



**FEMINISTS  
FOR A PEOPLE'S  
VACCINE**

**Issue  
Paper  
#2**

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**INTERNATIONAL TRADE  
& INVESTMENT RULES,  
INTELLECTUAL PROPERTY  
RIGHTS AND COVID-19:  
A PERSPECTIVE FROM  
THE SOUTH**

***#Fem4PeoplesVaccine***



**TWN**  
Third World Network

## Issue Paper # 2

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# International Trade & Investment rules, Intellectual Property Rights and Covid-19: A Perspective from the South<sup>1</sup>

International trade & investment rules, including the globally imposed rules of intellectual property rights, instituted through multiple trade and investment agreements and a plethora of global institutions such as the World Trade Organisation and the World Intellectual Property Organisation (WIPO), have significantly shaped how our countries operate their domestic economies and relate to the global economy. Looking at the Covid-19 pandemic, the trading system has played a major role in deciding where our governments are now with the crisis and how they will move forward. But we are yet to see a solution to the problem.

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1- This issue paper draws from an article published by the Vienna Institute of International dialogue for Cooperation (VIDC) contributed by the Third World Network. This article is available at <https://www.vidc.org/en/detail/international-trade-and-access-to-treatment-during-a-pandemic>

## Key Issues

**1** There has been an expansion of trade and investment agreements with binding rules on goods trade, services, intellectual property rights (IPRs), and investment. Now newer issues such as ecommerce, government procurement liberalisation, gender, MSMEs, GVCs are being brought under their purviews. But most of these rules have constrained developing countries from being able to meet their needs in health, food and other critical products and services. Further, these have constrained governments' policy space to enact policies for development, managing crises, and regulating MNCs.

**2** During the pandemic, developing countries have been faced with scarcity of medical products including vaccines, medicines, ventilators, diagnostic tools, PPEs; as well as underdeveloped health infrastructure and services. Trade & investment rules have bound their hands from acting effectively; either by constraining production by blocking access to raw material by export restrictions; blocking technology through IPRs or by the economic power that rich countries have displayed in cornering critical supplies, or by allowing investor cases on covid related regulations.

**3** The recommendations coming from developed countries have been ineffective as they have missed the core issues such as IPRs, or have deliberately pushed their own commercial agenda using the pandemic. Further, important progressive proposals from developing countries such as the TRIPS Waiver proposal have been aggressively blocked by them. The solutions recommended by developed countries (and backed by the new WTO DG) seem to bank of retaining and expanding control over markets and technologies, that favour MNCs in the North.

**4** Without a complete relook and reshaping of the global trade and investment policy regime in light with development objectives and human rights, and a reclamation of policy space, developing countries will remain unable to meet their critical needs, for this crisis and future ones.

## The Ever-Growing Hotpot: Trade Agreements and their Ingredients

The global trading system, in particular the World Trade Organisation (WTO), was instituted in 1995 in order to establish multilaterally agreed rules and a dispute settlement mechanism. Over the course of its GATT to WTO trajectory, the multilateral trading System had promised to help developing countries bridge the development divide. Since the WTO faced an impasse, culminating in 2008, an increasing number of trade and investment agreements proliferated, signed by both developed and developing countries. These include; bilateral, regional, plurilateral FTAs, mega FTAs between several countries such as the Trans Pacific Partnership (TPP), and investments protection agreements, popularly referred to as Bilateral Investment Treaties (BITs) or Bilateral Investment Protection Agreements (BIPAs). These agreements span all the old issues such as goods (including agricultural and industrial products trade), services, Intellectual Property Rights (IPRs) and investment that we saw in the WTO, but often in a more expanded version. This expansion of scope is especially visible in the case of *IPRs* that sees a push to go beyond WTO-TRIPS commitments in the FTAs and recently even at the WTO, and in *investment* that now faces a push for a multilateral agreement on Investment Facilitation (IF).

In addition, new issues such as e-commerce, competition policy, climate, environmental goods and services, State Owned Enterprises (SOEs) are getting included. Further, different liberalisation packages in the name of Global Value Chains (GVCS), MSMES, and gender are the newest on the block. Newer agreements and issues, including expanded investment and IPR agreements, are getting deeper into regulatory policy, impacting our government's ability to design and implement independent domestic policy and constraining their policy space to craft economic and even social policies for development.

