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Investment Treaty Arbitration and the Trips Patent Waiver: Indirect Expropriation Analysis of Covid-19 Vaccine Patents

JEAN PAUL ROEKAERT*

ABSTRACT

Intending to promote greater access to Covid-19 vaccines, a group of developing countries submitted a proposal to the World Trade Organization (WTO) recommending a waiver that would temporarily exempt all WTO members from the obligation to comply with Section 5 (Patents) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). If approved, states would be permitted to adopt domestic measures suspending the minimum protections afforded to Covid-19 vaccine patents under the TRIPS Agreement. In this article, I consider whether the owners of Covid-19 vaccine patents may have a compensable indirect expropriation claim under investment treaty arbitration against a state waiving their patent rights. My analysis concludes that, under modern treaty practice, the owners of Covid-19 vaccine patents will find it difficult to win on the merits. Nevertheless, states should take precautionary measures to maintain their regulatory space by reviewing their treaties to ensure they include the necessary IP-related safeguards.

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I. INTRODUCTION

> [The] tandem of economic and political importance, combined with persistent international tensions concerning the proper scope, length of protection, and enforcement of intellectual property and IPRs, forms a potent cocktail in which disputes concerning intellectual property can arise between foreign investors and host states.[1]

The Covid-19 pandemic has exacerbated issues at the intersection of international investment law (IIL), intellectual property (IP), and public health. Access to medicines, especially Covid-19 vaccines, is crucial to contain and suppress the virus. Even though multiple safe and effective Covid-19 vaccines have been developed in record time, the global vaccination rollout reveals acute disparities in vaccination rates between developed and developing countries, leaving many millions of people in low-income countries unvaccinated and vulnerable to infection.[2]

To promote greater access to Covid-19 vaccines, on October 2, 2020, India and South Africa submitted a proposal to the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) recommending a waiver that would temporarily exempt all WTO members from the obligation to comply with, *inter alia*, Section 5 (Patents) of the TRIPS Agreement in relation to products required to prevent, treat, and contain Covid-19 (hereinafter “the TRIPS patent waiver”).[3] The proposal garnered widespread support, and on May 25, 2021, a revised submission was co-sponsored by 65 developing countries.[4]

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1. Christopher Gibson, *A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation*, 25 AM. U. INT’L L. REV. 357, 360-61 (2010).

2. *See* U.N. DEV. PROGRAMME, SUPPORT TO VACCINE EQUITY BEYOND RECOVERY: TOWARDS 2030 1-2 (2021), www.undp.org/library/support-vaccine-equity-beyond-recovery-towards-2030.

3. *See* Council for Trade-Related Aspects of Intellectual Property Rights, *Waiver From Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, Communication From India and South Africa*, WTO Doc. IP/C/W/669 (Oct. 2, 2020).

4. *See* Council for Trade-Related Aspects of Intellectual Property Rights, *Waiver From Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, Communication From The African Group, The Plurinational State of Bolivia, Egypt, Eswatini, Fiji, India, Indonesia, Kenya, The LDC Group, Maldives, Mozambique, Mongolia, Namibia, Pakistan, South Africa, Vanuatu, The Bolivarian Republic of Venezuela and Zimbabwe*, WTO Doc. IP/C/W/669/Rev. 1 (May 25, 2021).

Assuming the TRIPS patent waiver was approved, states would be permitted to adopt domestic measures suspending the minimum protections afforded to Covid-19 vaccine patents under the TRIPS Agreement. For instance, a state could suspend the "right to exclude" under Article 28, which grants patent owners the right to prevent third parties from exploiting their patents without their consent.[5] Consequently, anyone within that state could produce Covid-19 vaccines without infringing on the patent rights of the owners of those vaccines (hereinafter "the Patentees").[6] Moreover, any measure adopted by a state that falls within the scope of the waiver would be nonjusticiable at the WTO.[7] Accordingly, the Patentees would not be able to rely on diplomatic protection to pursue a claim against a state waiving their patent rights. They could, however, rely on investor-state dispute settlement (ISDS) within international investment agreements (IIAs) to bring the claim themselves.[8] In fact, ISDS claims against states adopting measures during times of crisis are not uncommon.[9]

Such a scenario generates a contradiction between WTO law and IIL. On the one hand, WTO law provides a solution to the inequitable access to Covid-19 vaccines, whilst on the other hand, IIL may deter states from implementing this solution. The principle of systemic integration reflected in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) provides that treaties must be interpreted taking into account "any relevant rules of international law applicable in the relations between the parties."[10] Under this principle, the approval of the TRIPS patent waiver would not

5. Agreement on Trade-Related Aspects of Intellectual Property Rights § 5, art. 28(1)(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

6. *See* Council for Trade-Related Aspects of Intellectual Property Rights, *Waiver From Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, Communication From The African Group, The Plurinational State of Bolivia, Egypt, Eswatini, Fiji, India, Indonesia, Jordan, Kenya, The LDC Group, Malaysia, Maldives, Mozambique, Mongolia, Namibia, Pakistan, South Africa, Vanuatu, The Bolivarian Republic of Venezuela and Zimbabwe*, ¶ 6, WTO Doc. IP/C/W/684 (Sept. 30, 2021) [hereinafter TRIPS Waiver Proposal].

7. *See* ISABEL FEICHTNER, THE LAW AND POLITICS OF WTO WAIVERS: STABILITY AND FLEXIBILITY IN PUBLIC INTERNATIONAL LAW 169 (2012).

8. For the purpose of this article, the term "IIA" is used to encompass both bilateral investment treaties (BITs), multilateral investment treaties (MITs) and investment chapters within free trade agreements (FTAs).

9. *See generally* Federico Lavopa, *Crisis, Emergency Measures and the Failure of the ISDS System: The Case of Argentina,* S. CTR., INV. POL'Y BRIEF, 2015.

10. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. *See* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L. & COMPAR. L. Q. 279, 280 (2005) (stating that the principle of systemic integration is reflected Article 31(3)(c) of the VCLT).

foreclose the Patentees' ability to rely on ISDS because investment protections cannot be mixed with non-investment interests.[11] Therefore, WTO law will not exonerate state adopted measures in breach of IIL protections.

Against this background, I consider whether the domestic implementation of the TRIPS patent waiver may constitute an indirect expropriation of Covid-19 vaccine patents under investment treaty arbitration. In other words, this article discusses whether the Patentees may have a compensable indirect expropriation claim under ISDS against a state waiving their patent rights. My analysis focuses exclusively on the standard of protection against expropriation because it is the most likely challenge to a state domestically implementing the waiver.[12] It is worth noting that this article does not assess the merits of the TRIPS patent waiver nor imply that the proposal will eventually be approved. On the contrary, on June 17, 2022, the 12th Ministerial Conference of the WTO opted for a narrower waiver, suspending only certain provisions relating to compulsory licenses under Article 31 of the TRIPS Agreement.[13] Nonetheless, the TRIPS patent waiver is worth examining under IIL given the widespread support it has garnered and the possibility of similar requests in the future.[14]

Although IP rights (IPRs) have long been protected under IIAs, the relationship between IPRs and IIL remains unsettled given that there are few relevant IP-related cases.[15] These cases include *Philip Morris v. Uruguay*,[16] *Eli Lilly v. Canada,*[17] and *Bridgestone Licensing v. Panama*.[18]

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11. Edward Guntrip, *Systemic Integration and International Investment Law, in* SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 257, 268 (James Crawford & Sarah Nouwen eds., 3rd ed. 2010).

12. For an analysis on whether the Patentees may have a compensable fair and equitable treatment (FET) claim against a State domestically implementing the TRIPS patent waiver *see generally* Bryan Mercurio & Pratyush Nath Upreti, *The Legality of a TRIPS Waiver for Covid-19 Vaccines Under International Investment Law*, 71 INT'L. & COMPAR. L. Q. 323 (2022).

13. *See* Ministerial Conference, Twelfth Session, *Draft Ministerial Decision on the TRIPS Agreement*, WTO Doc. WT/MIN(22)/W/15/Rev. 2 (June 17, 2022).

14. *See generally* Miquel Montañá, *Covid-19 and India's and South Africa's Attempt to Reopen the TRIPS Pandora's Box: A Proposal Made in Vain?,* 43(6) EUR. INTELL. PROP. REV. 349 (2021).

