

EXPLAINER:

The June 2022 WTO TRIPS ‘deal’ that
tried to save reputations,
not lives!



The June 2022 WTO deal on vaccines
and patents during the COVID-19 pandemic

BACKGROUND

The COVID-19 pandemic, which is not yet over, has already claimed over **15 million lives** worldwide (excess deaths) and caused at least 537 million confirmed infections, damaged the economies of scores of countries, and decimated communities everywhere.

Throughout 2021 and 2022, we saw unprecedented suffering coupled with the hoarding of vaccine supplies (called 'vaccine apartheid'), test kits, new treatments and also of knowledge – ***hidden behind intellectual property protections like patents and trade secrets*** – which benefited from billions of dollars of public funding and support, as well as the knowledge of public scientists.

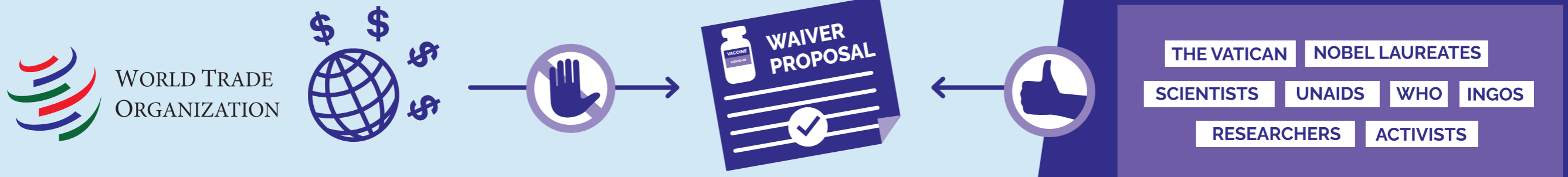


October 2020 TRIPS WAIVER PROPOSAL:

- Since October 2020, South Africa and India led the call for a comprehensive temporary **waiver** of certain TRIPS provisions (**TRIPS waiver proposal**). Such a waiver is permitted by the rules of the WTO. The **waiver proposal** is explained **here**. The **waiver proposal** sought to waive more than **35** Articles of the TRIPS Agreement.
- Mindful of the denial of life saving medicines globally, and the delays in the sharing of knowledge during the height of the AIDS pandemic in Africa, the President of South Africa used every major global platform to support such a call.
- If approved timeously, the **waiver proposal** would have enabled Africa and countries in the global South to take meaningful control of the response to this pandemic via access to timely vaccines, treatment, and tests, among others by providing manufacturers full freedom to produce and supply such technologies.

THE WTO AND THE WAIVER PROPOSAL

- The WTO is an institution of 164 members that is meant to operate on the basis of decision-making by 'consensus'.
- That is not always possible when richer countries exercise so much political and economic power over other countries, so that they can dictate the terms of any agreement.
- Despite over around 100 countries supporting the **waiver proposal** including 63 countries co-sponsoring the India-South Africa the **waiver proposal**, a handful of powerful, rich countries were allowed to scupper it with the help of the WTO secretariat. They delayed a response for 20 months, and bullied the majority of countries into accepting an inadequate **deal**.
- This was contrary to the considerable global support for the **waiver proposal** by former world leaders, the Vatican, Nobel Laureates, scientists, UNAIDS, WHO, academics, researchers and activists, INGOS, trade unions and community groups, among others.



UNFAIR DISCRIMINATION

APRIL 2022

The UN Committee on the Elimination of Racial Discrimination [statement](#) on global vaccine inequity stated that:

...a pattern of unequal distribution within and between countries replicates slavery and colonial-era racial hierarchies; and deepens structural inequalities affecting vulnerable groups...

13 JUNE 2022

[Open Letter](#) from the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to the World Trade Organization's Twelfth Ministerial Conference.

The pandemic has had disproportionate impacts on Africans and people of African descent, Asians and people of Asian descent, indigenous peoples, stateless persons, migrant workers, women, people discriminated against on the basis of their sexual orientation, gender identity or sex characteristics, persons with disabilities and many other marginalized groups. I share the conclusion, articulated by several other international human rights experts, that unequal access to COVID-19 prevention, containment and treatment technologies ("COVID-19 technologies") violates the fundamental human rights principles of equality and non-discrimination.

THE WTO MINISTERIAL CONFERENCE: JUNE 2022

After several postponements of the Ministerial Conference of the WTO ('MC 12') since 2020, it was held in June 2022 in Geneva, the headquarters of the WTO.

