

## APPENDIX

### Legal Backgrounder on Canada's Obligation to Support the TRIPS Waiver

1. On 2 October 2020, India and South Africa, on behalf of a wide range of developing and least-developed countries, submitted a formal proposal to the WTO ([IP/C/W/669](#)) for a temporary waiver from the obligation to implement, apply or enforce certain provisions of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ([TRIPS Agreement](#)) in relation to [COVID-19 medical products](#). These WTO Members submitted a revised proposal on 21 May 2021 ([IP/C/W/669/Rev.1](#))
2. The proposed waiver would remove certain legal barriers under the TRIPS Agreement that currently impede rapid scale-up of access to urgently needed, lifesaving COVID-19-related health products and technologies. More specifically, it would waive the obligations of WTO Members to create or maintain provisions in the areas of copyright, industrial designs, patents and undisclosed data, insofar as these relate to health products and technologies for the prevention, treatment and containment of COVID-19, including diagnostics, therapeutics, vaccines, medical devices, personal protective equipment, their materials or components, and their methods and means of manufacture. These provisions are impeding equitable access to such health products, including by hindering cross-border cooperation in capacity-building and generic manufacturing. The proposed waiver would facilitate the manufacture and distribution of lower-cost, generic products, including across borders to countries in need (and particularly those with limited or no domestic manufacturing capacity).
3. By excluding the possibility of WTO dispute settlement proceedings under the waived provisions of the TRIPS Agreement, the proposed waiver would remove the threat of retaliation between WTO Members for measures such as issuing compulsory licences, exporting to countries in need or engaging in other cross-border cooperation to share know-how and technology.

The failure to date of WTO Members to have adopted the TRIPS waiver has prevented wider production of affordable vaccines for low-income countries, increasing the number of cases and deaths from COVID-19 and permitting the emergence of variants of COVID-19 among unvaccinated populations. It has led to many more deaths from COVID-19 in all countries than would have occurred had there been equitable access sooner to such health products. The consequence of a failure to adopt the TRIPS waiver to facilitate a global strategy for the prevention, containment and treatment of COVID-19, and to prevent the emergence of new variants, could be millions of deaths worldwide, including among residents of Canada, with further severe social and economic consequences.

4. While Canada is unable to unilaterally bring about a TRIPS waiver, nonetheless, it is in position to significantly affect the outcome of deliberations on this issue as WTO Member.

***Obligation to perform human rights treaty obligations in good faith***

5. The obligation to perform treaty obligations in good faith, as required by Article 26 of the *Vienna Convention on the Law of Treaties (pacta sunt servanda)*, is recognised as *jus cogens*, a peremptory norm of international law and as such is domestically enforceable by domestic courts. Failing to act at the WTO, in response to the TRIPS waiver proposal, in accordance with Canada's obligations under international human rights law and the UN Charter to co-operate internationally and to engage in joint action to combat a global pandemic in which millions of lives are at risk, is contrary to Canada's obligation to perform its obligations under international human rights treaties in good faith.
  - Article 28 of the *Universal Declaration of Human Rights* recognizes that everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

- UN Member States are committed under the UN Charter (Articles 55 and 56) to joint action for achievement of solutions to health and related problems and universal respect and observance of human rights for all.
- Canada is required under article 2(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) to adopt measures individually and through international assistance and co-operation, especially economic and technical, to realize the rights set out in the ICESCR by all appropriate means, including particularly the adoption of legislative measures. Two rights recognized in the ICESCR are of particular relevance.
- Article 12 of the ICESCR guarantees the right of everyone to the highest attainable standard of physical and mental health. Article 12(2)(c) creates explicit obligations to prevent, treat and control epidemic diseases and Article 12(2)(d) specifies that states have an obligation to create conditions to ensure all people have access to medical service and medical attention. In its [General Comment on the right to health](#) the UN Committee on Economic, Social and Cultural Rights (CESCR) sets out that Article 12(2)(d) requires State parties to undertake joint efforts to make available relevant technologies and to implement or enhance immunization programmes and other strategies of infectious disease control.
- Article 15 of the ICESCR establishes the right to “enjoy the benefits of scientific progress and its applications” In its [General Comment on Article 15](#), the CESCR has clarified that “States parties should recognize the essential role of international cooperation for the achievement of the rights recognized in the Covenant.” The General Comment states that intellectual property is a social product and has a social function and that States parties thus have a duty to prevent unreasonably high costs for access to essential medicines.
- In the CESCR’s [Statement on universal affordable vaccination against coronavirus disease \(COVID-19\), international cooperation and intellectual](#)

[property \(E/C.12/2021/1\)](#) of April 21, 2021 the Committee stated that the TRIPS waiver is an essential element of complementary strategies to address the pandemic and that failing to approve it will also stand in the way of global economic recovery, which is necessary in order to overcome the negative impact of the pandemic on the enjoyment of all economic, social and cultural rights.