## **Global Trade Rules and Challenges for the South**

For developing countries, this has posed a particular challenge as their regulations are still undeveloped or under-developed. Trade commitments have often bound their hands in designing an effective policy suited to the particular development stages they are in. The general approach across these agreements has been to push so-called “free Trade”, and call to eliminate import duties and subsidies. At the same time, developed countries have protected their economies through standard & technical barriers (known generally as non-tariff barriers), as well as through control over technology. They have also not played fair and continued to subsidise both their agriculture and industry in disguised ways, while pressurising developing countries to eliminate their subsidies, even to small farmers and producers.

As a result, subsidised agricultural products from western countries have entered developing country markets, destroying production and livelihoods especially of small farmers, many of whom are women. In the industrial sector, while developed countries have used high import tariffs while they were developing. For example, the US used 50% import duty and the European countries 18-30% import duty on industrialised products. But the developing countries are now asked to manage without any “protection”. GVCs have been thriving because these have exploited natural resources and labour (especially women’s unorganized labour) in developing countries very effectively while MNCs sitting at top of the value chain, situated in developed countries, have cornered the profits through control of technology, which are protected through IPRs. China has proved to be the only major exception to this phenomenon.

## **Intellectual Property Rights and the Control of Technology**

The IPR regime in a way represents a non-trade tool that has been repeatedly pushed through trade agreements to ensure the economic control by corporations through the control of technology. The system forced governments to protect the economic rights of “innovators” through the protection of their

IP monopolies. While the evidence that this encourages innovation is still inconclusive, the fact that this has raised prices and taken access of critical products such as seeds, medicines, medical devices beyond the reach of the ordinary citizen, both in the global North and the South, is clear. But it has hit developing countries more, as they own very few of these IPRs (with the increasing exception of China) but bear the increasing costs of the system. The IPR system has also systematically challenged the development of cheaper, generic medicines based in countries such as India, Thailand, Brazil and China. Interestingly, developing countries signed the TRIPS Agreement as a payment for benefits in agriculture, but they lost out in both areas.

In particular, TRIPS Plus provisions in FTAs such as data exclusivity have led to a large price escalation. In the case of Jordan, which signed into TRIPS-Plus provisions in its FTA with USA, an Oxfam study (2007)<sup>2</sup> found prices were 1.67-8 times that in neighbouring Egypt, which had no such TRIPS plus provisions in its FTAs. Such provisions also delayed the introduction of generics in 79% of products that were introduced by pharma- MNCs.

## **Investment Agreements Protects Rights of Investors Through ISDS**

The international investments agreements (IIAs) are generally investment protection agreements that protect the rights of foreign investors. These allow the foreign investor, mainly large MNCs, to sue governments in secret, international arbitration cases through the Investor-State-Dispute-Settlement (ISDS) clause for any change in government policy that leads to a fall in their (even expected) profits. These are most often for astronomical figures. More than 7000 such cases globally have robbed developing country governments of precious revenues and policy tools to ensure their own development (including public health, environment, domestic revenue) and to protect vulnerable constituencies.

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2- "All costs, no benefits: How TRIPS-plus intellectual property rules in the US-Jordan FTA affect access to medicines", Oxfam International, Briefing Paper no. 102, 2007

As a result of this system of inequitable trade, investment and IPR rules, developing countries have lost self-sufficiency, their ability to create the needed number and quality of jobs, tariff revenue, and regulatory space. This has also led to deepening of inequalities between developed and developing countries, and within the latter, which is now a glaring reality as we face the pandemic.

## **COVID-19 and the Dangers of a Global Trade, IPR and Investment Regime**

Now faced with COVID-19, we see our countries are heavily import-dependent both for medical products including medicines, equipments, supporting gear, as well as for food. Free trade was to make goods available cheaply everywhere, but we have seen high concentration both in medical products<sup>3</sup> and in food products where 6 companies control global food production and distribution. It is not surprising that faced with the pandemic, most countries did not have the critical products they needed.

