2016).

<sup>195</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/> (hereinafter, “CPTPP”).

<sup>196</sup> Agreement Between the United States of America, the United Mexican States, and Canada, Dec. 10, 2019, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> (hereinafter, “USMCA”).

<sup>197</sup> JOSÉ-ANTONIO MONTEIRO, WTO WORKING PAPER ERSD-2016-12, PROVISIONS ON SMALL AND MEDIUM-SIZED ENTERPRISES IN REGIONAL TRADE AGREEMENTS (2016).

<sup>198</sup> See United Nations General Assembly, Transforming our World: The 2030 Agenda for Sustainable Development, A/RES/70/1, Oct. 21, 2015. See also United Nations General Assembly, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), A/RES/69/313, Aug. 17, 2015.

<sup>199</sup> INTERNATIONAL TRADE CENTRE, SME COMPETITIVENESS OUTLOOK 2019, BIG MONEY FOR SMALL BUSINESS: FINANCING THE SUSTAINABLE DEVELOPMENT GOALS, EXECUTIVE SUMMARY (2019).

<sup>200</sup> INTERNATIONAL TRADE CENTRE, SME COMPETITIVENESS OUTLOOK 2020, COVID-19: THE GREAT LOCKDOWN AND ITS IMPACT ON SMALL BUSINESS 45 (2020).

<sup>201</sup> UK TRADE POLICY OBSERVATORY, THE REPRESENTATION OF SME INTERESTS IN FREE TRADE AGREEMENTS: RECOMMENDATIONS FOR BEST PRACTICE (2020).

<sup>202</sup> INTERNATIONAL TRADE CENTRE, SME COMPETITIVENESS OUTLOOK 2019, BIG MONEY FOR SMALL BUSINESS: FINANCING THE SUSTAINABLE DEVELOPMENT GOALS, EXECUTIVE SUMMARY (2019).

<sup>203</sup> See WORLD TRADE ORGANIZATION, HELPING MSMEs NAVIGATE THE COVID-19 CRISIS: INFORMATION NOTE (2020), [https://www.wto.org/english/tratop\\_e/covid19\\_e/msmes\\_report\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/msmes_report_e.pdf).

As it stands currently, international trade is not working in favor of SMEs. Policymakers will be well advised to account for the inefficiencies of the current trade framework and address the needs of SMEs specifically if they wish to map out an inclusive and sustainable path to recovery from the present crisis. To allow SMEs to continue trading during the pandemic, policymakers' efforts should be directed at improving access to information and finance. For the post-pandemic recovery phase, on the other hand, policymakers should focus on promoting digitalization as a means of improving SMEs' participation in electronic commerce (e-commerce).

### **Access to Information**

Given their small size, SMEs have limited resources to navigate the current crisis.<sup>204</sup> Since the onset of the pandemic, government policies affecting cross-border movement of goods and people have changed rapidly to address the health risks posed by COVID-19. However, these changes have not always been communicated clearly to the parties that are most disproportionately affected by them: SMEs.<sup>205</sup>

The problem lies in the fact that compliance with trade policies represents a fixed cost for SMEs. Given their relatively small turnover *vis-à-vis* bigger multi-national corporations, these fixed costs account for a proportionally higher percentage of expenses that are otherwise borne by an SME which seeks to engage in international trade.<sup>206</sup> SMEs, therefore, are disproportionately affected by rapid changes in government policy, because they are limited by their (i) human resources constraints, in terms of the amount of labor hours they can expend on keeping abreast of these changes; (ii) knowledge, expertise, and resources to navigate market regulations and standards; and (iii) financial constraints, in terms of the number of times they are able to internalize the costs associated with complying with changing regulations before this eats far too much into their profit margins to be a financially feasible endeavor. Given these specific limitations, it becomes apparent that FTAs need to provide a viable mechanism that can alleviate the information asymmetry experienced by SMEs, thereby reducing the costs incurred by them in complying with changes in government regulations.

Existing FTAs seek to correct the information asymmetry through various means. On the trade facilitation front, newer FTAs include provisions that call for a single window mechanism that allows traders to electronically satisfy the various export and import requirements at a single point of entry.<sup>207</sup> This provides a transparent and predictable process for traders and removes the

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<sup>204</sup> JOSÉ-ANTONIO MONTEIRO, WTO WORKING PAPER ERSD-2016-12, PROVISIONS ON SMALL AND MEDIUM-SIZED ENTERPRISES IN REGIONAL TRADE AGREEMENTS (2016).

<sup>205</sup> The World Bank and the World Trade Organization both maintain a database on trade-related measures implemented by various member states during the COVID-19 pandemic. However, these databases rely on notifications from the respective governments, which may not necessarily be prompt. The World Bank's resources are available at <https://www.worldbank.org/en/topic/trade/brief/trade-and-covid-19>. The World Trade Organization's resources are available at [https://www.wto.org/english/tratop\\_e/covid19\\_e/covid19\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm).

<sup>206</sup> UK TRADE POLICY OBSERVATORY, THE REPRESENTATION OF SME INTERESTS IN FREE TRADE AGREEMENTS: RECOMMENDATIONS FOR BEST PRACTICE 11–12 (2020).

<sup>207</sup> WTO Trade Facilitation Agreement, Art. 10.4 (available at [https://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfatheagreement\\_e.htm](https://www.wto.org/english/tratop_e/tradfa_e/tradfatheagreement_e.htm)) encourages all members states to establish



bureaucratic hurdles that disproportionately affect SMEs.<sup>208</sup> However, in most instances, these provisions are couched in best endeavor terms, which effectively renders them nugatory if government parties do not deliver on these undertakings. Of the more recent FTAs, the Digital Economy Partnership Agreement signed between Chile, New Zealand, and Singapore contains obligatory language regarding the provision of a single window. This is a significant development, and such language ought to be replicated in other FTAs so as to hold the signatory parties accountable to their commitments and ensure that SMEs can compete on a fair playing field with bigger corporations by avoiding being bogged down by unnecessary bureaucracy.

The information asymmetry can also be addressed through targeted measures aimed at helping SMEs navigate market regulations and standards. Compliance with such international standards are not only a pre-requisite for SMEs engaging in international trade, but they also determine SMEs' ability to maintain their position in GVCs. FTAs often contain provisions pertaining to non-tariff measures (NTMs), which call for the harmonization of standards between trading partners, but the standards themselves are rarely static.<sup>209</sup> Conformity assessment requirements, which certify compliance with the applicable standards, can prove to be burdensome for SMEs both in terms of costs and the requisite knowledge required for compliance.<sup>210</sup> On this front, FTAs can level the playing field for SMEs by including language which promotes cooperation between the parties in improving systems to enhance SMEs' access to relevant standards and capacity to comply. For example, Enterprise Singapore, a statutory board under Singapore's Ministry of Trade and Industry which helps SMEs innovate and internationalize, has recently provided free viewing access to international standards relevant to supporting SME operations during the COVID-19 pandemic.<sup>211</sup> In addition, Enterprise Singapore also administers the Enterprise Development Grant, which helps defray some of the costs for SMEs that wish to upgrade their business practices to conform to international standards.<sup>212</sup>

Trading costs for SMEs arising from customs and regulatory compliance can also be directly reduced by increasing, and expressly communicating, the *de minimis* values which qualify for express shipment and reduced paperwork at the border. While the exact value at which the *de*

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a single window. CPTPP, Art. 5.6.2 encourages the establishment of single windows by the signatory parties. Digital Economy Partnership Agreement, Art 2.2.4 (available at <https://www.mti.gov.sg/-/media/MTI/Microsites/DEAs/Digital-Economy-Partnership-Agreement/Text-of-the-DEPA.pdf>), signed between Chile, New Zealand and Singapore, also mandates the establishment of a single window. For some best practices on the implementation of single windows, see UNITED NATIONS ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC (UNESCAP), SINGLE WINDOW FOR TRADE FACILITATION: REGIONAL BEST PRACTICES AND FUTURE DEVELOPMENT (2018), <https://www.unescap.org/resources/single-window-trade-facilitation-regional-best-practices-and-future-development>.

<sup>208</sup> *Trade Facilitation Implementation Guide, The Single Window Concept*, UNITED NATIONS, <http://tfig.unece.org/contents/single-window-for-trade.htm> (last visited Jul. 13, 2020).

<sup>209</sup> ZHANG YUHUA & AKHMAD BAYHAQI, APEC POLICY SUPPORT UNIT ISSUES PAPER No. 3, SMEs' PARTICIPATION IN GLOBAL PRODUCTION CHAINS (2013), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.680.3748&rep=rep1&type=pdf>.

<sup>210</sup> See INTERNATIONAL TRADE CENTER, SME COMPETITIVENESS OUTLOOK 2016, PART I: SME COMPETITIVENESS: STANDARDS AND REGULATIONS MATTER (2016),

[https://www.intracen.org/uploadedFiles/intracenorg/Content/Redesign/Projects/SME\\_Competitiveness/Part%20I.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Redesign/Projects/SME_Competitiveness/Part%20I.pdf)

<sup>211</sup> *Access Free Standards to Combat COVID-19*, ENTERPRISE SINGAPORE, <https://www.enterprisesg.gov.sg/quality-standards/standards/for-companies/access-free-standards-to-combat-covid-19> (last updated April 18, 2020).

<sup>212</sup> *Adopt Standards*, ENTERPRISE SINGAPORE, <https://www.enterprisesg.gov.sg/quality-standards/standards/for-companies/adopt-standards> (last updated April 15, 2020).

*minimis* amounts are pegged will depend on the specific parties to the agreement in question, a positive example of such a measure is observed in the USMCA, where shipments of up to US\$ 2,500 in value will qualify for reduced paperwork requirements.<sup>213</sup> This can benefit SMEs in particular as cross-border shipments by such enterprises generally represent lower dollar value amounts than those by multi-national corporations, and the reduced paperwork would correspondingly reduce the compliance costs associated with such border formalities. However, parties to an FTA should be wary of having the *de minimis* value spelled out authoritatively in the text of the FTA, as it will affect their flexibility in making subsequent changes. Instead, the *de minimis* value could be determined in a side letter which could be reviewed periodically to account for any changes in inflation and other macroeconomic circumstances. Such regulatory flexibility would also be particularly helpful in times of crises where the *de minimis* values can be raised to allow high-value, specialized goods such as medicines and vaccines to flow across borders more efficiently.

FTAs can also help to address the information asymmetry faced by SMEs by improving the channels for information sharing between parties. Most existing FTAs have some form of provisions promoting the transparency of trade-related regulations and customs procedures. However, informational transparency alone is inadequate if an effective means of accessing said information is not also provided.