- Article 6 of the *International Covenant on Civil and Political Rights* establishes the right to life. The UN Human Rights Committee, in its [General Comment on the right to life](#) and in its [jurisprudence](#), has clarified that article 6 requires State parties to take appropriate measures to address the prevalence of life-threatening diseases such as AIDS, tuberculosis and malaria; take measures to ensure access without delay by individuals to essential health care; and to ensure access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.
  - The equal enjoyment of the right to health without discrimination is also protected under the *Convention on the Elimination of All Forms of Discrimination against Women* (Article 12), the *Convention on the Elimination of All Forms of Racial Discrimination* (Article 5) the *Convention on the Rights of Persons with Disabilities* (Article 25) and the *Convention on the Rights of the Child* (Article 24).
  - The right to health of Indigenous Peoples is recognized in the *UN Declaration on the Rights of Indigenous Peoples*, which has been affirmed by Canada in the *United Nations Declaration on the Rights of Indigenous Peoples Act* as a universal international human rights instrument with application in Canadian law.
6. The *Vienna Convention's* general rule of interpretation under Article 31(3)(c) also requires treaty parties to interpret their obligations – including obligations under TRIPS – by “taking into account any relevant rules of international law applicable in the relations

between parties,” which includes in this instance the international human rights obligations enumerated above.

7. Supporting the proposed waiver of TRIPS obligations is consistent with WTO Members’ own previous agreements regarding the interpretation and application of TRIPS. In the *Doha Declaration on TRIPS and Public Health* (2001), the WTO Ministerial Conference expressly declared: “We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.” Article 31(3)(b) of the *Vienna Convention on the Law of Treaties* requires treaty parties to interpret their treaty obligations in light of “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”
8. Canada has the flexibility under the TRIPS Agreement to avoid any potential conflict between the TRIPS Agreement and international human rights obligations, including most obviously and easily by agreeing to the TRIPS waiver. Doing so is both in keeping with WTO Members’ own previous agreement to interpret and implement TRIPS to support efforts by Members to protect public health and promote universal access to medicines, and gives effect to its legal obligations to respect, protect and fulfil – including through international assistance and cooperation – the universal rights to enjoy the benefits of scientific progress, to enjoy the highest attainable standard of health, and to life. As such, taking the step of supporting the proposed TRIPS waiver is in keeping with the correct interpretation of the TRIPS Agreement (pursuant to VCLT’s rules of treaty interpretation requiring attention to WTO Members’ own Doha Declaration) and with Canada’s obligations under the VCLT to perform its human rights treaty obligations in good faith.

### ***Section 7 of the Canadian Charter of Rights and Freedoms***

9. Canada's failure to support the TRIPS waiver at the WTO has placed the lives of residents of Canada at risk by preventing wider access in developing countries to health products and technologies necessary to combat the spread of COVID-19. This has increased the risk that deadly variants will emerge which, in turn, has led to increased risk of such variants entering Canada and either infecting or leading to serious illness or deaths in Canada. This reasonably foreseeable consequence of a failure to adopt the TRIPS waiver thereby deprives residents of Canada of their rights to life and security of the person under section 7 of the *Canadian Charter*. Such deprivation is not in accordance with principles of fundamental justice, which include the requirement of good faith performance of human rights treaty obligations as a peremptory norm of international law. This violation of section 7 is not justifiable under section 1 of the *Canadian Charter*.

### ***Section 15 of the Canadian Charter of Rights and Freedoms***

10. Canada's failure to support the TRIPS waiver at the WTO has served to create greater risk to the lives and health of elderly persons, persons with disabilities, Black people and other racialized persons, Indigenous Peoples, women, persons experiencing poverty and other groups whose equality rights are protected under section 15 of the *Canadian Charter of Rights and Freedoms*. As such, it constitutes a violation of section 15 of the *Canadian Charter*, which violation is not justified under section 1.

### ***Unreasonable Exercise of Prerogative Powers***

11. Canada has a legal obligation to ensure that its interpretation and implementation of provisions in the TRIPS Agreement do not violate its obligations under both international human rights law and the *Charter*, which, in the event of any conflict, must enjoy primacy both constitutionally and as a matter of international law.

12. The exercise of discretionary prerogative powers is constrained by Canada's international human rights obligations and must be exercised in a manner that accords with Canada's international human rights values and with the *Canadian Charter*. In light of the harms to health and life of failing to take all appropriate measures to rapidly increase equitable access globally to health products needed for the prevention, treatment and containment of COVID-19, Canada's decision not to support the TRIPS waiver constitutes an unreasonable exercise of prerogative powers.