Interestingly the solutions coming from mainly the developed countries in the WTO harked on a few points. They asked countries to; limit export restrictions on medical and food products; eliminate import duties; facilitate trade through the Trade Facilitation Agreement or TFA in short (which has not been ratified by many developing countries as seen to be expensive and non-beneficial); and expand e-commerce (often by agreeing to e-commerce negotiations at the WTO). While the first deserves some attention, the other three recommendations clearly point to the age-old northern agenda on trade, manifesting in an aggressive push for developing country markets even during a pandemic. Moreover, many such proposals, for example by the Ottawa Group, have tried to point only towards supply chains and trade restrictions as concern areas in order to divert attention from the more critical issues such as technology and IPRs.

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3- A 3rd April, 2020 WTO report entitled “Trade in Medical Goods in the Context of Tackling Covid 19”, Information Note<sup>4</sup> shows Germany, the US and Switzerland supply 35% of medical products, while China, Germany and the US export 40% of personal protective products. Singapore, the US, the Netherlands and China export more than half the world’s respirators and ventilators.

## **Export Restrictions or not?**

Now when countries are prone to putting up export restrictions, many do not have supplies they need, especially Least-Developed Countries (LDCs) for whom it is devastating. At the same time, large populous developing countries will naturally need to put up export restrictions in order to support their large and poor population. But when exports are open, we have seen the highest bidder take all as in the case of Remdesivir, masks, and Hydroxychloroquine; a situation poised to repeat itself in the case of Covid-19 vaccines. While countries will want to cater to needs of their populations, there are situations where export restrictions simply cannot be justified. First when a country is hoarding products such as life saving vaccines or the raw material needed in excess of their needs. The result will be a deepening of inequality between the rich and the poor, within and across countries. This is what the US has been doing through their Defense Production Act, which has limited both supply of vaccines and its raw material to countries such as India. Repeated appeals by the Serum Institute of India were unheeded by the US government<sup>4</sup>. It is only with huge international pressure generated by the catastrophic second wave of the pandemic in India, that the US government has very recently agreed to release raw material while still refusing vaccines.

## **IPR and the access to Covid medicines and vaccines**

Of course IPRs and patent monopolies are a major issue for Covid-19 medicines and for the life-saving vaccines. Remdesivir costs USD 2340-3120 for one patient in developed countries. But IPRs also limit supply by allowing production only by the holder of the IP. Therefore many developing countries will not even be able to get any Remdesivir, notwithstanding some licenses to generic companies to supply to the developing countries. Remdesivir is sold at six times its price in black markets in New Delhi, India, and is now out of market in spite of efforts to boost production by local manufacturers.

At the current rate of production and pricing of Covid vaccines, which are both determined by patent rights of the innovators, it will take till the end of 2024 to

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4- <https://www.thehindu.com/news/national/coronavirus-sii-ceo-appeals-to-us-seeking-lifting-of-embargo-on-export-of-raw-material-for-vaccine/article34334852.ece>



vaccinate the global population. The vaccines have been priced at various ranges; at the top are Moderna and Pfizer, priced at the USD 25- 37 and 19.50 per dose respectively. This means their price for two doses is double per person. Sputnik is selling around USD 10 per shot. Astra-Zeneca at USD 4 per shot and some national vaccines such as the Indian Covaxin are cheaper but remain expensive for large populations in developing and least developed countries. As in the case of medicines, the production and supply are facing major constraints from monopolies. Some of these companies have reached limited voluntary licenses with producers in some developing countries such as the one between Astra-Zeneca and the Serum Institute of India. But sometimes royalty payments are high, and the originator may decide at any point not to get into such contracts, as was decided by Pfizer recently<sup>5</sup>.

Global efforts to increase access to vaccines, for example the WHO Initiatives (See DAWN-TWN Issue paper#5 on “WHO and COVID-19: Multilateral Initiatives”, 2021). However the initiatives bypass the critical issue of access to technology and rely again on voluntary licenses and licensing agreements, which are limited at best. Only when producers across the globe are able to access these technologies easily can they manufacture enough to meet global needs. However, we do not see IPRs getting addressed in the trade fora. In fact it is a taboo subject even in the UN development discourse.

