Policy Brief

COMPULSORY LICENSING AND POLITICAL-ECONOMIC COMPENSATION MECHANISMS TO PROVIDE LOWER INCOME COUNTRIES EQUAL ACCESS TO COVID-19 VACCINES PRODUCTION

Task Force 6
Global Health Security and Covid 19
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Abstract

In the face of the new Covid-19 variant of Omicron spreading across borders and social, political, and economic instability faced by middle to low-income countries to the lack of decent manufacturing capacity and the lack of the specialized expertise, many low- and middle-income countries are lagging behind in vaccine production. This gap in vaccination rate between rich and poor countries reflects considerable inequality in vaccine distribution. The 2020 proposal submitted by India and South Africa to the World Trade Organization (WTO) to temporarily rescind intellectual property provisions on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement shall indeed carry considerable redeeming outcomes in equal vaccine distribution in the short-term. To find common ground among member countries of the WTO, the author of this Policy Brief suggests that all WTO member countries agree to temporarily invoke the compulsory licensing proposed by the European Union to guarantee equal distribution of vaccines. The author also proposes several compensation mechanisms for the right holders of the patents and for the exporter countries by which both exporting and importing countries can agree on to maximize the interests of both sides, which can be financial, economic, or political. By leveraging bilateral dialogue between the exporting and importing country, the former shall be entitled to appropriate compensation while the latter shall have the opportunity to adjust the mechanisms to suit its institutional capacity.

Keywords: compulsory licensing; equal vaccine production; intellectual property rights; Trade-Related Aspects of Intellectual Property Rights; World Trade Organization.
Challenges

As of January 22, 2022, statistics proves the new record of 15 new million Covid-19 cases from across the globe in a single week while the Omicron variant has become the dominant mutation of the virus for the past few months (Feiner, 2022). To make matters worse, there are still 36 countries with the lowest vaccination rates below 10% due to the lack of equal vaccine distribution, with Yemen being the lowest of all- fewer than 2% of Yemeni population have been fully vaccinated- despite the fact that the country had gone through three waves of Covid-19 as of January 2022 (Beaubien, 2022). Other countries in the mid-section of Africa include Kenya, Nigeria, and Senegal, others include Yemen, Syria, Afghanistan, and Haiti.

As of early March 2022, low-income countries have only managed to vaccinate 12.9% of their population in a first dose vaccination (Ritchie et. al, 2022). In other parts of the world, wealthy countries have managed to vaccinate more than 80% of their population, with United Arab Emirates, Brunei, and Portugal have vaccinated above 90% of their population; and Singapore, China, South Korea, and Spain, among others, have vaccinated above 80% of their population; while United States, United Kingdom, Israel, Germany, France, among many others, have vaccinated above 60% of their population (Wolf, Matthews, & Alas, 2022). Vaccine inequity faced by middle and low-income countries carries health, social, political, and economic repercussions, which in turn will pose considerable threats to the exit strategies implemented by rich countries from their previous expansionary fiscal policies. If the gap in vaccine distribution were to remain, there will be a considerable amount of clustered demographics with health crises and social instability.

This persistent gap in vaccination is considerably due to the fact that wealthy countries, especially those of the Covid-19 vaccines exporting countries, have their own pharmaceutical companies whose intellectual property rights are protected by international law, such as AstraZeneca/Oxford, Johnson and Johnson, Moderna, Pfizer/BionTech, Sinopharm, Sinovac, COVAXIN, Covovax, and Nuvaxovid (World Health Organization, 2022). Intellectual property rights, in turn, prevented non-vaccine-producing countries’ manufacturers from independently producing vaccines of the vaccine-producing countries, those who have been approved by the World Health Organization and whose efficacy has been proved and guaranteed. In a time where global health crisis poses significant threats to a country’s public policies, governance, and institutions, intellectual property rights protecting Covid-19 vaccines production are becoming more of an institutional barrier to health equity.
This Policy Brief answers the two following questions and proposes relevant policy recommendations to the G20 leaders: Even if COVID-19 disappears or no longer becomes pandemic, re-emerging communicable diseases may turn into new global health threats. Should Intellectual Property Rights (IPR) in the future pandemic be temporarily waived? If such a waiver were to be the solution, how could the reciprocal relationship between the exporting and importing countries be built and maintained?
Recommendations

INTELLECTUAL PROPERTY RIGHTS WAIVER FOR VACCINES DURING PANDEMIC THROUGH COMPULSORY LICENSING

During global health emergencies, Covid-19 vaccines and other corona virus-related diagnostics and therapeutics should be treated as global public good which entitles everyone to it, regardless of their social status and economic capacity. Vaccines should be regarded as a common good which fulfils both the criteria of rivalrous and non-excludability, which means that even though one person’s consumption of a vaccine reduces the amount of vaccines for consumption of another, producers must not prevent anyone from having access to vaccines based on their economic inability to pay. Considering the current gap in vaccine distribution, global governance supported by concerted political leadership is needed to address vaccine inequity among countries. The World Health Organization reform agenda which consists of temporarily rescinding intellectual property rights on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement for vaccine production was proposed by India and South Africa in October 2020 (Baschuk, 2021).