15. Mercurio & Upreti, *supra* note 12, at 325-26.

16. Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016), 18 ICSID Rep. 450 (2020) [hereinafter Philip Morris v. Uruguay].

17. Eli Lilly & Co. v. Government of Canada, ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3544/DC10133_En.pdf [hereinafter Eli Lilly v. Canada].

18. Bridgestone Licensing Services, Inc. & Bridgestone Americas, Inc. v. Republic of Panama, ICSID Case No. ARB/16/34, Decision on Expedited Objections (Dec. 13, 2017),

Notwithstanding, scholars have not been deterred from considering hypothetical questions, including whether the issuance of a compulsory license may amount to a claim for indirect expropriation under investment treaty arbitration.[19] Since the TRIPS patent waiver bears many similarities with compulsory licenses, the analysis conducted by these scholars provides useful guidance. That being said, the TRIPS patent waiver and compulsory licenses differ significantly. Thus, the inquiry into the TRIPS patent waiver represents uncharted territory at the interface of IIL and IPRs.

The article is structured as follows. Part II provides background on the TRIPS patent waiver, discussing its legal basis and distinguishing it from compulsory licenses. Moreover, to understand the issues raised by the TRIPS patent waiver, I provide a brief overview of patents, the theory justifying their protection, their importance in the global economy, and the international protections afforded to them under the TRIPS Agreement. Part III considers whether Covid-19 vaccine patents constitute a "protected investment" under IIL. For the purpose of this inquiry, I discuss the role that domestic law plays in determining whether the Patentees may rely on ISDS. Moreover, I assess the extent to which Covid-19 vaccine patents meet the definition of "investment" under both IIAs and Article 25 of the ICSID Convention.

Part IV is the heart of this article. Part IV considers whether the Patentees may have a compensable indirect expropriation claim under ISDS against a state implementing the TRIPS patent waiver. To answer this question, I provide background on the standard of protection against expropriation, outlining the competing approaches used by arbitral tribunals to determine whether a measure constitutes an indirect expropriation requiring compensation or a non-compensatory regulation. At the same time, I examine the TRIPS patent waiver under each of these approaches to determine whether its domestic implementation may constitute an indirect expropriation of Covid-19 vaccine patents. Moreover, given that many IIAs include provisions affording exceptions to the application of the standard, I assess whether the TRIPS patent waiver falls under the scope of these provisions and therefore preclude the Patentees from having a compensable indirect expropriation claim. Finally, Part V concludes.

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https://www.italaw.com/sites/default/files/case-documents/italaw9453.pdf [hereinafter Bridgestone Licensing v. Panama].

19. *See, e.g.*, Gibson, *supra* note 1; Tsai-Yu Lin, *Compulsory Licenses for Access to Medicines, Expropriation and Investor-State Arbitration Under Bilateral Investment Agreements – Are There Issues Beyond the TRIPS Agreement?*, 40 INT'L REV. INTELL. PROP. & COMPETITION L. 152 (2009); Carlos M. Correa, *Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses*, 26 MICH. J. INT'L L. 331 (2004).

II. TRIPS PATENT WAIVER

The object of this section is to provide background on the TRIPS patent waiver. The TRIPS patent waiver targets the exclusive rights granted to patent owners; hence, to understand what is at stake, I provide a brief overview of patents, the theory justifying their protection, their importance in the global economy, and the international protections afforded to them under the TRIPS Agreement (Section II.A). I then discuss the legal basis of the TRIPS patent waiver, namely, the law of WTO waivers, explaining their legal effect, the WTO's competence to grant such waivers, and waiver procedure relating to decision-making and compensation (Section II.B). Finally, I distinguish the TRIPS patent waiver from provisions providing flexibilities within the TRIPS Agreement, particularly compulsory licenses issued under Article 31 (Section II.C).

A. Patents Overview

Patents provide inventors with exclusive rights over their inventions.[20] For an invention to qualify for a patent, it must be novel, useful, and reduced to practice. Moreover, the inventor must file a patent application with the respective patent authority in the state where it is seeking protection. The patent authority, in turn, assesses whether the invention qualifies for a patent and decides whether to grant or deny the application. Accordingly, patents are territorial in scope, meaning that they are only protected within the territory of the jurisdiction that granted them. Additionally, when a patent is granted, its application provides the public with the know-how underpinning the invention once the patent expires. In this sense, a patent grant is regarded as a bargain in which the inventor receives exclusive rights over his invention for a set period of time, in exchange for the know-how underpinning the invention.[21]

The incentive theory provides the most cited rationale for granting a patent.[22] By rewarding inventors with exclusive rights over their inventions, patents ensure that inventors receive adequate compensation for the time, effort and resources invested in developing their inventions. If patents did not exist, anyone could copy someone else's invention without their consent,

20. DANIEL C.K. CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES AND MATERIALS 291 (3rd ed. 2018).

21. *Id*.

22. *Id.* at 292. See Edmund Kitch, *The Nature and Function of the Patent System* 20 J.L. & ECON. 265 (1977), for a different theory, namely, the prospect theory.

thereby affecting the ability of the inventor to recover the costs incurred to develop their invention. For this reason, incentivizing and protecting inventors by rewarding them with patents where the invention meets certain requirements promotes technological progress.[23]

Patents have long had an international dimension.[24] Historically, patents have been used as a means to incentivize foreign investors to introduce their inventions into a territory in exchange for exclusive rights to their invention for a set period of time. In this respect, patents provide foreign investors with the legal protection necessary to enter a foreign market and leverage the monopoly over their invention to maintain a competitive advantage.[25] These benefits are why patents are some of the most valuable assets of transnational corporations and the global economy.[26]

In light of the importance, developed states have sought to protect patents by standardizing, through international treaties, the protections afforded to them.[27] The TRIPS Agreement establishes in Section 5 the minimum substantive protections that must be provided with the grant of a patent.[28] These protections include: the duration for which a patent must be protected, the exclusive rights patents must be afforded, and the limitations on when governments may authorize an exception to these rights.[29] If any WTO member violates a provision under the TRIPS Agreement, a claim may be brought against that member within the WTO.[30] Surprisingly, it is precisely here where the TRIPS patent waiver, if approved, would operate. Not only would it temporarily waive the international minimum substantive protections provided to patent owners, but it would also preclude WTO members from bringing a claim within the WTO against any member state adopting a measure that falls within the scope of the waiver.

23. *See* CHOW & LEE, *supra* note 20, at 292.

24. *Id*.

25. *Id.* at 293.

26. Markus Perkams & James M. Hosking, *The Protection of Intellectual Property Rights Through International Investment Agreements: Only a Romance or True Love?*, 2 TRANSNAT'L DISP. MGMT. 1, 3 (2009).

27. CHOW & LEE, *supra* note 20, at 293-95.

28. TRIPS Agreement, *supra* note 5, § 5.

29. *See id.* arts. 28, 31, 33.

30. Daniel Gervais, *Agreement on Trade-Related Aspects of Intellectual Property Rights (1994)*, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW para. 46 (Rüdiger Wolfrum ed., 2011).

B. The Law of WTO Waivers

Waivers are an essential component of the WTO legal system. As a legal instrument, waivers serve an important regime-building and law-making function. With regards to their legal effect, a waiver temporarily suspends a legal obligation, relieving the beneficiary from the burden of complying with it.[31] For this reason, any measure adopted by the beneficiary that falls within the scope of a waiver will not constitute a breach of the underlying legal obligation. Moreover, the legal effect of a waiver is not limited to the beneficiary of the waiver but binds all WTO members.[32] Consequently, no member state can effectively claim that the beneficiary has breached a legal obligation that has been waived.