On 15 June 2022,

because there was no agreement on the waiver proposal and on other MC 12 issues, it was extended by a further two days.

On 17 June 2022,

in Geneva, it was announced that countries rich and poor, including South Africa, agreed to a deal.

- The deal is not a comprehensive waiver: *critics call it 'weak', and a 'slap' in the face of poor countries.*
- As a result, we now face a future where access to life-saving technologies and recipes to produce them will remain uncertain and possibly out of our reach, where equitable access to testing and treatments for disease will remain a distant prospect, for many people in developing countries but especially in poorer countries.

WHAT THE WTO JUNE 2022 'DEAL' / DECISION MEANS

There is no comprehensive waiver of the TRIPS Agreement provisions as envisaged in the original October 2020 South Africa – India *waiver proposal*:

1.

The deal is limited to vaccines. The decision on whether to include diagnostics and treatments under this deal has been deferred, to be decided within 6 months. But there is no certainty that this will happen given the opposition of some developed countries such as US, EU, UK and Switzerland.

2.

The deal can be used only to respond to COVID-19 and for 5 years, and not for other pandemics or health crises.

3.

The deal does however temporarily lift restrictions on the *quantities of vaccines* that may be exported under a compulsory license but only for five years (note: the WTO decision does not impact the right of a government to issue a longer term compulsory license including even for the duration of the patent term of a vaccine).

- The deal contains additional conditions on notifications and anti-diversion measures when exporting vaccines using the decision, conditions that are not currently required by the TRIPS Agreement.
- The deal may only be used by an 'eligible member'. All developing countries are eligible members except for China. Developed countries are not eligible members and may not use the decision as *producers and exporters*, even if to supply developing countries.

4.

Even for vaccines, there is no waiver of other IP elements such as trade secrets and manufacturing know-how, potentially affecting the WHO mRNA Hub in South Africa.

5.

The deal mostly restates the option of overriding patents on vaccines through the use of a compulsory license:

- *The right to issue a compulsory license, is an existing flexibility in the TRIPS Agreement. A compulsory license is a license given by a government to a third party to exploit the subject matter of a patent without the consent of the patent holder.*
- *A condition attached to the use of a compulsory license ordinarily under the TRIPS Agreement is that the use must be predominantly for the supply of the domestic market. The deal waives this one requirement.*

HOW AND WHY DID WE GET HERE?

Many questions remain:

1. Globally, how did South Africa go from promoting a comprehensive meaningful **waiver** in October 2020 to a mere bystander in 2022 - while the US, EU, Switzerland and UK - with the WTO - pushed a weak deal?
2. Locally, why have much needed reforms of South Africa's intellectual property (patent) laws not been prioritised some 4 years later by the Department and Minister of Trade, Industry and Competition?
3. While it advocated for the **waiver proposal**, and given the delays, why did the South African government grant wide ranging patents to vaccine manufacturers during this time?
4. Because of the above, what executive action will follow the deal to also domesticate it; what steps will the South African government and other partners take to ensure that the work of the mRNA Hub in South Africa is not hobbled and instead is supported and accelerated?

Join us and others to demand accountability, answers and action.

WHAT MUST SOUTH AFRICA DO NEXT ?

1.

Where necessary, take executive action on the patents already granted to Moderna:

- Moderna must abandon its mRNA vaccine patents already granted. Alternatively, the South African government must issue public non-commercial use government use orders and/or open compulsory licences on those patents it granted.

2.

Urgently pass the Patent Laws Amendment Bill – and also include provisions that enable:

- the substantive examination of patents with both pre-and post-grant opposition procedures;
- stricter patentability criteria;
- the inclusion of public interest and public health grounds for compulsory licences, and a streamlined administrative process for hearing compulsory licence applications; and
- the application of competition law to intellectual property issues.

3.

Urgently introduce necessary flexibilities in South Africa's laws and issue proper executive decrees to ensure access to not just vaccines, but treatments and diagnostics too - there is no need to wait for the WTO.



USEFUL LINKS

<https://healthjusticeinitiative.org.za/2022/06/23/trips-waiver-negotiations/>

<https://www.keionline.org/category/wto>

<https://twn.my/title2/wto.info/2022/ti220625.htm>

<https://msfaccess.org/inability-agree-real-pandemic-intellectual-property-waiver-wto-devastating-global-failure-people>

<https://www.southcentre.int/sc-statement-trips-waiver-21-june-2022/>