A fact-based case for the extension of the TRIPS COVID-19 decision

We are calling on the member states of the World Trade Organisation (WTO) to support the extension of the WTO ministerial decision, agreed on 17 June 2022 to COVID-19 therapeutics and diagnostics, to enable diversified manufacturing and supply and to close the access gap facing people in low- and middle-income countries.

COVID-19 vaccines, therapeutics and tests are all vital in controlling the pandemic and preventing hospitalisations and loss of life. However, access to these life-saving medical technologies remain grossly inadequate in low- and middle-income countries, as pharmaceutical companies prioritise high-income countries and monopolise supply. Barely twenty percent of people in the poorest countries are fully vaccinated, with populations at greater risk of infection and adverse outcomes. Treatment is even more important in areas of low vaccine coverage but high-income countries account for over 70% of courses secured via identified COVID-19 treatment supply deals with originator companies.

After nearly two years of negotiations a decision was reached at the WTO ministerial in June 2022 on intellectual property (IP), but this was only for COVID-19 vaccines. Member states agreed to take a decision on extending the agreement to cover therapeutics and diagnostics within six months.

The WTO June decision was not the comprehensive TRIPS waiver originally proposed by South Africa and India and supported by over 100 governments, civil society and academics, former prime ministers and presidents, Nobel Laureates, and religious leaders. Most notably, the decision fails to effectively address access to technology and manufacturing know-how needed to expedite production of vaccines. Despite its significant limitations however, the existing decision, if extended, could still help to diversify and increase the manufacturing of generic therapeutics and diagnostics and redress today's dangerous and unacceptable lack of access to these products in low- and middle-income countries.

The People's Vaccine Alliance therefore calls on all WTO members to immediately agree to extend the WTO June decision to cover therapeutics and diagnostics for five years and without any further restrictions or conditions.

The therapeutic and diagnostic access gap

COVID-19 vaccines, therapeutics and tests are vital in controlling the pandemic and preventing further loss of life, but supplies remain grossly inadequate in lower-income countries.

Hundreds of thousands of COVID-19 cases are reported daily and this is a known undercount because of the severe lack of diagnostics - both PCR and antigen rapid diagnostic tests. Highly transmissible variants continue to spread, and the possibility of new and potentially more dangerous strains emerging remains. The shortage of diagnostics undermines global surveillance efforts and immediately endangers the lives of those without access to tests. At the end of Q2 in 2022, despite a marked decline in testing across countries, high-income countries continued to test people 50 times more frequently than low- and middle-income

countries, with low- and middle-income countries conducting just 0.04 tests per 1,000 people.[1] Lack of access to tests has been a persistent problem, among other factors.

High-income countries currently account for over 70% of courses secured via identified supply deals of all existing COVID-19 treatments. The US alone accounts for nearly 50% of identified originator supply deal courses.

Official reports indicate that many countries classified at WTO as 'developing' and 'least developed' remain unable to access affordable therapeutics in necessary volumes. A report from the ACT-Accelerator Facilitation Council Working Group finds that "equitable roll-out of COVID-19 diagnostics and therapeutics continues to be inadequate and threatens to undo public health gains achieved throughout the pandemic." Nature similarly says, "limited supplies and high costs have restricted the flow of COVID-19 antivirals to low- and middle-income regions." Low- and middle-income countries have been waiting months for deals Pfizer made with UNICEF (reportedly delayed due to renegotiation of some terms) and the Global Fund to begin delivering doses.[2] The lack of pharmaceutical companies' transparency on the real costs of R&D and manufacturing hinders any public scrutiny on pricing.

Without enabling manufacturing by developing countries manufacturers, newer more effective therapeutics are likely to be similarly inequitably distributed as they become available.

The WTO June decision extension should not only be seen as addressing issues with currently available tests and treatments, but also for the improved technologies that are still to come. Products are still needed to address long COVID, that can be administered in a longer window after infection, that can limit the duration and risk of spread of the infection and that can be used with people at standard risk. There are hundreds of treatments in the pipeline, including at least 78 in clinical trial phase 3 or later, according to BIO[3]. Some of these could be proven safe and effective in the coming years. These products must be available and affordable to all. Extending the WTO June decision to tests and treatment would avoid the terrible inequality that people in low- and middle-income countries experienced for vaccines and for current treatments.

Patents and inadequate voluntary licensing blocking access to COVID-19 therapeutics and diagnostics

Generic manufacturing of affordable lifesaving COVID-19 medical tools could help fix the access crisis in lower-income countries but is prevented by IP protections.

Between January 2020 and September 2021, 5,293 patent applications related to COVID-19 were published. This number is expected to increase significantly between 2022 and 2023 due to patent filing publication delays and companies filing further patents on the same product (evergreening of patents). There are four times more patent applications for therapeutics than there are for vaccines.