It is since second half of 2020 that a proposal by India and South Africa was presented in the WTO TRIPS Council, which sought exemption from TRIPS implementation for technologies related to Covid treatment including diagnostics, medicines and vaccines. However, in spite of growing support, now from over two-third of WTO membership, there is still massive resistance from Northern countries. The proposal is stuck in mid air (read more in DAWN-TWN Issue paper #4, part 2, entitled “TRIPS Waiver Proposal- An Ongoing Debate”, 2021). Even the new WTO Director General has bypassed addressing IPRs and has advocated a “third way” that banks on such voluntary licenses, thus posing a challenge to a

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5- <https://www.reuters.com/business/healthcare-pharmaceuticals/pfizer-consider-new-production-sites-only-after-pandemic-supply-phase-2021-03-11/>

resolution and a solution to global production constraints. However, the massive global support for this proposal shows that the global community recognizes the challenges to access to medicines and treatment posed by the global IPR regime and the TRIPS Agreement (see more on TRIPS waiver at [https://twm.my/title2/intellectual\\_property/trips\\_waiver\\_proposal.htm](https://twm.my/title2/intellectual_property/trips_waiver_proposal.htm))

### **Investors still do their damage**

This is not all, notwithstanding the utter destruction created by the pandemic, the investors are still suing governments through investment agreements in secret arbitration cases for measures to fight pandemic. Peru faced threats of ISDS case for removing a toll tax by law. The measure was designed to ease the transport of essential goods or workers at a time when many Peruvians have lost their income<sup>6</sup>. Several covid measures, for example of shifting hospitals to covid facilities, restricting airport traffic can all be subject to investment disputes. In addition, there are other ISDS case awards during the pandemic, such as 6 Billion USD in the Tethyan Copper case in Pakistan and the 1.4 Billion USD award in the Cairn Energy case in India, which are forcing many developing country governments to pay huge compensation to corporations, money which could have been used for Covid related measures.

## **Trade Policy for a Pandemic Devastated World**

Unfortunately, prescriptions coming from WTO ask countries to do more of the same<sup>7</sup>; liberalise more, remove tariffs, and not restrict exports, but fails to recognise the weaknesses of this system that has brought us where we are. There is no recommendation to change the TRIPs agreement and the IPR regime. There is a clear disjoint between what countries need now and what conventional trade policy has been prescribing as well as disconnect between trade policy and human Rights, trade policy and the Sustainable Development

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6- <https://www.bilaterals.org/?peru-warned-of-potential-icsid>

7- For an analysis of these recommendations see “Covid-19: Trade policy choices for developing countries during and after the pandemic” by Ranja Sengupta, [https://twm.my/title2/briefing\\_papers/twn/ranja1.pdf](https://twm.my/title2/briefing_papers/twn/ranja1.pdf)

Goals (SDGs). Developing countries also need policy space to deal with current and post pandemic crisis, to design their domestic policies but current trade rules do not allow that. Many countries are talking of self-reliance at least in critical sectors such as food and health. Even the US was talking about raising tariffs<sup>8</sup> to develop key health sectors. So if developing countries want to pursue self-reliance in critical health and food products, economic revitalization, creation of jobs and incomes, they should be encouraged rather than discouraged. If developing countries are arguing for a total overhaul of the WTO, and in particular, the TRIPS Agreement, so that it fosters, rather than blocks, access to medicines and health products for the world's population, especially those who are poor, marginalised and vulnerable, it needs to be taken seriously.

The current situation needs a complete review and restructuring of trade policy and rules to actually enable and support countries, especially developing countries, to formulate the domestic policy they need that works for their people at large. It also needs a multidimensional and systemic approach between different tools of global economic architecture such as global rules on finance, taxation, technology and data. This is not to argue against international trade, which is an important economic tool today, but to ask for a fair, trade, IPR and investment system for the South.

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8- <https://www.araujoibarra.com/en/related-articles/representante-comercial-de-ee-uu-pide-una-politica-industrial-estadounidense-tras-el-fin-de-la-pandemia-de-coronavirus/>



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