On this aspect, guidance may be had from the CPTPP,<sup>214</sup> the Economic Partnership Agreement signed between the European Union and Japan (EU-Japan EPA),<sup>215</sup> or the USMCA,<sup>216</sup> which carefully delineates the specific information that must be shared by the parties on their respective publicly accessible government websites. SMEs stand to benefit from a public portal which consolidates the resources on engaging in international trade under the preferential terms guaranteed by FTAs as it provides an avenue for them to access information on the FTAs easily and efficiently. Future FTAs should mandate the establishment of such ‘trade portals’ which not only contain information on the agreement, but also provide periodic updates on any changes to government policies which may affect trade flows under the FTA. This will be especially beneficial to SMEs in times of crisis where they will be able to exercise the necessary *savoir-faire* to comply with any regulatory changes by relying on timely updates from official channels, thereby reducing the uncertainties surrounding their ability to engage in international trade.

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<sup>213</sup> *United States-Mexico-Canada Agreement Fact Sheet: Supporting America’s Small and Medium-Sized Businesses*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/supporting> (last visited Jul. 13, 2020).

<sup>214</sup> See CPTPP, Art. 24.1.

<sup>215</sup> See Economic Partnership Agreement, Eur.–Japan, Jul. 18, 2018, Art. 20.2, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1684>.

<sup>216</sup> See USMCA, Art 25.3.

The challenges faced by SMEs relating to information asymmetry can also be partially addressed by allowing for the establishment of a committee or working group under the relevant FTA which has the power not only to engage both public and private sector stakeholders on trade-related issues arising under the FTA, but also to propose relevant policies and good practices based on experiences on the ground, which can assist SMEs in taking advantage of the preferential treatment promised under the FTA.<sup>217</sup>

While an example of such a mechanism is seen in both the EU-Japan EPA<sup>218</sup> and the USMCA,<sup>219</sup> it is submitted that the inclusive model captured by the USMCA be followed as it requires the SME Committee to engage in annual ‘Trilateral SME Dialogues’ that allow both public and private sector stakeholders to comment on the issues arising from the implementation of the FTA.<sup>220</sup> The inclusive model espoused by the USMCA is also preferable in that it allows for the SME Committee to collaborate with other committees and working groups established under the FTA, thereby expanding the committee’s purview to salient issues beyond the SME chapter which may nevertheless have an impact on SMEs.<sup>221</sup> Such an engaged approach will allow SMEs to participate directly in exchanging information, have a voice in shaping the rules and norms which affect their ability to trade regionally and internationally, and provide them with a forum to collaborate with the public sector institutions in addressing their specific concerns.

### **Access to Finance**

Generally, FTAs do not explicitly address issues surrounding trade financing for SMEs.<sup>222</sup> Instead, this has usually been dealt with in the domestic policy and regulatory realm. The lack of trade finance can severely inhibit a country’s potential to engage in cross-border trade,<sup>223</sup> and this is even more so in the case of SMEs which generally do not possess the necessary assets or collateral required for access to traditional forms of credit.<sup>224</sup> Therefore, to support the ability of SMEs to engage in international trade, policymakers need to continue to find ways to engage with their trading partners on issues of trade finance.<sup>225</sup>

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<sup>217</sup> JOSÉ-ANTONIO MONTEIRO, WTO WORKING PAPER ERSD-2016-12, PROVISIONS ON SMALL AND MEDIUM-SIZED ENTERPRISES IN REGIONAL TRADE AGREEMENTS 7 (2016).

<sup>218</sup> EU-Japan Economic Partnership Agreement, Art. 20.3.

<sup>219</sup> USMCA, Art. 25.4.

<sup>220</sup> USMCA, Art. 25.5.

<sup>221</sup> USMCA, Arts. 25.4.2(g)-(h).

<sup>222</sup> Even in instances where financing issues for SMEs are addressed in FTAs, the provisions are only directed at promoting dialogue and exchanging best practices surrounding trade finance. *See e.g.*, USMCA, Art. 25.4.2(c).

<sup>223</sup> United Nations General Assembly, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), A/RES/69/313, Aug. 17, 2015, ¶ 81.

<sup>224</sup> INTERNATIONAL TRADE CENTRE, SME COMPETITIVENESS OUTLOOK 2019, BIG MONEY FOR SMALL BUSINESS: FINANCING THE SUSTAINABLE DEVELOPMENT GOALS, EXECUTIVE SUMMARY 12 (2019).

<sup>225</sup> JOSÉ-ANTONIO MONTEIRO, WTO WORKING PAPER ERSD-2016-12, PROVISIONS ON SMALL AND MEDIUM-SIZED ENTERPRISES IN REGIONAL TRADE AGREEMENTS 7 (2016).

It is submitted that trade finance be explicitly spelled out as one of the key areas of co-operation between parties to an FTA. This can be done in one of two ways. First, the exchange of best practices and policies on improving trade finance generally can be included as a sub-provision under the co-operation chapter in FTAs. Parties to the FTA can work together to identify the specific financing needs of SMEs in their domestic markets and also promote dialogue between their respective financial services industries to explore the services and competencies which could best address the unmet financing needs.<sup>226</sup> Second, the committee or working group established to promote SME interests could be given the explicit authority to engage with public and private partners, including local financial institutions and regional development banks, to propose policy measures aimed at improving trade finance specifically for SMEs. This could include the promotion of innovative SME financing solutions such as blended finance and sustainable development bonds.<sup>227</sup> In addition, together with the domestic IPAs, the committee or working group could address specific information gaps faced by foreign investors when investing in SMEs located in frontier markets. This could plug the trade finance gap by encouraging the flow of FDIs to SMEs. Such commitments under an FTA may incentivize governments to continue to take concrete steps to address the trade finance gap faced by SMEs and provide opportunities for SMEs to have better access to finance in the future.

## Digitalization

COVID-19 underscores the importance of a more comprehensive digital strategy that will extend to all economic stakeholders.<sup>228</sup> The lockdowns and social distancing measures caused a sudden shift in consumption patterns to the online domain. SMEs, which are able to swiftly pivot their business model to embrace electronic commerce (e-commerce),<sup>229</sup> are more likely to be able to cushion themselves against the adverse economic impacts brought about by the pandemic.<sup>230</sup> In general, digitalization is beneficial for SMEs in that those with a digital presence are more likely to engage in international trade directly through imports and exports, or indirectly, through their

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<sup>226</sup> See INTERNATIONAL TRADE CENTRE, TRADE FINANCE FOR SMEs: ROAD MAP FOR IMPLEMENTING THE STRATEGY,

[https://www.intracen.org/uploadedFiles/intracenorg/Content/Trade\\_Support\\_Institutions/Delivering\\_services\\_to\\_exporters/Evaluating\\_trade\\_credit\\_applications/ROADMAP%20Trade%20Finance%20strategy%20v%209.0.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Trade_Support_Institutions/Delivering_services_to_exporters/Evaluating_trade_credit_applications/ROADMAP%20Trade%20Finance%20strategy%20v%209.0.pdf).

<sup>227</sup> See generally INTERNATIONAL TRADE CENTRE, SME COMPETITIVENESS OUTLOOK 2019, BIG MONEY FOR SMALL BUSINESS: FINANCING THE SUSTAINABLE DEVELOPMENT GOALS (2019),

<https://www.intracen.org/publication/smeco2019/>.

<sup>228</sup> See e.g., Matt Fitzpatrick, Isha Gill, Ari Libarikian, Kate Smaje & Rodney Zimmel, *The Digital-Led Recovery from COVID-19: Five Questions for CEOs*, MCKINSEY & CO. (Apr. 20, 2020),

<https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/the-digital-led-recovery-from-covid-19-five-questions-for-ceos>; Dave Evans, *Post COVID-19, the Answer is Digital Transformation, Now What's the Question?*, FORBES (May 19, 2020), <https://www.forbes.com/sites/daveevans/2020/05/19/post-covid-19-the-answer-is-digital-transformation-now-whats-the-question/#237f49453643>.

<sup>229</sup> The World Trade Organization defines e-commerce as “the production distribution, marketing, sale or delivery of goods and services by electronic means”. See *Electronic Commerce*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/ecom\\_e/ecom\\_e.htm](https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm) (last visited Jul. 27, 2020).

<sup>230</sup> Laura Starita, *Coronavirus: CIO Areas of Focus During the COVID-19 Outbreak*, GARTNER (Mar. 6, 2020), <https://www.gartner.com/smarterwithgartner/coronavirus-cio-areas-of-focus-during-the-covid-19-outbreak/>.

(“Businesses that can shift technology capacity and investments to digital platforms will mitigate the impact of the outbreak and keep their companies running smoothly now, and over the long term.”)

participation in GVCs.<sup>231</sup> The ability to draw consumer insights from big data can also allow SMEs to be more responsive to market demands by customizing their products and offering targeted services.<sup>232</sup> Notwithstanding the potential upside to engaging in e-commerce, SME participation in digital trade remains low due to the existence of various barriers.<sup>233</sup> It is noted that SMEs in developing countries do not have sufficient computer literacy skills and lack access to the digital infrastructure necessary to engage in e-commerce, e.g., stable internet connection, electronic payment capabilities, cloud computing facilities, etc.<sup>234</sup> Moreover, compliance with data privacy and data localization measures represent additional costs for SMEs, eating into the margins they may otherwise realise through partaking in e-commerce.<sup>235</sup>

Despite acknowledging the growing role played by e-commerce in creating new opportunities for trade over 20 years ago,<sup>236</sup> the World Trade Organization has yet to reach consensus on the rules and norms that ought to guide trade in the digital sphere.<sup>237</sup> This has resulted in policymakers resorting to FTAs as a means of shaping the rules of international trade in the digital age. Policymakers seeking to promote greater participation of SMEs in e-commerce may consider including language in FTAs allowing for investment in ICT infrastructure and capacity building for local SMEs,<sup>238</sup> which can help to improve their computer literacy skills while also providing them with an enabling environment to engage in e-commerce.

In addition to the infrastructure, data is crucial for businesses to remain competitive as it provides access to useful market intelligence, which can result in SMEs being able to identify better opportunities for growth and design products and services that suit the market demand.<sup>239</sup> However, data localization requirements represent a barrier to trade, especially for SMEs that may not have the requisite capital to invest in local data storage facilities.<sup>240</sup> Policymakers, therefore, should also seek to facilitate cross-border data flows by removing data localization requirements through FTAs.<sup>241</sup> Additionally, policymakers should look to harmonize their respective data

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<sup>231</sup> See generally Rainer Lanz, Kathryn Lundquist, Grégoire Mansio, Andreas Maurer & Robert Teh, WORLD TRADE ORGANIZATION ECONOMIC RESEARCH AND STATISTICS DIVISION STAFF WORKING PAPER ERSD-2018-13: E-COMMERCE AND DEVELOPING COUNTRY-SME PARTICIPATION IN GLOBAL VALUE CHAINS (2018).