[1] Report of Access to COVID-19 Tools Accelerator Facilitation Council Working Group on Diagnostics and Therapeutics, p 13: "while high-income countries, at the end of Q2 2022, conducted 2.01 tests per 1,000 people each day, LMICs only achieved rates of 0.04 tests per 1,000 people."
[2] The UNICEF deal was announced in March but per Nature, was still being renegotiated as of September. Pfizer and the Global Fund announced a letter of intent in May, but the final deal was only announced in September.
[3] As of Oct 17, 2022

Existing TRIPS flexibilities mean countries have rights to issue compulsory licenses to enable generic production primarily for domestic use. Rich countries, including the US, Germany, and Israel have already demonstrated their willingness to take action domestically to ensure patents don't stand in their way during this pandemic. However, for lower-income countries, especially those without domestic manufacturing capacity, the process can be complicated and time consuming. Decades of experience also show that low- and middle-income countries issuing compulsory licenses face huge commercial and political pressure not to do so.

An extension of the WTO decision to include therapeutics and diagnostics would help reduce the likelihood of obstructive political and commercial pressures against issuing compulsory licenses for COVID-19 products.

Rich countries, such as the UK, Switzerland, Japan and EU member states, frequently point to the use of voluntary licenses as a sufficient tool to meet supply demands for therapeutics and diagnostics. However, voluntary licenses usually have significant geographic exclusions as well as restrictions that impede their usage as mechanisms to genuinely upscale supply and access to medical products.

Bilateral voluntary licenses lack transparency, include territorial restrictions and conditionalities that limit the value of the license for developing countries, and often leave full control of production and supply decisions in the hands of the patent holder.

IP can still get in the way even when voluntary licenses are issued. For example, an Indian manufacturer faced delays in being able to export HIV treatments to Venezuela even though Venezuela didn't have blocking patents due to a voluntary-license-related legal dispute.

In the case of COVID-19 therapeutics, some voluntary licenses have been issued to allow generic manufacturing via the Medicines Patent Pool (MPP), a public health organisation working to facilitate the development of and increase access to medicines for low- and middle-income countries, but, as the examples below explain, these continue to exclude large numbers of countries without sufficient and affordable access to urgently needed COVID-19 therapeutics.

Paxlovid (Nirmatrelvir-ritonavir)

Pfizer developed nirmatrelvir combined with ritonavir – marketed as Paxlovid – and has applied for patents across the globe. These patents – as well as pending patent claims which could be granted later – means excluded countries will face challenges in producing generic versions of the treatment until 2041.

In November 2021, Pfizer signed a voluntary license agreement with MPP. For eligible countries that are determined by Pfizer, manufacturers can sign agreements with the MPP to produce generic versions of Paxlovid. However, Pfizer's license excludes most Latin American countries, including Brazil, and several other developing countries with manufacturing capacities, such as Malaysia and Thailand.

These excluded countries have faced significant pressure when attempting to use the legal tool of compulsory licenses whereby governments can approve the production of patented products or processes without the consent of the patent owner. Governments of Chile, Colombia, and Peru and the Dominican Republic have sought or are seeking compulsory licenses. Already, the Dominican Republic's consideration of a compulsory license for COVID-19 therapeutic Paxlovid, was resisted by Pfizer. The company paradoxically claimed it violated the company's 'human right' to IP rights.

Further, the Drugs for Neglected Diseases Initiative has publicly raised its inability to secure Paxlovid samples to undertake studies of combination outpatient therapies in Africa.

In May 2022, Pfizer announced a plan to offer lower prices of Paxlovid among other products for 45 lower-income countries. The announcement lacked details about prices, conditions and timelines and this information is yet to be provided.

Pfizer has charged more than $500 per treatment course in some high-income countries and $250 in some middle-income countries. The Clinton Health Access Initiative, on the other hand, has announced agreements to make generic Paxlovid available to low- and middle-income countries for less than $25 a course of treatment, subject to some conditions being met, including minimum volume requirements. Although eligible countries have not yet been declared, there are indications that it will be only low- and lower-middle-income countries, meaning again that millions of people in many middle-income countries will continue to be excluded.

Molnupiravir

US pharmaceutical company Merck has filed patents on molnupiravir in at least 25 low- and middle-income countries. These patents, once granted, could block independent generic production and supply in countries until 2038. It is worth noting that research and development of this medicine was funded by the US Government through financing research at Emory University.

Merck signed a voluntary license with the MPP in October 2021, but this license excludes supply to nearly half of the world's population including in countries with robust manufacturing capacity, including Brazil. It also contains a harmful provision undermining the right of generic companies who sign the license to legally challenge the validity of patents of molnupiravir; a provision that has been suggested to be potentially unlawful in some jurisdictions for its anti-competitive effects.

