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MSF Position on the Scope and Duration of the TRIPS Waiver for COVID-19

After more than a year of delay, the negotiation for a temporary waiver on intellectual property (IP) rights for COVID-19 medical tools under the World Trade Organization (WTO)'s Agreements on Trade-related Intellectual Property Rights (TRIPS) is speeding up, with countries engaging on the proposal to advance the negotiation before the 12th WTO Ministerial Conference in Geneva on November 30-December 3, 2021. The waiver, as initiated by South Africa and India in October 2020, and supported by multiple WTO members could provide a critical legal pathway for countries to facilitate more diversified and sustainable production and supply of COVID-19 medical tools. Médecins Sans Frontières (MSF) considers the adoption and implementation of the waiver are among the key actions that governments should take to turn the corner of the access challenges in COVID-19. We underline the following key elements as essential for inclusion in final text of the TRIPS waiver.

All essential medical technologies beyond vaccines

The scope of technologies under the waiver should go beyond vaccines. Ensuring access to all medical countermeasures is necessary to end the pandemic. MSF believes that the waiver must also cover other medical tools particularly medicines and diagnostics, as well as their underlying technologies, raw materials, components, manufacturing data, methods, delivery devices and process of production. Our experience in working in public health emergencies and some of the most difficult situations in the world, has made clear that testing and treatments are essential to infectious disease prevention and mitigation. A waiver that does not cover all of these elements will be a failure.

Intellectual property barriers beyond patents

The TRIPS Waiver proposal has brought clear recognition to multiple types of IP barriers, beyond patents, that are challenging access to COVID-19 medical tools. Particularly, often regulatory information related to the manufacturing of the medical product is available to the drug regulator but not disclosed, even when required in the public interest. This information submitted to authorities is not revealed and is treated as a trade secret, impeding the early entry of follow-on manufacturers for biotherapeutics, vaccines and other health technologies. The current rules under the TRIPS agreement do not provide comprehensive and expeditious options to remove these legal obstacles including those posed by Article 39 of TRIPS agreement and provisions related to IP enforcement in a pandemic.

In addition, IP enforcement and disputes both under WTO framework and other trade agreements could hinder governments' legitimate action in removing all IP barriers in the pandemic. It is imperative for the waiver to have clear effect to enable suspension of IP enforcement at national levels and remove all legal risks of governments being sued in front of any dispute settlement mechanism for implementing the waiver.

The final text of the waiver must include lifting any and all forms of IP and their enforcement through any dispute settlement mechanism that may hinder production and supply of or access to, COVID-19 medical tools. In particular, such IP would include patents, data exclusivity, trade secrets or any other protection of undisclosed information.

Sufficient duration for production and supply

The waiver must be of sufficient duration to help overcome the challenges of access to COVID-19 medical tools. There are many uncertainties associated with COVID-19 with the continuous emergence of new variants and gaps in treatment. The duration of the waiver should create an environment to prepare, scale up, diversify and sustain manufacturing and supply of COVID-19 vaccines, medicines, diagnostics and other medical tools and their materials and components.

The waiver should have a minimum duration of 5 years and be extendable to accommodate the ongoing uncertainty of the pandemic.

References:

MSF main briefing on the TRIPS waiver
MSF technical briefing on the myth and realities of the TRIPS waiver
MSF analysis on the EU communication to the TRIPS Council on COVID19
MSF briefing paper on compulsory licensing, the TRIPS waiver and access to medicines
MSF briefing paper on lessons learned and recommendation to ensure equitable access in the pandemic