<sup>232</sup> OECD, SME MINISTERIAL CONFERENCE 2018 PLENARY SESSION 3 DISCUSSION PAPER: FOSTERING GREATER SME PARTICIPATION IN A GLOBALLY INTEGRATED ECONOMY 16 (2018).

<sup>233</sup> See MARCO BIANCHINI, OECD DIGITAL FOR SMEs GLOBAL INITIATIVE CONCEPT NOTE 3 (2019), which states, “[a]cross OECD countries in 2015 only 20% of SMEs engaged in sales through e-commerce, against 40% of large firms”.

<sup>234</sup> INTERNATIONAL TRADE CENTRE, SME COMPETITIVENESS OUTLOOK 2020, COVID-19: THE GREAT LOCKDOWN AND ITS IMPACT ON SMALL BUSINESS 44 (2020).

<sup>235</sup> OECD, SME MINISTERIAL CONFERENCE 2018 PLENARY SESSION 3 DISCUSSION PAPER: FOSTERING GREATER SME PARTICIPATION IN A GLOBALLY INTEGRATED ECONOMY 16 (2018).

<sup>236</sup> World Trade Organization, Declaration on Global Electronic Commerce, WT/MIN(98)/DEC/2, May 25, 1998.

<sup>237</sup> At present, some of the WTO members are undertaking negotiations on the trade-related aspects of e-commerce. See World Trade Organization, Joint Statement on Electronic Commerce, WT/L/1056, Jan. 25, 2019. s

<sup>238</sup> See DEPA, Art. 10.2.

<sup>239</sup> *Australia-Singapore Digital Economy Agreement: Summary of Key Outcomes*, AUSTRALIAN GOVERNMENT DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, <https://www.dfat.gov.au/trade/services-and-digital-trade/australia-singapore-digital-economy-agreement-summary-key-outcomes> (last updated Mar. 20, 2020).

<sup>240</sup> *Australia-Singapore Digital Economy Agreement: Summary of Key Outcomes*, AUSTRALIAN GOVERNMENT DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, <https://www.dfat.gov.au/trade/services-and-digital-trade/australia-singapore-digital-economy-agreement-summary-key-outcomes> (last updated Mar. 20, 2020).

<sup>241</sup> See DEPA, Arts. 4.3, 4.4, 9.4, & 9.5.

protection regimes to avoid imposing extra costs on SMEs resulting from having to comply with differing laws and regulations. In the event that harmonization is not feasible, policymakers can consider including language in FTAs that allows for mutual recognition of their respective data protection standards and certifications.<sup>242</sup>

**Table 4: Possible Regulatory/Policy Recommendations to Include SMEs Concerns in FTAs**

#	Issue	Existing Mechanism	Recommendations
1.	Single Window System	Provisions calling for the implementation of a single window system to facilitate trade is couched in ‘best endeavors’ language. There is no stipulated framework on how this window may be designed or the timeline for its implementation.	<ul style="list-style-type: none"> <li>• Provide for binding language for the implementation of a single window system.</li> <li>• Adapt best practices from existing single window systems.</li> <li>• Agree to timeline for the rollout of the single window system.</li> </ul>
2.	Standards	NTM provisions promote harmonization of standards between trading partners but do not specifically address the information and cost barriers associated with compliance.	<ul style="list-style-type: none"> <li>• Include language requiring collaboration between parties to the FTA in improving SMEs’ access to standards.</li> <li>• Promote initiatives at domestic policy level to help defray some of the costs associated with complying with standards.</li> </ul>
3.	<i>De Minimis</i> Value	Provisions on <i>de minimis</i> values generally spell out the pegged value in the FTA itself, with some regulatory flexibility provided to adjust the values downward to reciprocate the values set domestically by a party.	<ul style="list-style-type: none"> <li>• Given the formalities required to amend an FTA, allow <i>de minimis</i> values to be determined in separate side letters, which are subject to periodic review.</li> </ul>
4.	Information Sharing	Provisions promoting the sharing of information relating to FTAs call for greater transparency of government regulations but	<ul style="list-style-type: none"> <li>• Include binding language which establishes a communication channel, e.g., a publicly accessible government website, and</li> </ul>

<sup>242</sup> See DEPA, Art. 4.2.6.

		stop short of establishing a communication channel.	<p>stipulates the type of information to be shared that may be relevant to SMEs, e.g., summary text and notes to explain the FTA in plain terms, tariff calculators, express shipment facilities, relevant standards, enforcement of intellectual property rights, etc.</p> <ul style="list-style-type: none"> <li>• Require relevant government institutions to provide periodic updates on trade-related measures through the public communication channel.</li> </ul>
5.	SME Committees	Provisions allowing for the establishment of SME Committees do not follow a universal structure.	<ul style="list-style-type: none"> <li>• Incorporate binding language to establish SME Committees which can advise the respective parties regarding the implementation of the FTA.</li> <li>• Host a regular dialogue forum between public and private sector stakeholders to comment on issues arising under the FTA.</li> <li>• Provide for the oversight scope of the SME Committee to extend beyond the SME chapter to cover other salient issues including, but not limited to, electronic commerce, digital inclusion, and intellectual property.</li> </ul>

6.	Trade Finance	This is not currently addressed explicitly in FTAs.	<ul style="list-style-type: none"> <li>• Include trade finance as one of the areas of co-operation between the parties to the FTA.</li> <li>• Authorize the SME Committee to engage in dialogue and propose amendments to domestic policies to plug the trade finance gap for SMEs through the promotion of innovative SME financing solutions such as blended finance and sustainable development bonds.</li> <li>• Encourage SME Committee to collaborate with local IPA to address information gaps for foreign investors seeking to invest in SMEs.</li> </ul>
7.	Digitalization	DEPA contains provisions which encourage investment to enable SMEs to participate in e-commerce, facilitate cross-border data flows, and promote harmonization and interoperability of domestic data protection laws between the signatory parties.	<ul style="list-style-type: none"> <li>• Encourage investment in ICT infrastructure and provide for capacity building, especially in computer and digital literacy skills.</li> <li>• Include provisions in future FTAs which remove data localization requirements so as to facilitate data transfers across borders and minimize costs for SMEs arising from having to establish local data centers.</li> <li>• Encourage the adoption of a harmonized data protection regime to minimize compliance costs. In the alternative, provide for the mutual recognition of data protection standards and certificates.</li> </ul>



## E. Gender

International trade was long viewed as ‘gender neutral’, in other words, as simply conferring a benefit on all of society in a non-discriminatory manner. However, gender and legal experts have increasingly dispelled that assumption and have shown that trade affects gender differently depending upon industry variation, wealth disparity, and specific country circumstances. Underlying legal disparities also impact the extent to which women can become engaged in economic activity, own and transfer property, and obtain financing. In addition to international trade, epidemics, pandemics, and specifically the current COVID-19 crisis affects women in a disproportionately negative way compared to men.

While the full impact of COVID-19 on gender is not yet clear, several disturbing trends have emerged. First, as with the Ebola (2014-2015) and Zika (2015-2016) outbreaks, sexual, domestic and gender-based violence increases during disasters.<sup>243</sup> Particularly, stay-at-home orders issued to curb the spread of COVID-19 have trapped women with their abusers.<sup>244</sup> Second, women are generally more economically vulnerable as they are more likely to be single mothers, work part-time jobs, or run their own SMEs (38 percent of SMEs in the Asia Pacific Economic Cooperation (APEC) countries are owned by women)<sup>245</sup> which have been particularly impacted by COVID-19. Women also tend to undertake an increased amount of unpaid work through child-care and caring for the sick and elderly during a pandemic, thus further preventing them from maintaining full-time paid work.<sup>246</sup> Third, the impact of COVID-19 on health services has been primarily borne by women. Women make up around 70 percent of those working in the health and social services sector globally, as well as account for most of the health facility staff working in cleaning, laundry, and catering, among others.<sup>247</sup> As a result, women have a heightened exposure to the disease. In addition, with medical facilities overburdened, access to already limited sexual and reproductive health services in many countries as well as pre-natal and post-natal care has been reduced. For example, in Latin America and the Caribbean, 18 million women will likely lose regular access to modern contraceptives.<sup>248</sup> Finally, the majority of COVID-19 deaths are comprised of elderly women who constitute a majority of the aging population.<sup>249</sup>

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<sup>243</sup> Ann Linde & Arancha González Laya, *What the COVID-19 Pandemic Tells Us About Gender Equality*, WORLD ECONOMIC FORUM (May 9, 2020), <https://www.weforum.org/agenda/2020/05/what-the-covid-19-pandemic-tells-us-about-gender-equality/>.

<sup>244</sup> Mélissa Godin, *As Cities Around the World Go on Lockdown, Victims of Domestic Violence Look for a Way Out*, TIME (Mar. 18, 2020 1:58 PM), <https://time.com/5803887/coronavirus-domestic-violence-victims/>.

<sup>245</sup> Huani Zhu & Carlos Kuriyama, *Gender Related Constraints Faced by Women-owned SMEs*, ASIA-PACIFIC ECONOMIC COOPERATION (Jun. 2016), <https://www.apec.org/Publications/2016/06/Gender-related-Constraints-Faced-by-Women-owned-SMEs>.

<sup>246</sup> *Policy Brief: The Impact of Covid-19 on Women*, UNITED NATIONS (Apr. 9, 2020), <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/policy-brief-the-impact-of-covid-19-on-women-en.pdf?la=en&vs=1406>.

<sup>247</sup> Mathieu Boniol et. al., *Gender Equity in the Health Workforce: Analysis of 104 countries*, WORLD HEALTH ORGANIZATION (Mar. 2019), [https://www.who.int/hrh/resources/gender\\_equity-health\\_workforce\\_analysis/en/](https://www.who.int/hrh/resources/gender_equity-health_workforce_analysis/en/).

<sup>248</sup> UNITED NATIONS POPULATION FUND (UNFPA), *LATIN AMERICA AND CARIBBEAN REGIONAL OFFICE, OUT-OF-POCKET SPENDING FOR CONTRACEPTIVES IN LATIN AMERICA* (2020).

<sup>249</sup> *How Will COVID-19 Affect Girls and Young Women*, PLAN INTERNATIONAL, <https://plan-international.org/emergencies/covid-19-faqs-girls-women> (last visited Jul. 26, 2020).