The power of the WTO to issue a waiver comes from Article IX of the WTO Agreement. Article IX:3 reads as follows:

> "In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph."[33]

In relation to the legal obligations that may be waived, Article II:2 of the WTO Agreement defines the term "Multilateral Trade Agreement" as the "agreements and associated legal instruments included in Annexes 1, 2 and 3" of the WTO Agreement.[34] The TRIPS Agreement is included under Annex 1C; therefore, any obligation within it, such as those in Section 5 (Patents), may be waived under Article IX. In fact, Isabel Feichtner notes that there have been several instances of waiver decisions suspending obligations under the TRIPS Agreement.[35] For example, obligations under Article 31(f) were waived, under the Doha Declaration, to allow the export of medicines produced under compulsory licenses to states lacking the manufacturing capability to use compulsory licenses themselves effectively.[36]

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31. FEICHTNER, *supra* note 7, at 169.
32. *Id*. at 169-70.
33. Marrakesh Agreement Establishing the World Trade Organization art. IX:3, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 [hereinafter WTO Agreement].
34. *See id.* art. II:2.
35. FEICHTNER, *supra* note 7, at 180.
36. Carlos M. Correa et al., *Implementation of a TRIPS Waiver for Health Technologies and Products for COVID-19: Preventing Claims Under Free Trade and Investment*

Under Article IX:3, the WTO's authority to grant a waiver is circumscribed by the substantive requirement that "exceptional circumstances" exist. Even though the term "exceptional circumstances" lacks an authoritative definition, under both the WTO and its predecessor (the GATT 1947), the existence of exceptional circumstances is seldom discussed between member states when deciding whether to grant a waiver.[37] Regarding the TRIPS patent waiver, the circumstances, namely, the Covid-19 pandemic and the urgent need for Covid-19 vaccines, are undoubtedly exceptional. It is common knowledge that there has not been a pandemic of this magnitude in over a century. Thus, the substantive requirement under the provision is most likely met.

Moreover, the WTO's competence to grant a waiver is further limited by the wording "on a Member." According to Feichtner, a strict interpretation of this wording suggests that waivers are not adopted for the benefit of a group of members or even the entire WTO membership, but rather for individual members who, due to undue hardship, cannot comply with a particular obligation. In practice, however, Feichtner points out that collective waivers are not uncommon.[38] Therefore, if the past is prologue, a TRIPS patent waiver requested by some members on behalf of the entire WTO membership does not contravene Article IX:3.[39]

Concerning waiver procedure, Article IX:3 states that a decision to approve a waiver "shall be taken by three fourths of the Members." However, since the early days of the international trade regime, decisions on whether to approve a waiver have been taken by consensus.[40] Moreover, in light of Article IV:2 of the WTO Agreement, waiver decisions have typically been taken by the General Council acting on behalf of the Ministerial Conference when the latter is not in session.[41] Footnote 1 to Article IX:1 of the WTO Agreement clarifies the term "consensus." Footnote 1 states that the WTO "shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is

Agreements, at 2, S. Ctr. Rsch. Paper 135 (Sept. 2015), https://www.southcentre.int/wp-content/uploads/2021/09/RP135_Implementation-of-a-TRIPS-Waiver-for-Health-Technologies-and-Products-for-COVID-19_EN-1.pdf. [hereinafter Correa et al.].

37. FEICHTNER, *supra* note 7, at 182.

38. *Id*. at 182-87.

39. *Contra* Montañá, *supra* note 14, at 349-50 (stating that a waiver request on behalf of the whole WTO membership is at odds with the underlying rationale for granting a waiver).

40. FEICHTNER, *supra* note 7, at 219.

41. *Id.* at 163; *See also* WTO Agreement, *supra* note 33, at 14 ("In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council.").

taken, formally objects to the proposed decision."[42] In other words, decision-making by consensus provides each WTO member with the right to veto a waiver request.[43] Unless all members present unanimously support the waiver, a waiver request will not be approved. Therefore, the basis for a waiver decision within the WTO is not strictly legal but rather quasi-political. This modus operandi for decision-making in the WTO generates a towering threshold for approving a waiver.[44]

With regard to the TRIPS patent waiver, the European Union (EU) has persistently opposed its approval, instead reaffirming "the right of WTO Members to use the provisions in the TRIPS Agreement, which provide flexibility for this purpose, including those relating to compulsory licensing."[45] In turn, the members requesting the waiver, contend that the requirements to issue compulsory licenses are too burdensome. Further, they maintain that compulsory licenses would not solve the issue of inequitable vaccine access because they are inadequate to quickly scale up production.[46] Despite the contentions advanced by the members requesting the waiver, if the EU or any other WTO member opposes the request, the TRIPS patent waiver will not be approved due to a lack of consensus.

Finally, WTO members often worry that measures taken by the beneficiary of a waiver, within the scope of the legal obligation waived, may impact their economic interests.[47] For this reason, compensation provisions are sometimes included in a waiver decision. Nonetheless, Feichtner points out that their inclusion is not required to grant a waiver while noting that most waivers do not provide compensation.[48] On this point, it is essential to mention that the request for the TRIPS patent waiver, as it stands, remains silent on this matter.

42. WTO Agreement, *supra* note 33, art. IX:1.

43. FEICHTNER, *supra* note 7, at 220.

44. *See generally* Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 339–374 (2002), for literature on consensus-based decision making within the WTO.

45. Communication from the European Union to the Council for TRIPS–*Council Declaration on the TRIPS Agreement and Public Health in the Circumstances of a Pandemic*, WTO Doc. IP/C/W/681 (June 18, 2021).

46. *See* TRIPS Waiver Proposal, *supra* note 6.

47. FEICHTNER, *supra* note 7, at 231.

48. *Id*.

C. Distinguishing the TRIPS Patent Waiver from Compulsory Licenses

In order to distinguish the TRIPS patent waiver from compulsory licenses, it is necessary to provide context on the nature of compulsory licenses and their respective legal basis. A compulsory license allows someone other than the patent owner to use the patent without the owner's consent.[49] In this regard, a compulsory license provides a narrow exception to the exclusive rights granted to patent owners. A government may authorize a compulsory license for a third party and for itself. Moreover, governments typically authorize compulsory licenses in response to a national emergency or to address anti-competitive behavior in the market.[50] Given that compulsory licenses force the transfer of technology from inventors to third parties without the inventor's consent, they are highly controversial. Nevertheless, compulsory licenses have been recognized internationally for over a century and, although rarely used, statutes providing for compulsory licenses are relatively common in jurisdictions across the world.[51]

At the international level, the TRIPS Agreement contains articles providing for flexibilities that permit the issuance of a compulsory license. Under Article 31 of the TRIPS Agreement, WTO members may authorize the issuance of a compulsory license as long as certain conditions are met.[52] Amongst these conditions, Article 31(h) requires that "the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization."[53] Therefore, for a compulsory license to be lawful, the right holder affected by such authorization must be adequately compensated.

Compulsory licenses differ from the TRIPS patent waiver in three important respects. First, the legal basis behind each measure is different. While the legal basis of compulsory licenses stems from Article 31 of the TRIPS Agreement, the power of the TRIPS patent waiver comes from Article IX of the WTO Agreement, under which provisions within the TRIPS Agreement may be waived. Moreover, each measure interferes with the IPRs of private parties to a different degree. While a compulsory license authorizes a specific

49. CHOW & LEE, *supra* note 20, at 480.
50. Gibson, *supra* note 1, at 364.
51. *Id*. at 368.
52. *See* TRIPS Agreement, *supra* note 5, art. 31.
53. *Id.* art. 31.

number of third parties to use a patent without the owner's permission and is therefore narrower in scope, the TRIPS patent waiver, by contrast, is much broader, permitting anyone within a state implementing the waiver to exploit a patent without the owner's consent. Third, both measures differ on whether compensation is required for their authorization. Unlike compulsory licenses, which require the payment of adequate compensation to the right holder to be authorized, WTO waivers do not require compensation. These differences are important when assessing whether the domestic implementation of the TRIPS patent waiver may constitute an indirect expropriation of Covid-19 vaccine patents under investment treaty arbitration. I will revisit these differences in Part IV of this article.

III. COVID-19 VACCINE PATENTS AS A "PROTECTED INVESTMENT"

The object of this section is to consider whether Covid-19 vaccine patents constitute a "protected investment" under IIL. The concept of a "protected investment" is critical to the application of IIAs and the subject-matter jurisdiction of arbitral tribunals.[54] Accordingly, an arbitral tribunal may only adjudicate a claim if the asset qualifies as a "protected investment." In making this determination, the host state‘s domestic law plays a crucial role.[55] As put forth by the arbitral tribunal in *Philip Morris v. Uruguay*, the property rights protected under an IIA are not created by the treaty but rather by the domestic law of the host state.[56] Hence, when assessing whether a foreign investment falls under the protection of an IIA, arbitral tribunals first examine whether the asset constituting the alleged investment is recognized under the host state's law.[57] In other words, arbitral tribunals assess whether the host state's domestic law affords that particular type of asset property rights.

54. CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 6.01 (2d ed. 2017); Carlos Correa, *Intellectual Property as Protected Investment: Redefining the Reach of Investors' Rights*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND INVESTMENT LAW 120, 123 (Christophe Geiger ed., 2020).

55. SIMON KLOPSCHINSKI, CHRISTOPHER S. GIBSON & HENNING GROSSE RUSE-KHAN, THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS UNDER INTERNATIONAL INVESTMENT LAW ¶ 4.98 (2021).

56. Philip Morris v. Uruguay, *supra* note 16, ¶ 243.

57. *E.g.*, Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Direction on Quantum, ¶¶ 416-40 (Sept. 9, 2021) [hereinafter Eco Oro v. Colombia]. *But see* Eli Lilly v. Canada, *supra* note 17 (the arbitral tribunal adjudicated on a claim based on the revocation of two pharmaceutical patents despite the fact that the claimant did not have any other property in the territory of the respondent State besides the revoked patents).

If an alleged investment is not recognized under the domestic law of the host state, the foreign investor may not bring a claim under investment treaty arbitration because it lacks a property right within the host state's territory.[58] Zachary Douglas has summarized the aforementioned as follows: "[i]nvestment disputes are about investments, investments are about property, and property is about specific rights over things cognizable by the municipal law of the host state."[59]

With regard to Covid-19 vaccine patents, given that patent rights are territorial in scope, the grant of a patent in one state does not afford protections in another state. That being said, in order for the Patentees to bring a claim against a state implementing the TRIPS patent waiver, the patents to their vaccines must be registered within the respondent state's jurisdiction. If they are not, the Patentees do not have a property right to base their claim on and therefore may have trouble accessing investment treaty arbitration.

The assessment of arbitral tribunals, however, does not end here. Upon finding that the claimant has a property right in the host state, arbitral tribunals examine whether the asset meets the definition of "investment" under the applicable IIA. Moreover, for parties choosing to resolve their investment dispute under ICSID arbitration, arbitral tribunals assess whether the asset satisfies the definition of "investment" developed under Article 25 of the ICSID Convention.[60] Accordingly, I evaluate whether Covid-19 vaccine patents meet the definition of "investment" under IIAs (Section III.A) and Article 25 of the ICSID Convention (Section III.B).

A. "Investment" under International Investment Agreements (IIAs)

To assess whether Covid-19 vaccine patents meet the definition of "investment" under IIAs, I must first determine the circumstances under which IPRs generally and patents in particular are protected under these treaties.

58. Correa, *supra* note 54, at 124-25.

59. Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151, 197 (2003).

60. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 61 (2d ed. 2012). *See, e.g.*, Toto Construzioni Generali S.P.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 66 (Sept. 11, 2009) ("[G]iven that the case at hand is submitted to an ICSID Tribunal, the Tribunal agrees with Lebanon that, for this Tribunal to have jurisdiction, it is not sufficient that the dispute arises out of an investment as per the meaning of 'investment' given by the parties in the Treaty, but also as per the meaning of 'investment' under the ICSID Convention."); Noble Energy, Inc. v. The Republic of Ecuador, ICSID Case No. ARB/05/12, Decision on Jurisdiction, ¶¶ 135-37 (Mar. 5, 2008).

Contrary to popular belief, investment treaties have long included IPRs within their definition of investment.[61] Currently, over 2,500 IIAs are in force,[62] most of which define the term "investment" in a manner that covers IPRs.[63] How IPRs are covered, however, is not uniform.[64]

Indeed, IPRs can be covered under IIAs in many ways. Most commonly, IIAs define "investment" as "every kind of asset" followed by a non-exclusive list of assets protected under the treaty in which the terms "IPRs" or "patents" are explicitly included.[65] This approach eliminates any potential ambiguity concerning whether IPRs generally and patents specifically fall within the scope of application of the treaty.[66] That being said, a minority of IIAs do not include the terms "IPRs" or "patents" within their definition of investment and instead define "investment" broadly to encompass "every kind of asset."[67] In this case, the term "asset," under Article 31 of the VCLT[68] may be construed to include intangible property, such as IPRs.[69] As stated by Julian Mortenson, "[IP] is so clearly recognized by international instruments as a form of property … that the default presumption must be that it would be included in any of these broad definitions of investment."[70]

Where "investment" is defined in any of these asset-based variations, the mere act of registering a patent within the host state may constitute an

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61. Bryan Mercurio, *Keep Calm and Carry On: Lessons from the Jurisprudence on Fair and Equitable Treatment and Intellectual Property Rights*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND INVESTMENT LAW 159, 160 (Christophe Geiger ed., 2020). *See, e.g.*, Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., art. 8(1)(a), Nov. 25, 1959, 457 U.N.T.S. 6575 ("The term 'investment' shall comprise . . . patents and technical knowledge.").

62. *See International Investment Agreements Navigator*, U.N. CONF. ON TRADE & DEV., https://investmentpolicy.unctad.org/international-investment-agreements (last visited July 8, 2022).

63. Julian D. Mortenson, *Intellectual Property as Transnational Investments: Some Preliminary Observations*, 6 TRANSNAT'L DISP. MGMT. 1, 5-6 (2009); Bryan Mercurio, *Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements*, 15 J. INT'L ECON. L. 871, 872 (2012).

64. *See* Rachel A. Lavery, *Coverage of Intellectual Property Rights in International Investment Agreements: An Empirical Analysis of Definitions in a Sample of Bilateral Investment Treaties and Free Trade Agreements*, 6 TRANSNAT'L DISP. MGMT. 1, 13 (2009).

65. *Id.* at 4; Mortenson, *supra* note 63, at 4. *See, e.g.*, France Model Bilateral Investment Treaty, 2006, art. 1(1)(d) (defining the term investment as "every kind of asset, such as . . . intellectual, commercial and industrial property rights such as copyrights, patents, licenses, trademarks . . . .").

66. LUKAS VANHONNAEKER, INTELLECTUAL PROPERTY RIGHTS AS FOREIGN DIRECT INVESTMENT: FROM COLLISION TO COLLABORATION 9-10 (2015).

67. *Id.* at 11.

68. VCLT, *supra* note 10, art. 31.

69. VANHONNAEKER, *supra* note 66, at 11; Correa, *supra* note 54, at 123.

70. Mortenson, *supra* note 63, at 5-6.

investment.[71] For this reason and in light of the widespread protection of IPRs under IIAs, where the Patentees have registered their Covid-19 vaccine patents within the host state, they will normally qualify for protection under investment treaty arbitration. However, a new generation of IIAs imposes additional qualifications on what constitutes an investment. In particular, they require that the asset have the characteristics of an investment, reflecting all or some of the elements of the *Salini* test developed under Article 25 of the ICSID Convention.[72] This new trend constrains what may qualify as an investment and therefore limits the circumstances under which IPRs may qualify for protection under investment treaty arbitration.[73] The circumstances under which Covid-19 vaccine patents qualify as an "investment" under Article 25 of the ICSID Convention are examined in the following section.

B. "Investment" under Article 25 of the ICSID Convention

Article 25(1) of the ICSID Convention, which puts forth the jurisdictional requirements for access to ICSID arbitration, provides that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment."[74] Although the provision refers to an "investment," the term is not defined under the ICSID Convention.[75] While this affords ICSID tribunals flexibility in applying the provision, it has been the subject of much controversy.[76]

To determine whether an asset qualifies as an investment, ICSID tribunals refer to the *Salini* test, developed through their case law, to assess whether the claimant's investment bears the traditional hallmarks of an

71. KLOPSCHINSKI ET AL., *supra* note 55, ¶ 4.27.

72. *Id.* ¶ 4.34. *E.g.*, U.S. Model Bilateral Investment Treaty, art. 1, 2012 (defining the term "investment" as "every asset … that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.") [hereinafter U.S. Model BIT 2012]; United States-Mexico-Canada Agreement, art. 14(1), July 1, 2020; Comprehensive Economic and Trade Agreement, Can.-European Union, art. 8.1, Oct. 30, 2016 [hereinafter CETA].