Tocilizumab

Tocilizumab is recommended by WHO as a treatment for patients with severe or critical COVID-19. The Swiss pharmaceutical company Roche has sought or been granted patents on Tocilizumab in multiple low- and middle-income countries. A study by Wang et al. in 2021 found inconsistent and unaffordable prices for this treatment. Australia was paying the lowest price identified, while Vietnam was paying double that price. Morocco, Malaysia and Peru were paying nearly 2.7 times that price. France, the UK, Norway and Israel all paid less than Morocco, Malaysia and Peru. Roche says it has since made doses available “at cost” to WHO for use in LMICs as of 24 March 2022. Whilst several other developers have been working on biosimilar versions of tocilizumab, the full availability and accessibility of these alternatives for all remain uncertain. Roche announced that it would not assert patents for low- and middle-income countries during the pandemic. However, Roche has not engaged in a voluntary license agreement for tocilizumab, and has not shared essential cell-lines and other manufacturing know-how or technology which enable manufacturers in low- and middle-income countries to produce the medicine.

Shortages of tocilizumab have been observed in countries using it for COVID-19 treatment. During India’s second COVID-19 wave in spring 2021, the only company marketing the medicine in India reported shortages in late April and did not know when additional supplies would be available. Roche reports that they donated 50,000 courses more than two weeks later on 11 May.

Baricitinib

Eli Lilly has or has sought patents on baricitinib in more than 40 predominantly low- and middle-income countries, including multiple Latin American countries, as well as South Africa and India. In most cases these patents won’t expire until 2029.

Eli Lilly has used its monopoly on supply and price in some countries to charge high prices. Whilst generic versions of baricitinib were reportedly available for under US$7 per 14-days treatment course in India and Bangladesh, research published earlier this year reports some middle-income countries, such as Argentina, paying even higher prices for Eli Lilly's supplies than those paid by high-income countries.

GeneXpert

The estimated cost of production for Cepheid's GeneXpert COVID-19 diagnostic test is just $3-$5 per test,[4] yet Cepheid is charging $14.90 in low- and middle-income countries,[5] at least 3 times the estimated cost of production. This high price vastly limits access to this test in resource limited settings. Wider access to point of care molecular diagnostics such as the GeneXpert system would mean more people could be tested for COVID-19 by the sensitive PCR technology in decentralised settings.

Extending the WTO Deal is critical to addressing existing and potential future access barriers

To control the pandemic globally, all countries must have access to affordable tests and treatments, especially lower-income countries with less vaccination coverage than high-income. Removing IP barriers currently precluding the generic manufacture of affordable COVID-19 health technologies is critical to maximising and diversifying supply and sustainably decreasing the price through generic competition.

If expanded to include tests and treatments, the WTO June decision could help restore the balance between IP rights and access to medicines in low- and middle-income countries. The extension would allow existing manufacturing capacity in developing countries, to ease supply of medicines and export to other countries in need of affordable treatments.

The extension doesn't require special "scope" considerations

The terms of this temporary decision don't change the fact that governments always have rights to grant non-voluntary licenses. Compulsory licensing is a legal tool in the TRIPS agreement which is freely used by high-income countries as noted above. What is under consideration is an extension of a decision that makes slight, temporary change to compulsory licenses for export in the context of an unprecedented pandemic. The WTO June decision could streamline the process for some countries and help to level the playing field for countries that do not have large domestic markets or robust production capabilities and therefore are reliant on other countries' abilities to export lifesaving products.

Extending the WTO June decision would indicate to people in low- and middle-income countries that high-income countries actually care about their access to COVID-19 products. Many people lost faith in global solidarity after suffering inequality in access to vaccines.

Extending the WTO June decision will not harm innovation

Analysis from the National Bureau of Economic Research suggests that "when patent rights have been too broad or strong, they have actually discouraged innovation", and finds that compulsory licensing encouraged innovation. Other peer-reviewed research has also found that overly "strong" patent systems stymie innovation "with many negative side effects."

[4] For details of costing calculation, see: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8407584/
[5] Ex-works and prepaid

Patents are not a strong measure of medically beneficial innovation. A study by Robin Feldman found that most patents over a 10-year period (2005-2015) were for existing products. Recent patent disputes among mRNA innovators illustrate how patents held by one company can impede important medical advances with costly and time-consuming legal disputes that threaten to detract all parties from innovation work.[6]

Further delay of the WTO June decision extension is unjustified

Following two years of protracted debates and negotiations on IP for *all* COVID-19 technologies, including therapeutics and diagnostics, arguments that there has been insufficient time to consider the extension of the existing decision to apply to therapeutics and diagnostics are unfounded. For example, the European Commission included COVID-19 therapeutics in its proposal for the TRIPS Council in June 2021.

There can be no justification for delay in extending the decision as there are no new issues to debate. The only facts that have changed is that there are now novel outpatient antivirals in regular use in high-income countries that remain inaccessible in lower-income countries and there are promising medicines in the pipeline.

Extending the existing WTO agreement to include therapeutics and diagnostics should be a swift decision without any further restrictions or conditions on the text. This is a crucial step towards ensuring access to the COVID-19 tests and treatments that all countries need to better control a pandemic that continues to disrupt the global economy and to better protect people's health.

[6] See, for example, here, here, and here