COVID-19 has evidenced the need to adequately address these disparities. To do so, governments would highly benefit from having access to sex-disaggregated data in order to adequately assess the disparities across the different sectors. For example, for over a decade Canada has been working on a gender sensitive initiative known today as ‘Gender Based Analysis Plus’ (GBA+). Hence, when the crisis hit, Canada was able to rapidly allocate up to CAD 50 million to women’s shelters and other centers in order to enhance their capacity to assist the increase of domestic violence cases during the COVID-19 crisis.<sup>250</sup> However, few countries have in place a well-functioning database of sex-disaggregated data that allows them to carry out the required impact assessment. As a result, “emergency responses to the COVID-19 outbreak can inadvertently exacerbate existing systemic gender inequalities”.<sup>251</sup>

In order to help address these disparities, in recent years, countries have begun to mainstream gender into the text of FTAs. “Mainstreaming affirms the commitment, understanding, and political will of members to reduce gender inequality through trade policies and agreements.”<sup>252</sup> In other words, mainstreaming refers to the explicit inclusion of gender considerations in the text of the treaty. For several years, the commitment to gender equality was mentioned in FTAs either in the preamble or in a chapter on development or sustainable development. It was not until 2016 that FTAs started including a stand-alone gender chapter. As of the time of writing, however, only four FTAs include a stand-alone gender chapter, namely, the Chile-Uruguay, Canada-Chile, Argentina-Chile, and Canada-Israel FTAs.

For the most part, the provisions of these agreements are all very similar. Most include language that: (i) acknowledges the importance of eradicating discrimination against women; (ii) reaffirms the Parties’ commitment to other international agreements that address gender; (iii) asserts the willingness of the Parties to cooperate with one another and lists possible cooperation activities (e.g., programs aimed at promoting women’s competencies in the workplace); (iv) establishes a Gender Committee to facilitate the exchange of information between the Parties and to facilitate cooperation; and (v) establishes the commitment of the parties to try to amicably resolve any issues that may arise from the interpretation and application of the chapter. It is worth noting that the Canada-Israel FTA contains one important element not found in the other three; it establishes that when Parties are unable to resolve matters amicably they may consent to submit the issue to a dispute settlement body. This opens up the possibility for Parties to submit gender-related issues to arbitration, which could, in turn, result in important repercussions for the liable Party.

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<sup>250</sup> *Women at the Core of the Fight Against COVID-19 Crisis*, OECD, <https://www.oecd.org/coronavirus/policy-responses/women-at-the-core-of-the-fight-against-covid-19-crisis-553a8269/#section-d1e1722> (last updated Apr. 1, 2020).

<sup>251</sup> *Women at the Core of the Fight Against COVID-19 Crisis*, OECD, <https://www.oecd.org/coronavirus/policy-responses/women-at-the-core-of-the-fight-against-covid-19-crisis-553a8269/#section-d1e1722> (last updated Apr. 1, 2020).

<sup>252</sup> *Mainstreaming Gender in Free Trade Agreements*, INTERNATIONAL TRADE CENTRE (Jul. 2020), [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender\\_FTA\\_20200707\\_web.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf).

In this context, this section of the report examines provisions in FTAs to highlight reform options that take into account the disproportionate impact that COVID-19 has had on women. The recommendations, however, are not specific to COVID-19 alone, but propose gender sensitive measures which would protect the rights and freedoms of women in the event of a future crisis or pandemic, while also striving for a more leveled-playing field overall.

**Table 5: Possible Regulatory/Policy Recommendations to Include Gender Provisions**

#	REGULATORY ELEMENT/ISSUES	OBSERVATIONS	RECOMMENDATIONS
1.	Gender is only referred to in a provision, or at most a chapter, rather than throughout the FTA	A study carried out by the International Trade Centre, shows that out of 73 trade agreements across 25 countries, 40 percent make no explicit reference to gender. <sup>253</sup>	<p>At a macro level, incorporating gender into the preamble of the FTA establishes the intentions of the negotiators and provides, for purposes of interpretation, the parties’ objectives. Incorporating gender into the preamble could be done by stating that the Parties seek to ensure that the implementation of the FTA will provide equal opportunities for both men and women.<sup>254</sup> Notably, this sort of preambular language could be extended to address other inequalities as well.</p> <p>Another solution to protect women in all areas considered in FTAs, would be to include a ‘GATT-like’ exception for gender. ‘GATT-like’ exceptions, such as in GATT Article XX and provisions in FTAs, allow states to restrict international trade when public morals, human health, animal life, the environment, and other areas are impacted.<sup>255</sup> An</p>

<sup>253</sup> *Mainstreaming Gender in Free Trade Agreements*, INTERNATIONAL TRADE CENTRE (Jul. 2020), [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender\\_FTA\\_20200707\\_web.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf).

<sup>254</sup> *Mainstreaming Gender in Free Trade Agreements*, INTERNATIONAL TRADE CENTRE (Jul. 2020), [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender\\_FTA\\_20200707\\_web.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf).

<sup>255</sup> General Agreement on Tariffs and Trade 1994, art. XX, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

			<p>example of the gender exception in an FTA could be: “nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of a measure necessary to promote women’s economic empowerment or achieve gender equality.”<sup>256</sup> By including a gender focused exception, governments could directly or indirectly tailor trade benefits to ensure that women are not irreparably harmed by the impact of a pandemic or even by the impact of international trade generally.</p>
2.	Lack of minimum legal standards	<p>The inclusion of minimum legal standards helps guarantee that the implementation of FTAs results in legally binding minimum standards of treatment.</p> <p>All-encompassing gender sensitive provisions are necessary to ensure that the chapter can adapt to gender issues in the respective countries. However, supplementing broad</p>	<p>FTAs should require that Parties ensure minimum standards in their domestic laws to ensure, for example, equal pay for equal work, implementation of anti-discrimination and anti-harassment laws, protection of reproductive rights, amongst others. Land tenure, inheritance provisions,<sup>258</sup> and other laws can be important to women’s participation in all aspects of economic activity as well.<sup>259</sup></p>

<sup>256</sup> *Mainstreaming Gender in Free Trade Agreements*, INTERNATIONAL TRADE CENTRE (Jul. 2020), [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender\\_FTA\\_20200707\\_web.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf).

<sup>258</sup> For further information on the importance of achieving gender-equitable governance in land tenure, see *Governing Land for Women and Men: A Technical Guide to Support the Achievement of Gender-equitable Governance of Land Tenure*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (2013), [www.fao.org/docrep/017/i3114e/i3114e.pdf](http://www.fao.org/docrep/017/i3114e/i3114e.pdf).

<sup>259</sup> For further information on constraints currently faced by women in the economic sphere See *Women, Business and the Law 2020*, WORLD BANK GROUP (2020), <https://wbl.worldbank.org>.

		<p>provisions with legally binding minimum standards would help ensure that measurable and attainable goals result from FTAs.<sup>257</sup></p>	<p>The minimum standards referred to in these FTAs could include standards set out under other treaties and international rules, including the International Labor Organization (ILO) conventions and the Convention on the Elimination of All Sorts of Discrimination against Women (CEDAW) for gender equality.<sup>260</sup></p> <p>When drafting a minimum standards clause, it would be best to avoid permissive language and subjective clauses such as “policies considered appropriate.”</p> <p>In addition to minimum legal standards, there must be a binding dispute resolution mechanism, which could impose, for example, trade sanctions<sup>261</sup> in case the minimum standards are not adhered to.</p>
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<sup>257</sup> *Mainstreaming Gender in Free Trade Agreements*, INTERNATIONAL TRADE CENTRE (Jul. 2020), [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender\\_FTA\\_20200707\\_web.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf).

<sup>260</sup> Art. 15.2 of the Chile-Argentina FTA includes explicit reference to the ILO conventions and CEDAW, and can serve as an example of a model provision.

<sup>261</sup> *From Europe to the World: Understanding Challenges for European Businesswomen*, INTERNATIONAL TRADE CENTRE (Sept. 2019), <https://www.intracen.org/publication/Europe-to-world/>.

3.	Lack of data, research and impact assessment	Research, data, and impact assessment help inform trade policy. However, the absence of sex-disaggregated data makes it difficult to assess the disparities faced by women in the trade sphere. “Gender-differentiated distributional effects of trade cannot be not identified if no gender-relevant (social and economic) impact assessments are conducted.” <sup>262</sup> Only through the collection of relevant quantitative and qualitative data, can a country really identify the impact that trade has on this section of the population.	FTAs should encourage the collection of sex-disaggregated data and should promote research into the relationship between trade and gender.  Provisions should mandate <i>ex-ante</i> and <i>ex-post</i> gender focused impact assessments as an FTA is negotiated and implemented. <sup>263</sup> Countries should also encourage the exchange of data with their trading partners <sup>264</sup> and promote academic exchange programs to help parties better understand the impact of these agreements in their respective economies. <sup>265</sup>
4.	Lack of participation of women and women’s groups in FTA negotiations	To achieve a greater presence of women in the treaty negotiation sphere, it is necessary that governments ensure they hire or promote women into trade negotiation positions.	The ministry or agency in charge of trade negotiations could advocate for the creation of a ‘Gender Officer’ role, designed exclusively to examine how to level the playing field through the implementation of gender responses, both in national and international policies. The Gender Officer would ideally work closely with the team of trade negotiators.  Governments could also develop an internship or

<sup>262</sup> Markéta von Hagen, *Trade and Gender - Exploring a Reciprocal Relationship*, OECD (2014), [https://www.oecd.org/dac/gender-development/GIZ\\_Trade%20and%20Gender\\_Exploring%20a%20reciprocal%20relationship.pdf](https://www.oecd.org/dac/gender-development/GIZ_Trade%20and%20Gender_Exploring%20a%20reciprocal%20relationship.pdf).

<sup>263</sup> *Mainstreaming Gender in Free Trade Agreements*, INTERNATIONAL TRADE CENTRE (Jul. 2020), [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender\\_FTA\\_20200707\\_web.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf).

<sup>264</sup> The four FTAs that as of the time of writing include a stand-alone chapter on gender have provisions that encourage the exchange of information between the parties.

<sup>265</sup> *Mainstreaming Gender in Free Trade Agreements*, INTERNATIONAL TRADE CENTRE (Jul. 2020), [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender\\_FTA\\_20200707\\_web.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf).

			<p>mentorship program for young women interested in pursuing a career in trade law or policy.</p> <p>Countries could hold open consultations at the national level, or find other ways to promote a public-private dialogue, in order to provide a space for the community to voice their concerns. This would allow women’s organizations, women entrepreneurs and SME owners, gender advocates, and other key players such as NGOs, to engage in the negotiation process while providing feedback and solutions.</p>
5.	Lack of adequate protection for sexual and reproductive health	<p>Goal 5.6 of the SDGs calls upon parties to ‘ensure universal access to sexual and reproductive health and reproductive rights’ and is accompanied by two indicators.<sup>266</sup></p> <p>The issue, as seen in the aforementioned FTAs with gender chapters, is the use of permissive language, such as, ‘acknowledges’, ‘reaffirms’, or ‘establishes’, when referring to gender rights or the SDGs.<sup>267</sup></p>	<p>To protect women in future pandemics, there needs to be clear, binding language enforceable upon states to ensure the rights under Goal 5.6. Specifically, clear language barring states from refusing access to important reproductive health services based on a national emergency, such as a pandemic, is needed. Universal access, as per Goal 5.6, must be consistent and accessible.</p> <p>Another method to achieve Goal 5.6 of the SDGs would be through the inclusion of minimum legal standards in</p>

<sup>266</sup> [“Proportion of women aged 15-49 years who make their own informed decisions regarding sexual relations, contraceptive use and reproductive health”] (SDG 5.6.1) and [“the number of countries with laws and regulations that guarantee full and equal access to women and men aged 15 years and older to sexual and reproductive health care, information and education.”] (SDG 5.6.2).