73. KLOPSCHINSKI, GIBSON & RUSE-KHAN, *supra* note 55, ¶ 4.27; Correa, *supra* note 54, at 128-29.

74. Convention on the Settlement of Disputes Between States and Nationals of Other States art. 25(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

75. DOLZER & SCHREUER, *supra* note 60, at 65.

76. Julian Davis Mortenson, *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L. J. 257, 309-10 (2010).

investment.[77] Under the *Salini* test, an investment must generally possess the following characteristics: (1) substantial commitment of money or assets; (2) participation in risk; (3) a certain duration; and (4) contribution to the economic development of the host state.[78] Where an investment possesses these characteristics, it is indicative of an "investment."[79] Commentators generally agree that the archetypal categories of IP can meet all elements required under the *Salini* test.[80] In the remainder of this section, I address whether Covid-19 vaccine patents satisfy each criterion of the *Salini* test.

1. Substantial Commitment of Money or Assets

Arbitral tribunals have broadly interpreted the "substantial commitment of money or assets" criterion to require contributions in pursuit of an economic objective.[81] According to Mortenson, patents satisfy this criterion because their development or acquisition generally require substantial capital commitments.[82] However, in *Bridgestone Licensing v. Panama*, the arbitral tribunal held that the mere registration of a trademark in the host state "does not amount to, or have the characteristics of, an investment in that country."[83] In line with this reasoning, some commentators contend that simply registering a patent in the host state, without any additional action, does not pursue

77. Salini Construttori S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 31, 2001) [hereinafter Salini v. Morocco]; Simon Klopschinski, *Public Policy Considerations in Intellectual Property-Related International Investment Arbitration*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND INVESTMENT LAW 33 (Christophe Geiger ed., 2020).

78. *See* Salini v. Morocco, *supra* note 77, ¶ 52. *But see* Phoenix Action, Ltd. v. Czech, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009) (requiring the additional element that the investment be '*bona fide*', that is, made in accordance with the law of the host state).

79. CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY, ¶ 159 (2d ed. 2009). *See, e.g.*, Malaysian Historical Salvors Sdn, Bhd v. Gov't of Malay., ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 106 (May 17, 2007) [hereinafter MHS v. Malay.] ("[I]f any of these hallmarks are absent, the tribunal will hesitate (and probably decline) to make a finding of 'investment.'").

80. VANHONNAEKER, *supra* note 66, at 27; Mortenson, *supra* note 63, at 7.

81. *See, e.g.*, Consorzio Groupement L.E.S.I.-Dipenta v. Alg., ICSID Case No. ARB/03/08, Award, § II, ¶ 14(i) (Jan. 10, 2005) (stating that the foreign investor must have "committed outlays, in some way, in order to pursue an economic objective."); Abaclat & Others v. Arg. ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 365 (Aug. 4, 2011) ("[T]he only requirement regarding the contribution is that it be apt to create the value that is protected under the BIT.").

82. Mortenson, *supra* note 63, at 8; *see also* Deutsche Bank AG v. Sri Lanka, ICSID Case No. ARB/09/02, Award, ¶ 297 (Oct. 31, 2012) ("[A] contribution can take any form. It is not limited to financial terms but also includes know-how . . . .").

83. Bridgestone Licensing v. Pan., *supra* note 18, ¶¶ 171-172.

an economic objective and therefore falls short of satisfying this element.[84] Consequently, as long as the Patentees pursue an economic activity within the respondent state, such as selling their vaccines or licensing their property rights, the patents to Covid-19 vaccines will satisfy this criterion.

2. Participation in Risk

The criterion of "participation in risk" has been interpreted by arbitral tribunals to require something qualitatively greater than the "ordinary commercial risk" associated with one-off transactions.[85] As Mortenson observes, any business venture seeking to introduce a patent-based product in a market is exposed to the risk that its product might not be successful.[86] Moreover, patents are at constant risk of being infringed by third parties, which may harm their economic value.[87] For these reasons, patents generally, and by implication Covid-19 vaccine patents, satisfy this criterion.

3. Certain Duration

Arbitral tribunals have construed the "certain duration" criterion to require a long-term investment commitment of at least two to five years.[88] Under Article 33 of the TRIPS Agreement, patents shall be protected for at least twenty years.[89] Accordingly, inventors typically submit patent applications expecting to exploit their invention within the host state for a long time. The Patentees would have registered their Covid-19 vaccine patents with the expectation of exploiting them for the length of the patent grant, subject to any limitations imposed by the host state. Therefore, Covid-19 vaccine patents satisfy this criterion.

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84. KLOPSCHINSKI, GIBSON & RUSE-KHAN, *supra* note 55, ¶ 4.78.

85. SCHREUER ET AL., *supra* note 79, ¶ 122; s*ee, e.g.,* MHS v. Malay., *supra* note 79, ¶ 112 ("[I]t is clear under ICSID practice and jurisprudence that an ordinary commercial contract cannot be considered as an 'investment.'"); Joy Mining Machinery Ltd. v. Egypt, ICSID No. ARB/03/11, Award on Jurisdiction, ¶ 57 (Aug. 6, 2004).

86. Mortenson, *supra* note 63, at 8.

87. *Id.*

88. *E.g.*, Salini v. Morocco, *supra* note 77, ¶ 54 (stating that for an investment to satisfy the certain duration criterion it must comply "with the minimal length of time upheld by the doctrine, which is from 2 to 5 years."); Jan de Nul N.V. v. Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 93 (June 16, 2006) ("[B]oth parties expressed the opinion that an operation may be characterized as an investment if it lasts at least two years.").

89. TRIPS Agreement, *supra* note 5, art. 33 ("[T]he term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.").

4. Contribution to the Economic Development of the Host State

Finally, the last criterion requires the investment itself to contribute to the economic development of the host state. This criterion has been the subject of much controversy, with some arbitral tribunals, like the tribunal in *Philip Morris v. Uruguay*, noting that the criterion is difficult to ascertain, while other tribunals have dropped the criterion altogether.[90] Mortenson opines that patents satisfy this criterion "simply by virtue of catalyzing economic growth."[91] However, Mortenson recognizes this might not be the case in cases of total disuse.[92] Where a patent is not exploited, it may stifle innovation or create anti-competitive market conditions, ultimately hampering economic growth.[93] For this reason, if the patents to Covid-19 vaccines are not in total disuse within the host state's territory, they will generally satisfy this criterion.

In sum, the patents to Covid-19 vaccines satisfy even the most rigorous elements of the *Salini* test as long as they are registered and exploited within the territory of the host state. Thus, the patents to Covid-19 vaccines will typically meet the definition of "investment" under both modern IIAs and Article 25 of the ICSID Convention. Put differently, Covid-19 vaccine patents will normally qualify as a "protected investment" under IIL.

IV. INDIRECT EXPROPRIATION OF COVID-19 VACCINE PATENTS

Having determined that Covid-19 vaccine patents will typically qualify as a "protected investment" under IIL, this section considers whether the Patentees may have a compensable indirect expropriation claim under ISDS against a state implementing the TRIPS patent waiver. My analysis focuses exclusively on the standard of protection against expropriation because it is the claim the Patentees would most likely raise to challenge a state domestically implementing the waiver. To answer this question, I discuss the standard of protection against expropriation, outlining the different approaches used by arbitral tribunals to determine whether a measure constitutes an indirect expropriation requiring compensation or a non-compensatory regulation. At the same time, I examine the TRIPS patent waiver under each

90. Philip Morris Brands Sàrl v. Uru., ICSID Case No. ARB/10/7, Award on Jurisdiction, ¶¶ 193-210 (July 2, 2013); *e.g.*, L.E.S.I. v. Alg., *supra* note 81, § II, ¶ 13.

91. Mortenson, *supra* note 63, at 9.

92. *Id.*

93. *See* RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 2-8 (Oxford University., 9th ed. 2018).

approach to determine whether its domestic implementation may constitute an indirect expropriation of Covid-19 vaccine patents. To accomplish this, I rely on the few relevant IP-related case law and scholarly analyses on whether the issuance of a compulsory license constitutes an indirect expropriation. (Section IV.A). Moreover, given that many IIAs include provisions affording exceptions to the application of the standard, I assess whether the TRIPS patent waiver falls under the scope of these provisions, therefore precluding the Patentees from having a compensable indirect expropriation claim under investment treaty arbitration (Section IV.B).