The proposal submission of the IPR waiver was backed by 60 lower-income countries where the waiver would entail the exemption of intellectual property rights currently governing the production of what are required to fight the Covid-19 pandemic, such as vaccines, diagnostics, and therapeutics, to medical devices and personal protective equipment (Baschuk, 2021). The implications would be that governments and companies who decide to independently replicate vaccines and provide technical know-how of the trade secrets would be exempt from the political and economic sanctions of the patent-holding countries to WTO sanctions (Baschuk, 2021).

The United States, through its Trade Representative Katherine Tai, has stated in May 2020 that even though Washington strongly advocated for the intellectual property protections regime, it supported the IPR waiver proposal for the Covid-19 vaccines in support of ending the pandemic (Baschuk, 2021). The European Union, the United Kingdom, and Switzerland have voiced their opposition to the proposed IPR waiver due to the possible harm it can inflict, from discouraging research and innovation in pharmaceutical industry; posing a threat to the current partnerships between companies and governments; the changing behavior of investors; and compromising the quality of vaccines produced, which in turn will affect its effectiveness and harm fair competition (Baschuk, 2021). To meet competing interests halfway, the European Union have
proposed a policy proposal called “Compulsory Licensing” that aims to temporarily rescind WTO’s intellectual property rights for Covid-19 vaccines where governments, companies, and individuals can independently produce “patented invention” of the vaccines under the compulsory license category without the permission of the patent owner, provided that the owner be paid a compensation (Baschuk, 2021). Nevertheless, the U.S. has explicitly stated that it would retaliate by means of trade sanctions in response to the use of compulsory licenses for American-made products.

Nevertheless, the IPR waiver carries considerable advantages. It is the appropriate solution to achieve equal vaccine production, one objective hindered by market failure, since not all countries whose governments and pharmaceutical companies have the capacity to produce their own vaccines. Considering the fact that the WTO is a consensus-based entity, it means all the 164 members must agree on the compulsory licensing if it were to come into force. To prevent the negative externalities, all member countries of the WTO should agree on the compulsory licensing policy proposed by the European Union to guarantee equal vaccine production while at the same time preserving and guaranteeing the incentive and rewards of scientists to continually conduct research and innovation on vaccines; maintain vaccine quality standards and competition; and keep investors under the industry’s belt. Not only does the compulsory licensing in the midst of a national emergency (Covid-19) waive the requirement to negotiate with the right holders, but it also proposes that the compensation for the right holders shall be at affordable rates relative to the financial and institutional capacity of the beneficiary countries. In addition, several compensation mechanisms for the right holders of the patents and for the exporter countries by which both exporting and importing countries can agree on to maximize the interests of both sides, which can be financial, economic, or political, must be greatly emphasized. By leveraging bilateral dialogue between the exporting and importing country, the former shall be entitled to appropriate compensation while the latter shall have the opportunity to adjust the mechanisms to suit its institutional capacity.

**COMPENSATION MECHANISMS FOR PATENT-HOLDING COUNTRIES**

In exchange for the exemption of the obligation to negotiate with patent holders enjoyed by non-vaccines producing countries, compensation is a key element to maintaining trust and partnership between the exporting and importing countries. The compensation mechanisms, which can be financial, economic, or political, should be adjusted to the institutional capacity of the beneficiary (importing) countries through bilateral dialogue and agreement.

**FINANCIAL AND ECONOMIC COMPENSATION MECHANISM**

Financial and Economic Compensation can take the form of investment or the removal of investment barriers (such as heavy tax rates) in beneficiary countries to increase the ease of
doing business for foreign investors and companies to the inclusion of developing countries to bilateral and multilateral free trade agreements. The sectors can be in infrastructure development, telecommunications, toll roads, electricity, water & sewerage, railways, airports, et cetera. Not only will the investment mechanism benefit the patent-holding countries and companies, but also will assist in the national development efforts of low-income countries and provide job opportunities for the beneficiary countries' local population, provided that the agreement sets out a quota for local job seekers. Low-income countries, such as Yemen, Libya, Venezuela, Syria, Afghanistan, and Haiti, are among economies with the lowest ease of doing business with investment opportunities in real estate development, fishery, IT infrastructure, energy, et cetera, and can benefit greatly from both the financial and economic compensation mechanism in their nation-building efforts. For developing countries, the compensation mechanism can revolve around the ratification of bilateral and multilateral free trade agreements to foreign investment in information technology infrastructure development in order to stimulate business digitization. In the stages of policy evaluation and review, the stakeholders concerned can employ the Ease of Doing Digital Business Index to measure the extent to which the business digitization has been implemented.