<sup>267</sup> *Mainstreaming Gender in Free Trade Agreements*, INTERNATIONAL TRADE CENTRE (Jul. 2020), [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender\\_FTA\\_20200707\\_web.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf).

			FTAs, <sup>268</sup> such as ensuring that countries implement laws protecting the right of women to sexual and reproductive health.
6.	Disproportionate impact on women’s economic well-being	In order to ensure the empowerment of women in the economic sphere, governments should provide incentives and opportunities for women that guarantee equal labor rights. Currently, it is estimated that a median full-time female worker earns 15 percent less than her male counterpart. <sup>269</sup> “As long as women remain underqualified and less skilled than men, they are likely to remain in lower-paid jobs with poor working conditions and job insecurity.” <sup>270</sup>	<p>FTAs could incorporate provisions to ensure that women have access to education and skills development programs. It is important that the wording of these provisions encourage women to pursue careers in STEM<sup>271</sup> and other roles which may not be considered “traditional” as well as provide them with the skillset required to successfully assume leadership positions.<sup>272</sup></p> <p>FTA provisions could also make explicit reference to business and technology training programs aimed at helping women-owned SMEs go digital.<sup>273</sup></p> <p>The scope of said provisions should be worded in detail, and refrain from simply mentioning access to education without defining the specifics.</p>

<sup>268</sup> *Mainstreaming Gender in Free Trade Agreements*, INTERNATIONAL TRADE CENTRE (Jul. 2020), [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender\\_FTA\\_20200707\\_web.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf).

<sup>269</sup> *The Pursuit of Gender Equality: An Uphill Battle*, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (2017), <https://dx.doi.org/10.1787/9789264281318-en>.

<sup>270</sup> *Mainstreaming Gender in Free Trade Agreements*, INTERNATIONAL TRADE CENTRE (Jul. 2020), [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender\\_FTA\\_20200707\\_web.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf).

<sup>271</sup> *Girls’ and women’s education in science, technology, engineering and mathematics (STEM)*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, <https://en.unesco.org/stemed> (last visited Jul. 26, 2020).

<sup>272</sup> *Mainstreaming Gender in Free Trade Agreements*, INTERNATIONAL TRADE CENTRE (Jul. 2020), [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender\\_FTA\\_20200707\\_web.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf).

<sup>273</sup> *Women at the Core of the Fight Against COVID-19 Crisis*, OECD, <https://www.oecd.org/coronavirus/policy-responses/women-at-the-core-of-the-fight-against-covid-19-crisis-553a8269/#section-d1e1722> (last updated Apr. 1, 2020).



## F. Circular Economy

Similar to prior pandemics, COVID-19 has been both a devastating health crisis and a global economic shock. Since the early stages, economies across the world have struggled to respond to the virus. The crisis has exposed the fragility of our predominantly linear economic systems. Global supply chains have collapsed, accessibility to essential goods has become an ongoing concern, and unprecedented unemployment has stunned the labor market.<sup>274</sup> In the predominant linear economic model of today, firms extract natural resources, create products, and sell them on the market for consumers to use and discard.<sup>275</sup> Meanwhile, in the circular model, the material and energy loops are closed so more of what is produced is circled back to the market.<sup>276</sup> The issues brought to the forefront by COVID-19 are closely related to the fact that the linear model is extractive and relies on unsustainable practices to generate economic growth,<sup>277</sup> whereas the circular model decouples unsustainable resource use from growth and upholds sustainable labor and resource use.<sup>278</sup> More than ever, current events underscore the urgency of departing from the linear model to a circular economy model that can offer immediate and long-term solutions to the world's most pressing problems. Circularity creates resilient economies by lowering the reliance on primary raw materials, preventing supply-chain breakdown, and encouraging sustainable policies that avoid harming nature. International trade has a special role to play in promoting circularity and supporting greater resilience in markets.

As of 2020, global food waste is around one billion tons, with most food items ending in landfills without ever being consumed due to harvesting or logistical issues.<sup>279</sup> Wasting food perpetuates the cycle of global poverty and also produces significant amount of greenhouse gas emissions.<sup>280</sup> On the ground, COVID-19 has wiped out the businesses of stakeholders who are dependent on an exclusive category of consumers (e.g., farmers who rely on restaurants and schools to buy their products).<sup>281</sup> As restrictions related to the pandemic continue, farmers have seen the market shrink,

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<sup>274</sup> David McGinty and Patrick Schröder, *EU Recovery Fund is a Chance to Accelerate the Circular Economy*, EURACTIV (May 25, 2020), <https://www.euractiv.com/section/circular-economy/opinion/eu-recovery-fund-is-a-chance-to-accelerate-the-circular-economy/>.

<sup>275</sup> Concepción Garcés-Ayerbe, Pilar Rivera-Torres, Inés Suárez-Perales & Dante I. Leyva-de la Hiz, *Is It Possible to Change from a Linear to a Circular Economy? An Overview of Opportunities and Barriers for European Small and Medium-Sized Enterprise Companies*, 16 INT'L J. ENVTL. RES. & PUB. HEALTH 851 (2019).

<sup>276</sup> Concepción Garcés-Ayerbe, Pilar Rivera-Torres, Inés Suárez-Perales & Dante I. Leyva-de la Hiz, *Is It Possible to Change from a Linear to a Circular Economy? An Overview of Opportunities and Barriers for European Small and Medium-Sized Enterprise Companies*, 16 INT'L J. ENVTL. RES. & PUB. HEALTH 851 (2019).

<sup>277</sup> Concepción Garcés-Ayerbe, Pilar Rivera-Torres, Inés Suárez-Perales & Dante I. Leyva-de la Hiz, *Is It Possible to Change from a Linear to a Circular Economy? An Overview of Opportunities and Barriers for European Small and Medium-Sized Enterprise Companies*, 16 INT'L J. ENVTL. RES. & PUB. HEALTH 851 (2019).

<sup>278</sup> ELLEN MACARTHUR FOUNDATION, *GROWTH WITHIN: A CIRCULAR ECONOMY VISION FOR A COMPETITIVE EUROPE* (2015).  
[https://www.ellenmacarthurfoundation.org/assets/downloads/publications/EllenMacArthurFoundation\\_Growth-Within\\_July15.pdf](https://www.ellenmacarthurfoundation.org/assets/downloads/publications/EllenMacArthurFoundation_Growth-Within_July15.pdf).

<sup>279</sup> Shelby Lin Erdman, *Global Food Waste Twice as High as Previously Estimated, Study Says*, CNN, <https://www.cnn.com/2020/02/20/health/global-food-waste-higher/index.html> (last updated Mar. 18, 2020).

<sup>280</sup> Shelby Lin Erdman, *Global Food Waste Twice as High as Previously Estimated, Study Says*, CNN, <https://www.cnn.com/2020/02/20/health/global-food-waste-higher/index.html> (last updated Mar. 18, 2020) (stating that if food waste could be represented as a nation then it would be the third largest greenhouse emitter, behind China and the USA).

<sup>281</sup> Katie Brigham, *Why Coronavirus is Causing a Massive Amount of Food Waste*, CNBC (May 19, 2020), <https://www.cnbc.com/2020/05/19/how-coronavirus-is-causing-mountains-of-food-waste.html>.

with fresh produce going to waste. In the United States, some companies have estimated that farmers have been dumping 3.7 million gallons of milk every day.<sup>282</sup> Meanwhile, the livestock market has also taken a hit with chicken farmers reporting that they are discarding 750,000 unhatched eggs every week.<sup>283</sup> This trend has been observed for farmers across the globe. In Nigeria, farmers have reported that demand for their products has gone down 70 percent due to the closures of restaurants and bakeries.<sup>284</sup> Finding ways to combat food waste during the pandemic has presented some unique problems.

Redirecting the excess produce to food banks or repurposing farms to directly serve individual consumers have also proved challenging, as food banks are unable to store and deliver produce at such high volumes.<sup>285</sup> It is reported that food banks and food waste charities are receiving double what they received before the COVID-19 crisis.<sup>286</sup> Consequently, logistical deficiencies prevent this sort of re-distribution. On the other hand, it is financially prohibitive for farmers to repurpose their factories. In the dairy industry, farms who cater to restaurants and schools pack their products in large bags and cartons.<sup>287</sup> They would need to invest millions of dollars to repurpose their operations and sell their products to grocery stores. Not only does this represent high lock-in costs, but it is also not financially sensible since the lockdown is not permanent, and the investment might not generate adequate returns to be justified.<sup>288</sup> In a world where 821 million people,<sup>289</sup> or one out of every nine people, are undernourished, the fact that tons of fresh produce is going to waste is a glaring indicator that our economic systems must do better. When addressing food waste during the pandemic and after, it is important to take a multi-faceted approach that addresses both practical issues as well as broader trade barriers. To increase the movement of food from producers to parties who need them, we can consider strategies such as expanding liability protection,<sup>290</sup>

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<sup>282</sup> David Yaffe-Bellany & Michael Corkery, *Dumped Milk, Smashed Eggs, Plowed Vegetables: Food Waste of the Pandemic*, THE NEW YORK TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/business/coronavirus-destroying-food.html>. (Dairy Farmers of America has stated that about %5 of U.S. milk is currently dumped and the number is expected to double if closures continue over the next month.)

<sup>283</sup> David Yaffe-Bellany & Michael Corkery, *Dumped Milk, Smashed Eggs, Plowed Vegetables: Food Waste of the Pandemic*, THE NEW YORK TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/business/coronavirus-destroying-food.html>.

<sup>284</sup> Marvin G. Perez, Michael Hirtzer & Deena Shanker, *Smashing Eggs, Dumping Milk: Farmers Waste More Food Than Ever*, BLOOMBERG GREEN, <https://www.bloomberg.com/news/articles/2020-05-18/smashing-eggs-dumping-milk-farmers-waste-more-food-than-ever> (last updated May 18, 2020).

<sup>285</sup> Marvin G. Perez, Michael Hirtzer & Deena Shanker, *Smashing Eggs, Dumping Milk: Farmers Waste More Food Than Ever*, BLOOMBERG GREEN, <https://www.bloomberg.com/news/articles/2020-05-18/smashing-eggs-dumping-milk-farmers-waste-more-food-than-ever> (last updated May 18, 2020).