A. The Standard of Protection Against Expropriation

The protection against expropriation is one of the cornerstones of IIL.[94] While the expropriation of a foreign investor's property is neither prohibited nor is per se illegal, certain cumulative conditions must be satisfied for an expropriation to be lawful.[95] In other words, a state has the sovereign right to expropriate the property of foreign investors within its territory as long as certain conditions are met.[96] These conditions, required under customary international law and reflected in IIAs,[97] demand that the expropriation be (1) undertaken for a public purpose; (2) in a non-discriminatory manner; (3) in accordance with due process of law; and (4) against payment of compensation.[98]

Expropriation can be of a direct or indirect nature.[99] A direct expropriation occurs when the state formally transfers the legal title of an asset or

94. KLOPSCHINSKI, ET AL., *supra* note 55, ¶ 7.01.

95. *Id.* ¶ 7.03.

96. *See* Case Concerning Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, ¶ 136 (May 25).

97. *E.g.*, Generation Ukraine, Inc. v. Ukr., ICSID Case No. ARB/00/9, Award, ¶ 11.3 (Sept. 16, 2003) ("It is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law."); Glamis Gold, Ltd. v. U.S., UNCITRAL, Award, ¶ 354 (June 8, 2009) ("The inclusion in Article 1110 of the term 'expropriation' incorporates by reference the customary international law regarding that subject.").

98. August Reinisch, *Legality of Expropriation*, in STANDARDS OF INVESTMENT PROTECTION, at 176 (August Reinisch ed., 2008). *E.g.*, Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶ 441 (Sept. 11, 2007) ("[E]xpropriation is legitimate if done for public interest and under domestic legal procedure; if not discriminatory; and if done against compensation.").

99. Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. 1, 9-10 (2005).

right to itself or a third party.[100] According to Christopher Gibson, the issuance of a compulsory license does not amount to a direct expropriation because the property owner is not deprived of the legal title to the IP.[101] Similarly, the domestic implementation of the TRIPS patent waiver would not formally transfer the legal title of Covid-19 vaccine patents to the state or any third party; thus, it would not amount to a direct expropriation. Instead, without dispossessing the Patentees, the measure would authorize any third party to manufacture Covid-19 vaccines within the state without infringing on the IPRs of the Patentees. Moreover, given that the Patentees would not be dispossessed of their IPRs, they could continue to manufacture and sell their vaccines within a state implementing the waiver. Therefore, the domestic implementation of the TRIPS patent waiver would not trigger a direct expropriation analysis. Instead, at issue is whether the implementation of the TRIPS patent waiver may give rise to an indirect expropriation of Covid-19 vaccine patents.

An indirect expropriation occurs where a measure does not amount to a direct expropriation but the effects are tantamount, that is, where the measure permanently and substantially deprive the foreign investor of the enjoyment of the investment.[102] Arbitral tribunals have interpreted substantial interference to require a severe or almost complete deprivation of the use or economic benefit of the investment.[103] Moreover, a measure has permanent effects where the interference with the property right is irreversible.[104] Aside from these common parameters, arbitral tribunals have developed three competing approaches to determine whether a measure constitutes an indirect expropriation requiring compensation: (1) the sole effects doctrine; (2) the

100. *Id. E.g.*, Crystallex Int'l Corp. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶ 667 (Apr. 4, 2016) [hereinafter Crystallex v. Venez.] ("It is generally understood that a 'direct' expropriation occurs where the investor's investment is taken through formal transfer of title or outright seizure . . . ."); El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Award, ¶ 265 (Oct. 31, 2011); Enron Corp. Ponderosa Assets, L.P v. Arg., ICSID Case No. ARB/10/3, Award, ¶ 243 (May 22, 2007).

101. Gibson, *supra* note 1, at 378.

102. Newcombe, *supra* note 99, at 9-10; Christoph Schreuer, *The Concept of Expropriation under the ETC and other Investment Protection Treaties*, 2 TRANSNAT'L DISP. MGMT. 1, 28-9 (2005). *E.g.*, Crystallex v. Venez., *supra* note 100, ¶ 667 ("[A]n 'indirect' expropriation occurs where a state's action or series of actions result in the investor being deprived of the enjoyment or benefit of its investment, although title to the property or the rights remains with the original owner.").

103. CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award, ¶ 262 (May 12, 2005) ("[T]he essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized.").

104. LG & E Energy Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶ 193 (Oct. 3, 2006) ("[T]he expropriation must be permanent, that is to say, it cannot have a temporary nature . . . .").

radical police powers doctrine; and (3) the moderate police powers doctrine.[105] In the following subsections, I discuss the three doctrines and examine the TRIPS patent waiver under each to assess whether its domestic implementation may constitute an indirect expropriation of Covid-19 vaccine patents. The goal is to provide a comprehensive overview of the assessment that an arbitral tribunal would conduct.

1. The Sole Effects Doctrine

Under the sole effects doctrine, the sole criteria to determine whether an indirect expropriation has occurred is the effects of the measure on the protected investment.[106] Where an arbitral tribunal determines that a measure has permanently and substantially deprived the foreign investor of the enjoyment of the investment, the tribunal will find, regardless of the measure's purpose, that the measure constitutes an indirect expropriation requiring compensation.[107] In this light, the sole effects doctrine may be characterized as pro-investor because it protects foreign investors' interests by having states bear the financial burden of any regulation they enact, no matter how laudable their intentions.[108]

A categorization of the TRIPS patent waiver and the rights with which it interferes is required to determine the economic impact that the implementation of the TRIPS patent waiver could have on Covid-19 vaccine patents.[109] As previously discussed, the grant of a patent provides the inventor with the legal right to exclude third parties from exploiting their IP. The underlying rationale for such protection is to ensure that the inventor will recover the resources invested in developing their invention. Notwithstanding, the

105. Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 J. WORLD INV. & TRADE 717, 724-29 (2007).

106. *Id.* at 724.

107. *Id. See, e.g.*, Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 111 (Aug. 30, 2000) ("[T]he Tribunal need not decide or consider the motivation or intent of the adoption of the [measure]."); Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Final Award, ¶ 72 (Feb. 17, 2000) ("[E]xpropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."); Saipem S.p.A. v. People's Republic of Bangl., ICSID Case No. ARB/05/7, Award, ¶ 133 (June 30, 2009).

108. VANHONNAEKER, *supra* note 66, at 42.

109. *See* Newcombe, *supra* note 99, at 34 ("[D]etermining whether there has been a substantial or significant deprivation will necessarily depend on the categorization of what has been taken.").

TRIPS patent waiver specifically targets this protection. If approved, the TRIPS patent waiver would temporarily allow anyone within a state implementing the waiver to exploit Covid-19 vaccine patents without the fear of infringing on the IPRs of the Patentees. For this reason, the TRIPS patent waiver may not only hinder the Patentees' ability to recover their investment but may impact the market value of their patents.

To assess whether the economic impact of the TRIPS patent waiver on Covid-19 vaccine patents would be significant enough to constitute an indirect expropriation, the analysis conducted by scholars concerning whether compulsory patent licenses constitute an indirect expropriation provides useful guidance. According to Lukas Vanhonnaeker, the degree of interference of a compulsory license with the enjoyment of an investment is directly proportional to the scope of the compulsory license's authorization.[110] By way of illustration, a compulsory license issued in favor of a third party interferes with the right of the property owner to grant a license to that specific third party. The greater the number of third parties authorized to use the IP without the owner's consent, the greater the degree of interference with the property owner's right to license.

The TRIPS patent waiver would allow anyone within a state that has domestically implemented the waiver to exploit the patents to Covid-19 vaccines without the Patentees' consent. Hence, the degree by which the measure would interfere with the Patentees' right to license their Covid-19 vaccine patents is much broader than under compulsory licenses, essentially reducing this right to naught. Only a third party wanting to establish a long-term relationship with the Patentees beyond the temporary scope of the waiver would consider licensing the IP directly from the Patentees. Moreover, the breadth of the measure may also influence the assessment of whether the economic impact of the TRIPS patent waiver on Covid-19 vaccine patents is irreversible. The greater the number of third parties exploiting the IP, the greater the risk that the IP will be exploited past the temporary scope of the measure.

Another factor scholars consider when subjecting compulsory licenses to an indirect expropriation analysis is whether the patent owner received any compensation as required under Article 31(h) of the TRIPS Agreement.[111] It is important to highlight the word "factor" because a measure failing to comply with the TRIPS Agreement does not automatically imply that

110. VANHONNAEKER, *supra* note 66, at 56.
111. KLOPSCHINSKI, GIBSON & RUSE-KHAN, *supra* note 55, ¶¶ 7.191-93.

an expropriation has occurred under IIL.[112] If the patent owner was compensated for the issuance of the compulsory license, the economic impact of the authorization would be lessened. However, if the patent owner was not compensated, the economic impact may be significant enough to trigger potential liability for expropriation.[113] As mentioned earlier, the law of WTO waivers does not require any form of compensation, and importantly, the current proposal requesting the TRIPS patent waiver is silent on this matter. If a state domestically implementing the TRIPS patent waiver does not adequately compensate the Patentees, an arbitral tribunal may conclude that the impact of such a measure on Covid-19 vaccine patents has not been lessened in any way and therefore is severe enough to constitute a substantial deprivation.

