

Human Rights Obligations of States to not impede the Proposed COVID-19 TRIPS Waiver

Executive Summary
November 2021

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Acknowledgments:

This legal opinion was researched and drafted by Sanya Samtani (University of Pretoria) and Timothy Fish Hodgson (ICJ). The executive summary was drafted with the assistance of Jamie Burton QC. Legal and Policy Review was provided by Ian Seiderman.

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At time of publication on 8 November the jurists listed on the page below have signed on to this expert legal opinion. The opinion remains open for further signature.¹

¹ To sign the opinion please fill in the google form available here in full: <https://docs.google.com/forms/d/e/1FAIpQLSeDj5FZ2e6YrDnKGybTqi1TCrIyAxxoKFn61SgoolFk15-hU2A/viewform>. The International Commission of Jurists welcomes sign on by experts on human rights, legal experts, intellectual property experts and other eminent jurists around the world.

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² The full list of signatories and their affiliations can be found at <https://www.icj.org/wp-content/uploads/2021/11/Legal-Brief-List-of-Signatories-.pdf>.

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Executive Summary

This opinion applies to the full range of diagnostics, medications, vaccines, therapeutics and other relevant health products required for the containment, prevention and mitigation of COVID-19. In short, it sets out States' international human rights obligations to not impede the negotiations around the COVID-19 TRIPS Waiver, concluding that the many States currently impeding it at the World Trade Organization (WTO) are acting in violation of the rights of everyone to health, life, equality and science.

Rights to Health, Life and Science. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (right to health) and obliges States Parties to take the steps necessary for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases' and the 'creation of conditions which would assure to all medical service and medical attention in the event of sickness.' Article 6 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to life of every human being, requiring States to take measures to ensure health care essential to life without delay.³ The COVID-19 pandemic, which threatens life and health, engages the obligations of the State Parties to ICESCR and/or ICCPR.⁴ The rapid development of effective COVID-19 vaccines also engages the right to 'enjoy the benefits of scientific progress and its applications', 'the right to science' in Article 15 of the ICESCR. Moreover, 'provid[ing] immunisation' against 'major infectious diseases', such as COVID-19⁵ is a minimum core obligation of 'immediate effect'.⁶

Regulation of Businesses. The range of measures necessary to meet States' minimum core obligations and realise the rights to life and health include effective regulatory measures to ensure that private actors, such as pharmaceutical companies, comply with their own responsibilities to respect human rights

³ UN Human Rights Committee (HRC), General comment no. 36, Article 6 (Right to Life) (3 September 2019) CCPR/C/GC/3, available here: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_878_5_E.pdf [26].

⁴ This position has been confirmed by the UN Human Rights Committee: UN HRC, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, CCPR/C/128/2 (24 April 2020), available here: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>.

⁵ See CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (E/C. 12/2000/4), 11 August 2000, available here: [https://undocs.org/E/C.12/2020/1/44\(b\)](https://undocs.org/E/C.12/2020/1/44(b))].

⁶ The only justification available to States for not fulfilling their minimum core obligations is to demonstrate that 'every effort has been made to use all resources that are at its disposition, in an effort to satisfy, as a matter of priority, those minimum obligations' according to General Comment 3, (E/1991/23), 1990, available here: <https://www.refworld.org/pdfid/4538838e10.pdf> [10].

including the right to health.⁷ The UN Committee on Economic, Social and Cultural Rights (CESCR) has stressed that companies should 'refrain from invoking intellectual property rights in a manner that is inconsistent with the right of every person to access a safe and effective vaccine against COVID-19'.⁸ CESCR has explained that 'ultimately, intellectual property is a social product and has a social function and consequently, States parties have a duty to prevent unreasonably high costs for access to essential medicines [...] from undermining the rights of large segments of the population to health'.⁹

Non-discrimination. Obligations in terms of all human rights must be performed without discrimination on any prohibited grounds. States Parties are required to take proactive steps to ensure substantive equality for marginalised groups and individuals,¹⁰ and to prohibit discrimination on the basis of one or more grounds of discrimination.¹¹ The CESCR has reiterated in the context of the COVID-19 pandemic that States parties must prioritise the fulfilment of human rights obligations relating to marginalised groups and individuals as they are disproportionately affected.¹²

International Cooperation. State Parties to ICESCR have undertaken to realise the rights under it 'through international assistance and co-operation, especially economic and technical'.¹³ At the very least, States must 'facilitate access to

⁷ *ibid* [5] read with UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, available here: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf Principle 3: '3. In meeting their duty to protect, States should: (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights'.

⁸ UN CESCR Committee, Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property (21 April 2021) E/C.12/2021/1 available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2021/1&Lang=en, [8]-[9].

⁹ *ibid* [62]; CESCR, General Comment 17 The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), E/C.12/GC/17 (12 January 2006), available here <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slO6QSmIBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcMZjyZIUmZS43h49u0CNAuJIjwgfzCL8JQ1SHYTZH6jsZteqZOpBtECZh96hyNh%2F%2FHW6g3fYyiDXsSgaAmIP%2BP> [35].