<sup>286</sup> Marvin G. Perez, Michael Hirtzer & Deena Shanker, *Smashing Eggs, Dumping Milk: Farmers Waste More Food Than Ever*, BLOOMBERG GREEN, <https://www.bloomberg.com/news/articles/2020-05-18/smashing-eggs-dumping-milk-farmers-waste-more-food-than-ever> (last updated May 18, 2020). (For example, the largest food waste charity in the U.K., Fareshare, has received 758 metric tons of food which is more than double what it received pre-COVID-19.)

<sup>287</sup> David Yaffe-Bellany & Michael Corkery, *Dumped Milk, Smashed Eggs, Plowed Vegetables: Food Waste of the Pandemic*, THE NEW YORK TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/business/coronavirus-destroying-food.html>.

<sup>288</sup> David Yaffe-Bellany & Michael Corkery, *Dumped Milk, Smashed Eggs, Plowed Vegetables: Food Waste of the Pandemic*, THE NEW YORK TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/business/coronavirus-destroying-food.html>.

<sup>289</sup> WORLD FOOD PROGRAMME, HUNGER MAP 2019 (2019), <https://www.wfp.org/publications/2019-hunger-map>.

<sup>290</sup> HARVARD LAW SCHOOL FOOD AND POLICY CLINIC, FEDERAL POLICIES TO SUPPORT THE FOOD SYSTEM AND

increasing tax benefits for donations,<sup>291</sup> and offering government funded transportation support for produce.<sup>292</sup> Each of these measures considers the day to day reality of countless farmers across the globe and provides solutions that can make an immediate impact by lowering the costs and risks of doing business. On the international trade side, we must consider easing the regulatory burden on food imports. The burden can be eased by accepting certificates given by foreign accredited agencies with similar standards<sup>293</sup> or lowering the requirements of applications, permits and licenses when the food product does not pose a great danger to human health.<sup>294</sup>

Market problems exacerbated by COVID-19 are not unique to the food sector and have caused issues for other products and supply chains. The global supply chain breakdown has been especially pronounced for medical supplies and illustrates the linear model's fragility. The broader problem is characteristic of most current economies that rely on the "take-make-dispose"<sup>295</sup> concept. In linear systems, material and energy loops are left open, and products go through a relatively short use-cycle before they are discarded. Moreover, products have also become entrenched in increasingly complex international supply chains.<sup>296</sup> Consequently, production shutdowns at any one point in the chain can create a chokepoint that disrupts the entire production cycle. This phenomenon has occurred in the context of healthcare supplies during COVID-19. The crisis has revealed that the supply chains behind most of our medical products do not uphold central circular economy principles (such as reuse, repair, and refurbishment) and thus are vulnerable to disruptions. While it is true that certain medical supplies cannot be reused due to health and sanitation concerns, most of these single-use devices can, in fact, be reused without posing a danger to patients or doctors.<sup>297</sup> However, the concept of "planned obsolescence" in healthcare has been adopted by many manufacturers to curb repurposing and drive profits through repeat purchases.<sup>298</sup>

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CONSUMERS DURING COVID-19, 1, 7 (2020), <https://www.chlpi.org/wp-content/uploads/2013/12/FLPC-Policies-v4.pdf>.

<sup>291</sup> HARVARD LAW SCHOOL FOOD AND POLICY CLINIC, FEDERAL POLICIES TO SUPPORT THE FOOD SYSTEM AND CONSUMERS DURING COVID-19, 1, 6 (2020), <https://www.chlpi.org/wp-content/uploads/2013/12/FLPC-Policies-v4.pdf>.

<sup>292</sup> HARVARD LAW SCHOOL FOOD AND POLICY CLINIC, FEDERAL POLICIES TO SUPPORT THE FOOD SYSTEM AND CONSUMERS DURING COVID-19, 1, 10 (2020), <https://www.chlpi.org/wp-content/uploads/2013/12/FLPC-Policies-v4.pdf>.

<sup>293</sup> WORLD BANK GROUP, TRADE AND COVID-19 GUIDANCE NOTE (2020), <http://documents1.worldbank.org/curated/en/509521585605825305/pdf/Do-s-and-Don-ts-of-Trade-Policy-in-the-Response-to-COVID-19.pdf>.

<sup>294</sup> WORLD BANK GROUP, TRADE AND COVID-19 GUIDANCE NOTE (2020), <http://documents1.worldbank.org/curated/en/509521585605825305/pdf/Do-s-and-Don-ts-of-Trade-Policy-in-the-Response-to-COVID-19.pdf>

<sup>295</sup> Concepción Garcés-Ayerbe, Pilar Rivera-Torres, Inés Suárez-Perales & Dante I. Leyva-de la Hiz, *Is It Possible to Change from a Linear to a Circular Economy? An Overview of Opportunities and Barriers for European Small and Medium-Sized Enterprise Companies*, 16 INT'L J. ENVTL. RES. & PUB. HEALTH 851 (2019).

<sup>296</sup> Geoffrey Gertz, *Coronavirus Will Reveal Hidden Vulnerabilities in Complex Global Supply Chains*, THE BROOKINGS INSTITUTE (Mar. 5, 2020), <https://www.brookings.edu/blog/future-development/2020/03/05/the-coronavirus-will-reveal-hidden-vulnerabilities-in-complex-global-supply-chains/> (stating that a Toyota car has 30,000 distinct parts and relies on 2,192 different firms to produce a vehicle).

<sup>297</sup> Lars Thording, *Planned Obsolescence and Single-Use Reprocessing in Healthcare*, MEDTECH INTELLIGENCE (Oct. 18, 2018), <https://www.medtechintelligence.com/column/planned-obsolence-and-single-use-reprocessing-in-healthcare/>.

<sup>298</sup> Lars Thording, *Planned Obsolescence and Single-Use Reprocessing in Healthcare*, MEDTECH INTELLIGENCE (Oct. 18, 2018), <https://www.medtechintelligence.com/column/planned-obsolence-and-single-use-reprocessing-in-healthcare/>.

EU nations have recently acted against planned obsolescence in consumer electronics, but such a movement has not yet taken place in medical goods.<sup>299</sup> Furthermore, in the short-term, researchers at T.U. Delft and Van Staten Medical have devised a sterilization method that can allow single-use masks to be safely reused up to five times.<sup>300</sup> Researchers have stated that this technique can help save 100,000 masks a day just in Europe alone. Facilitating the sharing of such technology across borders is crucial to upholding circularity and also saving lives. Also, many manufacturers do not readily share the necessary information regarding their products' repairs citing copyright issues; however, the sharing of such information must be facilitated to prolong the life spans of essential devices and foster circularity.<sup>301</sup> Notably, the global refurbished medical devices market is expected to grow over 10 percent per year in the next five years, a positive development that must be supported via international trade agreements.<sup>302</sup>

Several trade barriers undermine the trade of used medical devices without providing any health or security benefits. Some countries apply high tariffs on medical devices, which can shrink the market. These elevated expenses can diminish the profits of second-hand exporters and importers and deter them from participating in international trade.<sup>303</sup> At the same time, countries can have different national regulations and requirements concerning medical devices in a way that may make the trade of such devices impossible.<sup>304</sup> High tariff rates and strict regulatory requirements in the export market can have a chilling effect on the used medical device trade and ultimately undermine efforts to circularize. However, international trade can serve to lower these barriers to entry and offer solutions that benefit stakeholders. The USMCA and the CPTPP offer two examples of how trade can promote circularity in the medical devices market. In the USMCA, Annex 12-E addresses medical devices.<sup>305</sup> The agreement aims to create regulatory harmonization among the parties and ease the trade of medical devices.<sup>306</sup> Similarly, the CPTPP removes tariffs between the trade parties, increases regulatory coherence, and makes pricing policies more transparent for stakeholders.<sup>307</sup> These strategies can be considered and implemented in future

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in-healthcare/. Planned obsolescence refers to producing goods that are single-use by design or have technology in them (such as chips) that artificially “lock” products and prevent reuse or repair.

<sup>299</sup> See e.g., Laura Kayali, *Apple Fined €25 Million in France for Misleading Consumers about Slowed Down Phones*, POLITICO, <https://www.politico.eu/article/apple-fined-e25m-in-france-for-misleading-consumers-about-slowed-down-iphones/> (last updated Feb 7, 2020); Nicholas Vinocur, *Italy Hits Apple, Samsung with Fines Over Planned Obsolescence*, POLITICO, <https://www.politico.eu/article/italy-hits-apple-samsung-with-fines-over-planned-obsolence/> (last updated Apr. 19, 2019).

<sup>300</sup> Jos Wassink, *Masks Reusable After Sterilization*, DELTA (Mar. 26, 2020), <https://www.delta.tudelft.nl/article/masks-reusable-after-sterilisation>.

<sup>301</sup> Janet Gunter, *Circular Economy isn't Just Recycling Products; Repair and Reuse are Also Vital*, THE GUARDIAN (Dec. 4, 2011), <https://www.theguardian.com/sustainable-business/circular-economy-recycling-repair-reuse>.

<sup>302</sup> Jocelyn Blériot, *The COVID-19 Recovery Requires a Resilient Circular Economy*, GREENBIZ (May 29, 2020), <https://www.greenbiz.com/article/covid-19-recovery-requires-resilient-circular-economy>.

<sup>303</sup> See U.S. DEPARTMENT OF COMMERCE INTERNATIONAL TRADE ADMINISTRATION, 2016 TOP MARKETS REPORT FOR MEDICAL DEVICES, A MARKET ASSESSMENT TOOL FOR U.S. EXPORTERS (2016), [https://legacy.trade.gov/topmarkets/pdf/Medical\\_Devices\\_Top\\_Markets\\_Report.pdf](https://legacy.trade.gov/topmarkets/pdf/Medical_Devices_Top_Markets_Report.pdf).

<sup>304</sup> See U.S. DEPARTMENT OF COMMERCE INTERNATIONAL TRADE ADMINISTRATION, 2016 TOP MARKETS REPORT FOR MEDICAL DEVICES, A MARKET ASSESSMENT TOOL FOR U.S. EXPORTERS (2016), [https://legacy.trade.gov/topmarkets/pdf/Medical\\_Devices\\_Top\\_Markets\\_Report.pdf](https://legacy.trade.gov/topmarkets/pdf/Medical_Devices_Top_Markets_Report.pdf).

<sup>305</sup> USMCA, Annex 12-E.