Given the aforementioned, where an arbitral tribunal applies the sole effects doctrine, the domestic implementation of the TRIPS patent waiver potentially triggers liability for expropriation requiring compensation. Nonetheless, more detailed expropriation provisions within IIAs limit arbitral tribunals from applying the sole effect doctrine, instead giving way to alternative approaches that allow states to justify regulatory measures without having to compensate foreign investors.[114] I examine these alternative approaches in the following subsections.

2. The Radical Police Powers Doctrine

Under the radical police powers doctrine, the decisive criterion to determine if an indirect expropriation occurred is whether the measure was taken for a public purpose.[115] According to this theory, a state can regulate in the public interest without a foreign investor being entitled to compensation as long as the state did not make a specific commitment to the foreign investor that it would refrain from regulating in a certain manner.[116] When a

112. Henning Grosse Ruse-Khan & Federica Paddeu, A TRIPS-COVID WAIVER AND OVERLAPPING COMMITMENTS TO PROTECT INTELLECTUAL PROPERTY RIGHTS UNDER INTERNATIONAL IP AND INVESTMENT AGREEMENTS 32 (S. Ctr., Rsch. Paper No. 144 2022).

113. KLOPSCHINSKI, GIBSON & RUSE-KHAN, *supra* note 55, ¶¶ 7.191-93.

114. *Id.*; *see, e.g.*, U.S. Model BIT 2012, *supra* note 72, Annex B, § 4(a); Indian Model Bilateral Investment Treaty, art. 5.3(b), 2015, UNCTAD [hereinafter India Model BIT 2015]; Neth. Model Investment Agreement, 2019, art. 12(4), UNCTAD.; CETA, *supra* note 72, Annex 8-A.

115. Kriebaum, *supra* note 105, at 726.

116. *Id.*; *E.g.*, Methanex Corp. v. U.S., ITA Inv. Treaty Cases,, Final Award of the Tribunal on Jurisdiction and Merits, pt. IV, ch. D, ¶ 7 (Aug. 3, 2005) ("[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment

state makes a specific commitment, however, it must uphold its commitment or compensate the foreign investor for any regulation enacted in contravention of said commitment. Hence, unlike the sole effects doctrine, the radical police powers doctrine prioritizes state interests by having foreign investors bear the financial burden of any state measure.[117]

With regard to whether a measure is taken for a "public purpose," arbitral tribunals will not second-guess a state's decision on what constitutes a regulation enacted in the public interest as long as the measure is not manifestly unreasonable.[118] According to Tsai-Yu Lin, issuing a compulsory license to ensure access to medicines falls within the range of what is deemed a reasonable public purpose.[119] By the same token, given that the raison d'être of the TRIPS patent waiver is to promote greater access to Covid-19 vaccines to protect public health, the domestic implementation of the TRIPS patent waiver would constitute a reasonable regulation introduced for a public purpose.

In the context of patents as an investment, the question arises whether granting a patent on the part of the state rises to the level of a specific commitment that may support a foreign investor's indirect expropriation claim. In this regard, scholars argue that the grant of a patent does not amount to a specific commitment that the state will refrain from restricting the patent in any way during the period it was granted.[120] The rationale is that the same law that grants the patent contains inherent checks and balances, such as provisions allowing the issuance of compulsory licenses that may circumscribe its protections.[121] Therefore, the registration of Covid-19 vaccine patents in the territory of a host state, without more, such as a contractual agreement between the state and the Patentees, would not amount to a specific commitment on which the latter may base their indirect expropriation claim.

In sum, implementing the TRIPS patent waiver at the domestic level appears to be a reasonable measure that seeks to protect public health by promoting greater access to Covid-19 vaccines. Moreover, the grant of a patent on the part of a state, without more, does not amount to a specific commitment. Therefore, arbitral tribunals applying the radical police powers

that the government would refrain from such regulation."); Saluka Inv. B.V. v. Czech ITA Inv. Treaty Cases, Partial Award, ¶ 262 (Mar. 17, 2006).

117. VANHONNAEKER, *supra* note 66, at 44.

118. Tsai-Yu, *supra* note 19, at 161.

119. *Id*.

120. KLOPSCHINSKI, GIBSON & RUSE-KHAN, *supra* note 55, ¶ 7.72.; *But see* VANHONNAEKER, *supra* note 66, at 57 (stating that a state's grant of a patent "can be considered as a specific undertaking on the part of the State.").

121. KLOPSCHINSKI, GIBSON & RUSE-KHAN, *supra* note 55, ¶ 7.72.

doctrine would probably find that no liability for indirect expropriation is triggered and no compensation is due.

While the two doctrines discussed provide great legal certainty as to whether a measure constitutes an indirect expropriation, they fail to fully grasp the intricacies of the international investment system.[122] In this respect, a more moderate approach, preferred under modern IIAs, allows for a more nuanced analysis to establish whether a measure amounts to an indirect expropriation.[123] I examine the moderate approach in the following subsection.

3. The Moderate Police Powers Doctrine

Under the moderate police powers doctrine, when assessing whether a measure constitutes a compensable indirect expropriation, arbitral tribunals rely primarily on the effect of the interference but also consider the public purpose of the measure.[124] To balance the two criteria, arbitral tribunals, such as the tribunal in *Philip Morris v. Uruguay*, apply a proportionality test. Under this test, if a state passes measures that protect the public interest, those measures do not trigger liability for indirect expropriation as long as (1) foreign investments have not been discriminated against and (2) the public interest protected by the regulatory actions is not significantly disproportional to the protection granted to investments.[125] Some arbitral tribunals have also considered whether the objective pursued by the measure could have been achieved through less burdensome means.[126]

The implementation of the TRIPS patent waiver would apply to any product required to prevent, treat, and contain Covid-19, irrespective of whether foreign investors own the patents to these products or not. Hence,

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122. VANHONNAEKER, *supra* note 66, at 46-47.

123. *Id.*; Kriebaum, *supra* note 105, at 729.

124. Kriebaum, *supra* note 105, at 727.; *e.g.*, S.D. Myers, Inc. v. Government of Can. ITA Inv. Treaty Cases, Partial Award, ¶ 285 (Nov. 13, 2000) (stating that when determining whether an expropriation has occurred, a tribunal "must look at the real interests involved and the purpose and effect of the government measure.").

125. *See* Kriebaum, *supra* note 105, at 729; Philip Morris v. Uru., *supra* note 16, ¶ 305; Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003) ("After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.").

126. *E.g.*, Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahr., ITA Inv. Treaty Cases, Award, ¶ 689 (Nov. 9, 2021).

the Patentees and their Covid-19 vaccine patents would not be discriminated against in a state that implements the TRIPS patent waiver. At issue, however, is whether such a measure passes muster under the proportionality test. As mentioned earlier, the EU has persistently opposed the waiver, contending that the same objective could be accomplished by issuing compulsory licenses. Indeed, compulsory licenses are less burdensome than the TRIPS patent waiver. Nevertheless, as contended by the members requesting the waiver, the speed at which the TRIPS patent waiver would scale up the production of Covid-19 vaccine would be much greater than under compulsory licenses. Therefore, while in principle less restrictive, compulsory licenses may not achieve the objective pursued by the TRIPS patent waiver to a similar degree.