¹⁰ CESCR, General comment No. 20: Non-discrimination in economic, social and cultural rights (art.2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20. [27]-[35]. See also, General Comment 14, available here: <https://digitallibrary.un.org/record/659980?ln=en> [18]-[19].

¹¹ *ibid* [17], [27].

¹² CESCR, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, E/C.12/2020/1 [12], [14].

¹³ Art 2, ICESCR.

essential health facilities, goods and services in other countries wherever possible and provide the necessary aid when required',¹⁴ and seek to 'influence [...] third parties by way of legal or political means' to ensure the full realisation of the right to health across the world,¹⁵ 'including by using their voting rights as members of different international institutions and organisations' and if necessary through the 'development of further legal instruments'.¹⁶ There is a 'special responsibility'¹⁷ on high-income States to cooperate internationally by working with low and middle-income States to achieve the prevention, control and treatment of epidemic diseases such as COVID-19.

Human Rights Obligations of WTO Member States. Over 85% of the Member States to the WTO are also States Parties to ICESCR and ICCPR. Thus, States' obligations to realise the rights to life and health in the face of a global pandemic without discrimination and through international cooperation *must* influence their conduct at the WTO. Membership of the WTO necessitates accession to, amongst others, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). CESCR has highlighted that 'the current restrictions imposed by the intellectual property rules in the TRIPS Agreement make it very difficult to achieve the international cooperation needed for the massive scale up'¹⁸ required to ensure universal access to diagnostics, medications, vaccines, therapeutics and other relevant health products to prevent, treat and control COVID-19.

The TRIPS Waiver and Human Rights. Over 100 of the member states to the WTO have publicly supported the proposal by India and South Africa that there should be a waiver of sections 1, 4, 5 and 7 of Parts II and III of the TRIPS Agreement, at the TRIPS Council.¹⁹ The TRIPS Waiver would ensure that

¹⁴ See CESCR General Comment 14 [39].

¹⁵ *ibid*

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ CESCR, Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property, E/C.12/2021/1, 23 April 2021, available here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2021%2f1&Lang=en [11]. Para [13] reads: "All mechanisms, including voluntary licensing, technology pools, use of TRIPS flexibilities and waivers of certain intellectual property provisions or market exclusivities should be explored carefully and utilized" and "thus, the waiver of certain provisions of the TRIPS Agreement is an essential element of these complementary strategies. Besides, failing to approve the temporary waiver of TRIPS Agreement provisions for equitable and affordable access to medical technologies, including COVID-19 vaccines, will also stand in the way of global economic recovery, which is necessary in order to overcome the negative impact of the pandemic on the enjoyment of all economic, social and cultural rights. In that context, the Committee strongly recommends that States support the proposals of this temporary waiver, including by using their voting rights within WTO."

¹⁹ Communication by India and South Africa, 'Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of Covid-19', World Trade Organisation, IP/C/W/669 (2 October 2020), available: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669R1.pdf&Open=True>; Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and

companies and other holders of intellectual property in respect of the full range of diagnostics, medications, vaccines, therapeutics and other relevant health products required for the containment, prevention and mitigation of COVID-19 do not prevent the realisation of the rights to health, life, equality, and science for all. The Marrakesh Agreement Establishing the WTO (WTO Agreement) explicitly contemplates the possibility of such time-limited waivers.²⁰ Member States of the WTO have in fact previously employed a waiver to tackle a global disease: the Doha Declaration, adopted to respond to the HIV/AIDS epidemic in Southern Africa in 2001, also involved international consensus to waive a part of the TRIPS Agreement.²¹

Conclusion: States must desist from obstructing the COVID-19 TRIPS waiver. The proposed TRIPS waiver should be understood as an effort by the States proposing and supporting it to comply with their human rights obligations in terms of the rights to health, equality, science and life by initiating necessary coordination and solidarity in line with their obligations relating to international assistance and cooperation. Conversely, those States actively opposing or otherwise blocking or inhibiting international consensus at the WTO in respect of the waiver must be understood as contravening their obligations to *respect* and *fulfil* the same human rights.²² Further, by failing to take measures to effectively regulate private actors in health operating on a multinational level where their operations compromise access to COVID-19 diagnostics, medications, vaccines, therapeutics and other relevant health products, States contravene their obligations to *protect* human rights.²³

treatment of covid-19 - Joint statement of co-sponsors, (18 May 2021) WTO, IP/C/W/677, available:
<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W677.pdf&Open=True>.

²⁰ WTO Agreement art IX:3(b).

²¹ Doha Declaration on the TRIPS Agreement and Public Health, adopted at WTO Ministerial Conference 2001, WTO WT/MIN(01)/DEC/2 (20 November 2001), available:
https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

²² Most member States opposing the waiver, including the UK, Norway, Switzerland and Germany are State Parties to both ICESCR and ICCPR.

²³ CESCR General Comment 14 [50] reads: 'Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties'. Given the nature of multinational corporations their effective regulation requires collective state action in terms of the duty of international cooperation.

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