<sup>306</sup> USMCA, Annex 12-E-2

<sup>307</sup> U.S. DEPARTMENT OF COMMERCE INTERNATIONAL TRADE ADMINISTRATION, 2016 TOP MARKETS REPORT FOR MEDICAL DEVICES, A MARKET ASSESSMENT TOOL FOR U.S. EXPORTERS (2016), [https://legacy.trade.gov/topmarkets/pdf/Medical\\_Devices\\_Top\\_Markets\\_Report.pdf](https://legacy.trade.gov/topmarkets/pdf/Medical_Devices_Top_Markets_Report.pdf).

FTAs to lower tariff and non-tariff barriers and facilitate the trade of both new and second-hand medical devices.

Finally, the global workforce has been severely impacted by the COVID-19 crisis. It is unrealistic to imagine a resilient economy without an adaptive workforce. The crisis has shown that migrant workers and workers in informal economies are especially vulnerable to macroeconomic shocks.<sup>308</sup> However, we have also seen that workers in disparate fields can pivot and work in fields in which they lack experience if they receive the necessary support in adapting to conditions.<sup>309</sup> In a circular model, nations can devise ways to equip their workforce with the requisite skills to adapt as conditions change. The SkillsFuture program developed by Singapore offers a viable a model. The Singaporean government has invested close to \$1 billion dollars a year to the program since 2015.<sup>310</sup> The SkillsFuture program promotes lifelong learning by giving Singaporeans aged 25 and above a \$500 credit to enroll in academic or technical courses and learn new skills.<sup>311</sup> Following the COVID-19 crisis, the SkillsFuture program has been modified by the Singaporean government to include a complementary program called SGUnited Skills Programme.<sup>312</sup> The program allows furloughed Singaporeans to enroll in six to twelve-month courses to develop skills in high demand sectors such as healthcare, food manufacturing, transport and logistics.<sup>313</sup> The government incentivizes workers to enroll in the program by covering basic expenses through a \$1200 per month allowance for the course of the training.<sup>314</sup> While we may never be able to foresee a crisis like COVID-19, preemptively investing in an adaptive workforce will promote circularity and resilience by future-proofing one of our most valuable resources, labor. Moreover, as nations begin to close material and energy loops, we will see new areas of work open up, especially in recycling and refurbishing, which may offer stability and opportunity for those in informal economies.

FTAs have an important role to play in promoting the shift to a circular economy and helping combat the impact of COVID-19. As the pandemic has led to shortages in goods and breakdowns

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<sup>308</sup> Costi Rogozanu & Daniela Gabor, *Are Western Europe's Food Supplies Worth More than East European Workers' Health?*, THE GUARDIAN (Apr. 16, 2020), <https://www.theguardian.com/world/commentisfree/2020/apr/16/western-europe-food-east-european-workers-coronavirus>. See also Jamaine Krige and Yeshiel Panchia, *Amid Lockdown, South Africa's Waste Pickers Suffer Most*, AL JAZEERA (Apr. 8, 2020), <https://www.aljazeera.com/news/2020/04/lockdown-south-africa-waste-pickers-suffer-200408113458382.html>.

<sup>309</sup> See *Chinese Companies Rush to Produce Anti-Covid Kit*, THE ECONOMIST (Mar. 14, 2020) <https://www.economist.com/business/2020/03/14/chinese-companies-rush-to-produce-anti-covid-kit>. See also Camila Domonoske, *ExxonMobil Starts Making Hand Sanitizer, Following Liquor Companies*, NPR (Apr. 24, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/24/844363276/exxonmobil-starts-making-hand-sanitizer-weeks-after-many-liquor-companies>.

<sup>310</sup> Charlene Tan, *Lifelong Learning Through the SkillsFuture Movement in Singapore: Challenges and Prospects*, 36 INT'L J. LIFELONG EDUC. 278, 281 (2017).

<sup>311</sup> Charlene Tan, *Lifelong Learning Through the SkillsFuture Movement in Singapore: Challenges and Prospects*, 36 INT'L J. LIFELONG EDUC. 278, 282 (2017).

<sup>312</sup> *SGUnited Skills Programme, What is It?*, SKILLSFUTURE, <https://www.skillsfuture.sg/sgunitedskills> (last visited Jul. 22, 2020).

<sup>313</sup> *SGUnited Skills Programme, What is It?*, SKILLSFUTURE, <https://www.skillsfuture.sg/sgunitedskills> (last visited Jul. 22, 2020).

<sup>314</sup> *SGUnited Skills Programme, What is It?*, SKILLSFUTURE, <https://www.skillsfuture.sg/sgunitedskills> (last visited Jul. 22, 2020).

in supply chains, trade has become one avenue for countries to secure essential supplies.<sup>315</sup> Some countries have lowered tariffs and export restrictions to facilitate trade; however, many others have responded by adopting export restrictions to keep certain goods in their domestic markets.<sup>316</sup>

Outside the specific context of COVID-19, FTAs can either support a circular economy or create direct and indirect barriers.<sup>317</sup> In particular, FTAs can support efforts to circularize by creating incentives for parties to facilitate the trade of environmental goods and services (EGS).<sup>318</sup> By lowering tariffs and export restrictions on EGS, countries can streamline the trade of environmentally responsible goods and mitigate climate change. FTAs can also affect trade through tariffs, quotas and embargos.<sup>319</sup> To reduce the number of deliberate bans on CE, we must first understand why countries issue such bans. Recovering primary material from products through recycling and refurbishing is crucial to achieve a circular economy. However, today most of these processes take place in nations where the processes are not sustainable and create significant pollution.<sup>320</sup> Countries that import waste are able to offer better prices for their service, because the waste process is not as stringent or developed. However, this trade can become harmful for waste importing nations' natural resources and citizens. This reality has led major waste importing nations to issue various direct barriers on trade. Indirect or accidental barriers refer to obstacles that are not meant to voluntarily hinder trade but do so because rules and regulations are ambiguous, inconsistent or convoluted.<sup>321</sup>

One major obstacle to trade of environmental goods is the lack of an internationally accepted definition of environmental goods.<sup>322</sup> Although parties may understand EGs to refer to a particular set of goods, there is no consensus. It will be important to arrive at universally accepted understanding of EGS, and work done through the Asia-Pacific Economic Cooperation

(APEC) can serve as a foundation. APEC has compiled a list of 54 EGs, upon which agreements

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<sup>315</sup> FERNANDO LEIBOVICI & ANA MARIA SANTACREU, FEDERAL RESERVE BANK OF ST. LOUIS ECONOMIC SYNOPSIS NO. 35, INTERNATIONAL TRADE POLICY DURING COVID-19 (2020), <https://files.stlouisfed.org/files/htdocs/publications/economic-synopses/2020/06/12/international-trade-policy-during-covid-19.pdf>.

<sup>316</sup> David McGinty and Patrick Schröder, *EU Recovery Fund is a Chance to Accelerate the Circular Economy*, EURACTIV (May 25, 2020), <https://www.euractiv.com/section/circular-economy/opinion/eu-recovery-fund-is-a-chance-to-accelerate-the-circular-economy/>.

<sup>317</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY (2019).

<sup>318</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 26 (2019).

<sup>319</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 27 (2019).

<sup>320</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 40 (2019).

<sup>321</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 28 (2019).

<sup>322</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY (2019).

such as the Environmental Goods Agreement (EGA)<sup>323</sup> have built.<sup>324</sup> However, the list should become more robust and inclusive in order to incorporate as wide a range of products as possible. Moreover, we must take steps to increase trade in environmental services, a separate but related area. The Closer Economic Partnership (CEP) agreement between New Zealand and Singapore can serve as a model.<sup>325</sup> Per the most recent updates to the CEP, New Zealand has better access to Singapore's highly developed environmental services sector.<sup>326</sup> The agreement has also made a wide variety of services, including environmental services in Singapore, more accessible to New Zealanders.<sup>327</sup> Collectively, the CEP facilitates the trade of environmental services by reducing obstacles and improving market access; both these strategies can be scaled globally.

The impact of FTAs on circular economy is an important area that deserves more attention if we are to transition to a more sustainable and resilient economy on a global scale. International trade can and must play a special role in our new reality by applying the lessons learned from the pandemic. FTAs can be a critical tool to address the direct and indirect obstacles to circularity. The WTO TFA model for phased implementation could also help build investment/trade schemes that support circular economies. Based on such a model, trade parties entering into new agreements could determine three tiers of goals for circularity such as a) goals for the immediate term, b) goals for the medium-term c) longer-term goals that would require international assistance. The tiered approach would help set coherent goals and investment plans while also developing capacity in a way that supports circularity on a global scale. It would also allow parties to trade agreements to control their domestic policy process but benefit from financial assistance to tackle more expensive projects. Anticipating crises such as COVID-19 is extremely difficult; however, by actively supporting circularity, we can have the confidence that our systems are resilient enough to weather the storm. In the specific context of trade liberalization, COVID-19, and circular economy, the issues of food waste,<sup>328</sup> resilient economies,<sup>329</sup> and labor<sup>330</sup> provide a good starting point.

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<sup>323</sup> *Environmental Goods Agreement (EGA)*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/envir\\_e/ega\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/ega_e.htm).

<sup>324</sup> *APEC 2012 Leader's Declaration, Annex C – APEC List of Environmental Goods*, ASIA-PACIFIC ECONOMIC COOPERATION (2012), [https://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012\\_aelm/2012\\_aelm\\_annexC.aspx](https://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012_aelm/2012_aelm_annexC.aspx). See also Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY (2019).

<sup>325</sup> Closer Economic Partnership Agreement, Sing. – N.Z., Jan. 1, 2001.

<sup>326</sup> Closer Economic Partnership Agreement, Sing. – N.Z., Jan. 1, 2001

<sup>327</sup> Closer Economic Partnership Agreement, Sing. – N.Z., Jan. 1, 2001

<sup>328</sup> David Yaffe-Bellany & Michael Corkery, *Dumped Milk, Smashed Eggs, Plowed Vegetables: Food Waste of the Pandemic*, THE NEW YORK TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/business/coronavirus-destroying-food.html>.

<sup>329</sup> David McGinty and Patrick Schröder, *EU Recovery Fund is a Chance to Accelerate the Circular Economy*, EURACTIV (May 25, 2020), <https://www.euractiv.com/section/circular-economy/opinion/eu-recovery-fund-is-a-chance-to-accelerate-the-circular-economy/>.

<sup>330</sup> *COVID-19: Impact Could Cause the Equivalent of 195 Million Job Losses, Says ILO Chief*, UN NEWS (Apr. 8, 2020), <https://news.un.org/en/story/2020/04/1061322>.