Moreover, as put forth by the arbitral tribunal in *Philip Morris v. Uruguay*, where the state regulation has been enacted for the protection of public health, states should be afforded a great degree of deference.[127] For this reason, given that the TRIPS patent waiver's purpose is to protect public health, arbitral tribunals will most likely afford deference to a state implementing it. Furthermore, the tribunal in *Philip Morris v. Uruguay* stated that the legitimacy of the regulatory action taken by a state is further strengthened if it is regulating in pursuit of international obligations.[128] The members requesting the TRIPS patent waiver allege that adopting such a measure is consistent with Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under the ICESCR, signatory states recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and commit to taking steps to ensure the "prevention, treatment and control of epidemic … and other diseases."[129] They also contend that the TRIPS patent waiver is consistent with the 2030 Sustainable Development Goals, especially SDG 3, which aims to "[a]chieve universal health coverage, including … access to safe, effective, quality and affordable essential medicines and vaccines for all."[130] Certainly, these international commitments would bolster the legitimacy of a state implementing the TRIPS patent waiver. Therefore, under the moderate police powers doctrine,

127. *See* Philip Morris v. Uru., *supra* note 16, ¶ 399 (stating that the margin of appreciation, a judicial doctrine developed by the European Court of Human Rights (ECtHR) under the European Convention on Human Rights (ECHR) whereby states are afforded a great degree of deference for measures enacted in the public interest applies equally to investment arbitration).

128. *Id.* ¶ 307.

129. TRIPS Waiver Proposal, *supra* note 6, ¶ 6; G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 12 (Jan. 3, 1976).

130. TRIPS Waiver Proposal, *supra* note 6, ¶ 7; G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, Goal 3 (Sept. 25, 2015).

implementing the TRIPS patent waiver would probably not trigger liability for indirect expropriation.

In sum, implementing the TRIPS patent waiver could trigger liability for indirect expropriation where an arbitral tribunal adopts the sole effects doctrine. However, where an arbitral tribunal adopts either variation of the police powers doctrine, the assessment cuts against a finding of liability. Since the expropriation provisions of most modern IIAs are drafted in a manner that aligns with the moderate police powers doctrine, the Patentees will find it difficult to prevail on the merits. In any case, the Patentees may encounter additional hurdles in the form of provisions within IIAs affording exceptions to the application of the standard. These hurdles are discussed in the following section.

B. General Exceptions and Safeguard Clauses

In recent years, in reaction to arbitral tribunals adopting expansive interpretations of substantive investment clauses advanced by foreign investors, states have begun to include general exceptions and safeguard clauses within their IIAs. These clauses exclude measures taken in the public interest from the scope of application of these treaties.[131] According to some commentators, this reflects a "return of the State" whereby states are attempting to regain regulatory space within IIL.[132] Where an arbitral tribunal finds that the challenged measure falls under the scope of these provisions, the state will be immune from liability for violating a substantive protection within the treaty.[133] However, the ambiguous language used in some of these provisions has allowed arbitral tribunals to increasingly scrutinize their scope and effect, occasionally rendering them futile.[134]

General exceptions clauses are typically drafted along the lines of Article XX of the General Agreement on Tariffs and Trade (GATT), listing accepted policy goals and requiring that the challenged measure be necessary

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131. Henning Grosse Ruse-Khan, Protecting Intellectual Property Through Trade and Investment Agreements: Concepts, Norm-Setting and Dispute Settlement, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND INVESTMENT LAW 11, 24 (Christophe Geiger ed., 2020).

132. *See*, *e.g*, José Alvarez, The Return of the State, 20 MINN. J. INT'L L. 223, 223 (2011).

133. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, EXPROPRIATION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II 89 (2012); William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 322 (2008).

134. Correa et al., *supra* note 36, at 13.

and capable of achieving the objective pursued.[135] Some IIAs, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA), import Article XX of the GATT into the treaty verbatim.[136] Under Article XX(b) of the GATT, measures "necessary to protect human … health" are exempted from liability.[137] The TRIPS patent waiver's purpose is to protect human health, therefore, the presence of a general exceptions provision mirroring Article XX of the GATT under the applicable IIA may impact the assessment of whether the Patentees have a compensable indirect expropriation claim against a state domestically implementing the waiver. However, in the few ISDS cases where general exceptions clauses mirroring Article XX of the GATT have been interpreted, arbitral tribunals have found that they do not exclude states from liability to pay compensation to foreign investors for the damages suffered due to breaches of substantive protections within the treaty.[138] Hence, it is unclear whether a state would successfully rely on a general exceptions clause to avoid liability for domestically implementing the waiver.

Additionally, some IIAs contain safeguard clauses that specifically exempt IP-related measures from the standard of protection against expropriation where the measure complies with the TRIPS Agreement.[139] For instance, Article 6.5 of the 2012 United States Model Bilateral Investment Treaty provides that:

> This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the

135. Ruse-Khan, *supra* note 131, at 25; s*ee, e.g.*, India Model BIT 2015, *supra* note 114, art. 32.

136. *See* CETA, *supra* note 72, art. 28.3.1 ("Article XX of the GATT 1994 is incorporated into and made part of this Agreement.").

137. General Agreement on Tariffs and Trade 1994 art. XX(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153.

138. Mercurio & Upreti, *supra* note 12, at 350; *e.g.*, Eco Oro v. Colom., *supra* note 57, ¶¶ 822-837.

139. KLOPSCHINSKI, GIBSON & RUSE-KHAN, *supra* note 55, ¶ 7.128; e.*g.*, CETA, *supra* note 72, art. 8.12.6 ("[T]he revocation, limitation or creation of intellectual property rights, to the extent that these measures are consistent with the TRIPS Agreement … do not constitute expropriation.").

> extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.[140]

Where the applicable IIA contains such a safeguard clause, one may argue that the domestic implementation of the TRIPS patent waiver falls within its scope and is therefore afforded safe harbor. Nonetheless, given that the law of WTO waivers– unlike the TRIPS Agreement– does not require compensation, if the Patentees are not compensated by a state implementing the TRIPS parent waiver, such a measure may not be "*consistent with the TRIPS Agreement*" and therefore may fall outside the scope of the provision.

Some IIAs have addressed this ambiguity by replacing the term "TRIPS Agreement" with "WTO Agreement."[141] Moreover, other IIAs have explicitly exempted regulatory actions that are consistent with a TRIPS waiver in force between the parties.[142] For instance, Article 9.6 of the 2021 Canada Model BIT provides that:

> A measure of a Party that would otherwise constitute an expropriation of an intellectual property right under this Article does not constitute a breach of this Article if it is *consistent with* the TRIPS Agreement and *any waiver or amendment of that Agreement accepted by that Party*.[143]

The TRIPS patent waiver would undoubtedly fall within its scope when such a clause is included within the applicable IIA. Therefore, the tribunal's determination may boil down to matters of semantics. For this reason, arbitral tribunals should pay close attention to the precise wording chosen by the parties to the treaty.

In sum, the inclusion of general exceptions and safeguard clauses within modern IIAs may impact the determination whether the Patentees may have a compensable indirect expropriation claim against a state domestically implementing the TRIPS patent waiver. Nonetheless, most IIAs in

140. U.S. Model BIT 2012, *supra* note 72, art. 6.5 (emphasis added).

141. *E.g.*, Free Trade Agreement Between Canada and The Republic of Colombia, Can.-Colom., art. 811.5, Nov. 21, 2008, https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/FTAs/PANAMA %20FULL%20PDF.pdf.

142. *E.g.*, Free Trade Agreement Between the United States and Panama, U.S.-Pan., art. 10.7(5), n. 3, June 28, 2007, https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/FTAs/PANAMA%20FULL%20PDF.pdf ("The reference to 'the TRIPS Agreement' in paragraph 5 includes any waiver in force between the Parties.").

143. Canada Model Bilateral Investment Treaty, art. 9.6, May 12, 2021, UNCTAD (emphasis added).

force today do not contain these provisions.[144] Hence, where an arbitral tribunal finds that the domestic implementation of the TRIPS patent waiver constitutes an indirect expropriation of Covid-19 vaccine patents, it is likely that the state would have to compensate the Patentees for any damages suffered by the breach.

V. CONCLUSION

This article has examined whether the Patentees may have a compensable indirect expropriation claim under ISDS against a state domestically implementing the TRIPS patent waiver. My analysis concludes the Patentees will find it difficult to prevail on the merits under modern treaty practice. Nonetheless, the fact that foreign investors may rely on ISDS to bring a claim against a state implementing a WTO-approved waiver may deter states from regulating IPRs in the public interest. Thus, to prevent the objectives of a WTO waiver from being undermined by IIL, states should review their IIAs to include safeguards that exempt IP-related measures that fall within the scope of a waiver.

144. *See* UNCTAD, *International Investment Policies and Public Health* 2-3 (IIA Issues Note No. 2, July 2021), https://investmentpolicy.unctad.org/publications/1252/international-investment-policies-and-public-health.

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