The enforcement of financial and economic compensation requires incremental policy evaluation which should include multi-stakeholders approach, from the beneficiary countries to the patent-holding countries and non-governmental organizations. In September 2021, the World Bank released a new approach to measure economic and investment climate in countries worldwide, called Business Enabling Environment, as a successor to its previous Doing Business report since 2003 (The World Bank, 2022). Collaborative governance among governments (both patent holders and beneficiary countries), pharmaceutical companies, individuals, and non-governmental organizations must be emphasized in all policy stages from agenda setting and policy formulation to policy implementation, evaluation, and review. The World Bank, making use of its new approach Business Enabling Environment, can assist governments and companies in their policy evaluation process to measure and analyze the implementation of financial and economic remineralisation mechanisms in low-income and developing countries using several indicators. It can conduct qualitative research on the ensuing national legislation and administrative regulations in low-income and developing countries regarding the removal of trade and investment barriers to measure their ease of doing business and investment climate, and to identify any negative externalities and moral hazards.

Public-Private Partnership between Beneficiary Countries with Foreign Companies
Policy implementation of the financial and economic compensation in low-income and developing countries can be effectively and efficiently best achieved through Public Private
Partnership (PPP) such as contracting out for public services and other long-term and capital-intensive programs such as information technology infrastructure development, real estate development, energy, highway, airport, water system, public buildings, hospital, public schools, et cetera. In the case of stimulating foreign investment in beneficiary countries, particularly on long-term and capital intensive projects, it is worth emphasizing that the most viable mechanism, according to the classification taxonomy proposed by Savas (2000), would be delegation that takes in the forms of contracting out to the private sector; public-private competition; public private partnership; grant; loan; favored tax status; and mandate; where the host governments in beneficiary countries still retain responsibility and oversight, including but not limited to enacting policies concerned and to adjust the compensation mechanism to its institutional and governance capacity; and that the foreign companies and individual investors take charge of the services delivery.

POLICY MITIGATION
POLITICAL COMPENSATION MECHANISM

Compensation in the form of political compensation is the least likely since the mechanism is considerably delicate and can carry domino effects over other aspects of the relationship between and among countries, from diplomatic and social to economic and environmental. Nevertheless, there are several mechanisms as explained below.

Administrative Reform of the Public Sector in Beneficiary Countries through Development Administration aims to achieve both sustainably economic and social change and therefore should touch on three interdependent aspects: policy, governance, and institutions.

1. The policy aspect acts as the basis for the administration of the government itself, such as the Constitutional Law and Administrative Law; the regulation of the discretion of state officials; the separation of powers so as to enhance checks and balances; and the structure of government agencies and their tasks. The policy aspect aims to establish and maintain a system of government that is based on law and order and is both stable and conducive.

2. The governance aspect refers to how the government uses its power in implementing its policies and in relation to its relationship with non-state actors in the implementation of public policies and the allocation of public services.

3. The institutional aspect refers to symbols, values, procedures, to the logic of appropriateness that develop in government agencies which as a whole can be referred to as public sector organizational culture which greatly affects the governance of government organizations and their relationship with the external environment.
Furthermore, the public sector reform itself can be achieved through the intersection of the following strategies (Pollitt & Bouckaert):

1. Tighten up traditional control by cutting back on government expenditure and implementing Public Expenditure Management principles such as aggregate fiscal discipline by allocating financial aid to local government on the basis of program priorities, allocative efficiency on the basis of citizen preference, and operational efficiency on the basis of affordability and services allocation efficiency.

2. Modernize, marketize, and minimize the administrative system by advancing science and technology in public programs and services, by introducing market principles to the public sector in terms of public services allocation through public-private partnerships and open tendering to establish competitive level playing field, and through privatization of particular state-owned enterprises to the private sector to boost corporate governance and efficiency.

3. Deregulate the administrative system by rescinding minimizing regulations to enhance ease of doing business and attract investors and reform the bureaucracy.

Taking possession of a very significant role in the global arena by representing more than 80% of the world’s GDP, 75% of international trade, and 60% of the world’s population, the unanimous support for the compulsory licensing for vaccines production shall be the driving force for G20 to achieve global equality and prosperity. By committing to advocating for the compulsory licensing of vaccines for low-income countries, the G20 shall be the reapers of its own harvest when it comes to climb the ladder toward its exit strategies from previous expansionary fiscal policies. The technical recommendation should be further develop by the next G20 Presidency to ensure sustainability of this compulsory licensing. WHO and WTO need to monitor this special public-private partnership in global public goods.
References


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