**Table 6: Possible Regulatory/Policy Recommendations to Incorporate Provisions Relating to Circular Economy for Post COVID-19 Recovery**

#	Issues	Observation/ Current Positions	Recommendation
1.	Facilitating Trade in Environment Goods and Services	<p>Since 2014, eighteen participants representing 46 WTO members have been engaged in negotiations over an Environmental Goods Agreement (EGA).<sup>331</sup> The EGA aims to eliminate tariffs for environmental goods in order to facilitate their trade.<sup>332</sup> To date, there have been 18 rounds of negotiation over the EGA with the latest round held November 26 to December 1, 2016.<sup>333</sup></p>	<ul style="list-style-type: none"> <li>• Policymakers may consider including a standardized definition for EGS under FTAs so as to avoid incongruences that hamper trade in EGS.</li> <li>• Policymakers may also consider adopting specific commitments to encourage facilitation of trade in EGS starting with delineating EGS as an area of cooperation between the State Parties.</li> <li>• Given the rapid development of technology in EGS, including, but not limited to: renewable energy, air pollution, water treatment, waste treatment, and environmental monitoring, State Parties may consider setting up a living agreement like DEPA to periodically evaluate commitments on EGS.</li> <li>• Adapt best practices from other agreements and discussions regarding EGS</li> </ul>

<sup>331</sup> *Environmental Goods Agreement (EGA)*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/envir\\_e/ega\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/ega_e.htm).

<sup>332</sup> *Environmental Goods Agreement (EGA)*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/envir\\_e/ega\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/ega_e.htm).

<sup>333</sup> *Environmental Goods Agreement (EGA)*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/envir\\_e/ega\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/ega_e.htm).



			and build on them to achieve policy coherence.
2.	Implementing Circular Economy Measures	Implementing circular economy measures can involve a number of stages and procedures both at and behind the border. For example, import measures on waste have been an ongoing issue. In 2017, China announced a “National Sword” policy, which aimed to ban the import of most plastic waste as well as other materials. <sup>334</sup> The ban took effect in January 1 <sup>st</sup> , 2018 and included 24 categories of solid waste, with more waste products added in late 2018. <sup>335</sup> A complete ban on foreign waste is planned by 2021. <sup>336</sup> Following, China’s import ban, other nations, such as India, Vietnam, Malaysia and Thailand became the main international importers of waste. <sup>337</sup> However, most of these nations have also begun to enact partial and full trade bans on waste imports. On March 1, 2019 India banned the import of solid plastic waste while Thailand,	<ul style="list-style-type: none"> <li>• One way in which FTAs might address the different layers of developing a circular economy would be to consider a model similar to the WTO TFA for implementation of circular economy measures, with the ability to divide implementation into short, medium-, and long-term measures and identify goals that would require assistance.</li> <li>• Incorporate and uphold disciplines on transboundary waste movement.<sup>339</sup></li> </ul>

<sup>334</sup> See Cheryl Katz, *Piling Up: How China’s Ban on Importing Waste Has Stalled Global Recycling*, YALE ENVIRONMENT 360 (Mar. 7, 2019), <https://e360.yale.edu/features/piling-up-how-chinas-ban-on-importing-waste-has-stalled-global-recycling>.

<sup>335</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 36 (2019).

<sup>336</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 36 (2019).

<sup>337</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 37 (2019).

<sup>339</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 39 (2019). (In the context of e-waste, the EU follows 2006 Waste Shipment Regulation. These regulations prohibit the export the e-waste outside the EU if the e-waste is to be disposed at the destination. However, a 2015 UN report has found that around 30 percent of member states do not follow the regulation, and as of 2012, over 4 percent of e-waste has left the EU undocumented. This is troubling when we recognize that 95 percent of e-waste imports are processed informally in urban slums which can have dire health and environmental consequences.)

		Vietnam, and Malaysia all signaled their interest in reducing waste imports in the coming years. <sup>338</sup>	
3.	Non-Tariff Barriers	<p>The CE is based on the idea that waste can be avoided and processed in order to yield useful materials (secondary raw materials). However, this is difficult to achieve in the current climate since there is no internationally accepted standard on waste quality or secondary raw materials.<sup>340</sup></p> <p>Consequently, a product can be qualified in different categories throughout its international trade journey and disrupt the flow of circularity. Currently, the leading document on waste categorization is the Basel Convention.<sup>341</sup> Yet, the document does definitively determine what waste is and how it can become a recovered resource, thus complicating global circularity. Moreover, there is a discrepancy between environmental inspection and customs procedures. While the former follows the guidance of the Basel convention, the latter</p>	<ul style="list-style-type: none"> <li>• Establish internationally recognized standards for waste and its regulation. FTAs and RTAs must include such definitions until broader scale agreement can be reached.</li> <li>• Resolve the discrepancy between the Basel Convention and HS.<sup>346</sup></li> <li>• Establish a definition for secondary raw materials to avoid unnecessary export restrictions.<sup>347</sup></li> </ul>

<sup>338</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 37 (2019).

<sup>340</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 29 (2019).

<sup>341</sup> See generally UNITED NATIONS ENVIRONMENT PROGRAMME, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTES AND THEIR DISPOSAL, <http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf>.

<sup>346</sup> In 2013, the Secretariat to the Basel Convention published a proposal to link the two codes. Accepting and implementing this proposal is crucial to overcome undue burdens to trade while also maintaining the requisite health and safety standards for member states. See Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 29 (2019).

<sup>347</sup> SHUNTA YAMAGUCHI, OECD TRADE AND ENVIRONMENT WORKING PAPERS 2018/03, INTERNATIONAL TRADE AND THE TRANSITION TO A MORE RESOURCE EFFICIENT AND CIRCULAR ECONOMY: A CONCEPT PAPER 17 (2018). According to the OECD database, one third of all export restrictions on raw materials between 2009-14 were applied to secondary raw materials.

		<p>works with the World Customs Organization’s Harmonized System (HS).<sup>342</sup> The two systems are different in that the HS is more focused on what the products is and its composition while the Basel Codes emphasize end-life procedures.<sup>343</sup> The discrepancy between these two guidelines leads to inconsistent treatment of waste at the border. The same problem is observed in secondary raw materials. As of 2020, there is no universally accepted definition of secondary raw material thus it is difficult to track global trade in this area despite the centrality of these resources to the circular economy.<sup>344</sup> The HS codes on secondary metal, paper and plastic could be a starting point for this effort.<sup>345</sup></p>	
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**VI. Conclusion**

The economic interdependence between States created by trade liberalization and the proliferation of global supply chains has helped preserve a period of relative peace and security since the end of the Second World War. In recent times, however, the system has been challenged due to politics, pervasive inequalities, and now the pandemic. While global trade volumes had been on the rise prior to COVID-19, the promised economic benefits stemming from international trade had not been distributed evenly. Such systemic inequality, if left unaddressed, has the potential to foment greater unrest between countries, jeopardizing global security. For international trade to continue undergirding peaceful relations between countries, new approaches are required that build upon the foundation established over the past seventy-five years and integrate all nations into the future of the global system.

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<sup>342</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 29 (2019).  
<sup>343</sup> Marianne Kettunen, Susanna Gionfra & Misty Monteville, *EU Circular Economy and Trade: Improving Policy Coherence for Sustainable Development*, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY 29 (2019).  
<sup>344</sup> SHUNTA YAMAGUCHI, OECD TRADE AND ENVIRONMENT WORKING PAPERS 2018/03, INTERNATIONAL TRADE AND THE TRANSITION TO A MORE RESOURCE EFFICIENT AND CIRCULAR ECONOMY: A CONCEPT PAPER 16 (2018).  
<sup>345</sup> SHUNTA YAMAGUCHI, OECD TRADE AND ENVIRONMENT WORKING PAPERS 2018/03, INTERNATIONAL TRADE AND THE TRANSITION TO A MORE RESOURCE EFFICIENT AND CIRCULAR ECONOMY: A CONCEPT PAPER 16 (2018).

The objective of this report has been to encourage policy makers to adopt forwarding thinking measures to not only mitigate the losses caused by COVID-19 but also guide them to adopt better policies considering the structural inefficiencies that have come light as a result of the current pandemic. While multilateral collaboration remains a goal, FTAs have also been instrumental in promoting trade between nations and contributing to their economic development. The report has analyzed six different elements of FTAs, many with analogous multilateral initiatives, that we consider to be vital for the COVID-19 recovery process: investment measures, intellectual property, trade facilitation, SMEs, gender, and the circular economy. We believe that aligning trade to a model that is more inclusive and focused on sustainable development and the SDGs will help build resilience and better prepare policymakers in the case of future exigencies like the pandemic. Pivoting to an inclusive model for international trade that transgresses the bounds of economic development to concomitantly focus on social development as well will allow FTAs to continue being a favored tool to promote international relations into the 21<sup>st</sup> century.

At the end of the day, it must be recognized that *pax mercatoria* is far from over.<sup>348</sup> As the world focuses its energy in dealing with the fallout from COVID-19, the specter of additional challenges like climate change continue to remain on the horizon. Other issues, such as the increasing digitization of trade, require further regulatory focus as well. In this context, the New Markets Lab has launched a larger research initiative to benchmark FTAs with SDGs in the hope that sustainable development will be seen as imperative in building an inclusive model of international trade that is resilient to future crises. This program will generate a book on trade law and the SDGs and contribute to a digital tool NML is developing on law and sustainable development aimed at creating a platform for inclusive legal and regulatory design and implementation options that could help inform future alignment of trade rules with social and economic goals. With innovative solutions and further research and empirical evidence in the areas covered in this report, as well as other areas of international trade and development, future trade disciplines could be designed to benefit all in times of both peace and crisis.

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**Treaty Provisions**

CBD, Arts. 1 & 15 ..... 26

Common Market for Eastern and Southern Africa, Article 13 ..... 23

CPTPP, Art. 24.1 ..... 54

CPTPP, Art. 5.6.2 ..... 52

DEPA, Art. 10.2 ..... 58

DEPA, Art. 4.2 ..... 58

DEPA, Arts. 4.3, 4.4, 9.4, & 9.5 ..... 58

Digital Economy Partnership Agreement, Art 2.2.4 ..... 52

General Agreement on Tariffs and Trade 1994, Art. XX ..... 65

ITPGRFA, Art 9.2 ..... 27

ITPGRFA, Arts. 10, 12 & 13 ..... 26

Nagoya Protocol, Art. 5. .... 26

Nagoya Protocol, Arts. 5, 6 & 7..... 26

TFA, Art. 10..... 36

TFA, Art. 7..... 36

TFA, Art. 8..... 36

USMCA, Annex 12-E..... 76

USMCA, Annex 14-C..... 21

USMCA, Art 25.3 ..... 54

USMCA, Art. 20.11 ..... 32

USMCA, Art. 20.6 ..... 35

USMCA, Art. 25.4 ..... 54

USMCA, Art. 25.5 ..... 55

WTO TFA, Art. 1..... 36

WTO TFA, Art. 7.9..... 43

WTO Trade Facilitation Agreement, Art. 10.4..... 52