

# INTELLECTUAL PROPERTY AND GLOBAL INEQUALITY IN THE COVID-19 PANDEMIC

**Alan Rossi Silva, Clara Alves Silva,  
Felipe de Carvalho Borges da Fonseca, Pedro Villardi  
and Susana Rodrigues Cavalcanti van der Ploeg**

- *The struggle for the right to health in times of emergency* •

## ABSTRACT

*The Covid-19 pandemic has increased the inequality of rights around the world. The intellectual property system contributes to this asymmetry by limiting access to vaccines and other health technologies to only a few producers. This article addresses the impacts of this system, presents and analyses alternatives for broadening the supply of these health goods – such as compulsory licensing – and demonstrates the importance of defending the TRIPS Waiver mechanism in the fight against the coronavirus.*

## KEYWORDS

Intellectual property | Global inequality | Covid-19 pandemic | Right to health | TRIPS Waiver

## 1 • Introduction

The Covid-19 pandemic has had unprecedented impacts on the world and generated a crisis situation with political, economic and social implications.<sup>1</sup> While the current health emergency is global, it affects each region and population of the planet differently, as it exacerbates pre-existing inequalities. Therefore, for those who already faced substantial social contradictions, the pandemic posed an even greater threat to basic human rights, namely the right to life, as nearly 4 million lives have been lost to the coronavirus.

To make the health and social crisis worse, the response to the pandemic has come up against obstacles that contribute to and accentuate this asymmetry. As anticipated, the intellectual property system acts as a major hindrance to efforts to control Covid-19, as it grants monopolies to transnational pharmaceutical corporations and restricts the distribution of affordable generic products. Once again, trade rules have condemned millions of people to death.<sup>2</sup> While the deleterious effects of intellectual property can be felt in all countries, its most perverse expression has been experienced in countries of the Global South, thus reflecting their situation of vulnerability.

The rights to life, health and access to the tools necessary to respond to the health crisis are constantly being violated. Many countries, especially those on the African continent, are still having major difficulties in accessing the health technologies used to fight the coronavirus. The hope of immunizing the entire world population is but a distant dream, which is expected to be achieved in 2024 at the earliest.<sup>3</sup>

To reverse this situation, numerous initiatives have emerged all around the world. Internationally, mobilizations at the World Trade Organization (WTO) for the temporary suspension of certain intellectual property rights related to the fight against Covid-19 – known as the TRIPS Waiver<sup>4</sup> – have been gaining ground. In this article, we present the impacts of the intellectual property system on impoverished countries, which generates global disparities in access to immunization and other health technologies used to combat Covid-19 and the importance of defending initiatives such as the TRIPS Waiver to guarantee rights during the pandemic.<sup>5</sup>

## 2 • The intellectual property system and inequality of access to health technologies to fight Covid-19

In 1994, the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) standardized the rules on intellectual property rights at the international level. Since then, all WTO member states have committed to adopt the same minimum standards on intellectual property rights. The new provisions establish, for instance, that countries must recognize patents in all technological fields, including ones for essential live-saving goods.

In the area of health, the pharmaceutical industry has a history of charging exorbitant prices, thanks to the monopoly that the intellectual property system grants them, under the pretence of the need to guarantee an economic return on their investment. In the context of the current Covid-19 pandemic, when there is unprecedented demand for health technologies, exclusive rights limit the maximization of supply, which generates inequalities in access to these goods all over the world.<sup>6</sup> In other words, the monopoly established by intellectual property makes it impossible to achieve mass treatment or immunization goals because it creates a shortage of vaccines and medicines and price barriers. As a result, these goods become a luxury that only the richest countries can afford.

As if the policy incoherence between intellectual property and public health goals was not enough, the intellectual property regime looms as a general threat to human rights. Data from the *Our World in Data*<sup>7</sup> project of the University of Oxford indicates that 31.4% of the world population received at least one vaccine dose and 23.6% has been completely vaccinated. However, in the case of poor countries, a mere 1.3% of the population has received at least one dose of the vaccine. Such a large gap favours the emergence of new variants and makes a faster and fairer recovery from the socioeconomic impacts of the pandemic impossible.

The *Launch and Scale Speedometer* research project of the Global Health Innovation Center at Duke University has been monitoring the distribution of vaccines around the world on a weekly basis since November 2020. Systematized data show that high income countries, such as the United States or the United Kingdom, purchased their vaccines in May 2020 even before the vaccines had been developed and far in excess of their population.<sup>8</sup>

Low-income countries made their first purchases in January 2021 through a joint effort led by the African Union. However, countries from Latin America, Africa and Asia still have not been able to buy vaccines for their entire population. Although demand for Covid-19 vaccines far outstrips supply, 17.6 billion doses are currently being held for countries of the Global North.<sup>9</sup> To satisfy the global demand for vaccines, production must increase on a scale never seen before. The monopoly granted to some laboratories, however, constitutes a major barrier to the production and distribution of these products.

In intellectual property regulations, the definition of priorities is subjected to the logic of the market and the privatization of knowledge, which systematically excludes millions of people from access to essential health goods. The Covid-19 pandemic adds to a wealth of evidence from past experiences which illustrates that the very functioning of the intellectual property system is contrary to global public health interest because it restricts universal access to immunization and treatment and prolongs the duration of the crisis and its inherent risks.

In this context, alternatives must be developed to overcome the obstacles that intellectual property rights have created in order to guarantee the right to health in all countries. With this goal in mind, civil society groups, persons affected by various illnesses, and health and human

rights activists are working in networks to advocate for the use of compulsory licences. Since the beginning of the pandemic, this mobilization – which is the result of a long history of political struggle known as “the global movement for access to medicines” – has gone further and defended the adoption of the TRIPS Waiver as a solution for reversing this situation.

### 3 • Public health safeguards: compulsory licencing, its limits and its potential

Compulsory licencing (CL) of patents, which is provided for by law, refers to the use of the object of the patent by a government or a third party authorized by the government without the consent of the patent holder. In practice, this allows governments to purchase generic or biosimilar versions of health technologies for which its only option prior to the CL was to buy brand name versions. The measure aims to reduce the negative impacts of intellectual property rules, especially in the area of health, because of the high prices of these goods.<sup>10</sup> The monopoly granted to the patent holder must not override the right to health and life and compulsory licensing can ensure the sustainability of important public policies.

Article 31 of the TRIPS agreement sets out the procedural conditions for the use of compulsory licences. It stipulates that such use should be considered on its individual merit and authorized predominantly for the supply of the domestic market of the government that authorized them. The agreement also establishes that this mechanism is temporary, and the licence will be terminated when the circumstances that justified it cease to exist. It highlights that the patent holder shall be remunerated and that any decision regarding this remuneration may be reviewed. Similarly, the TRIPS agreement states that the legal validity of the licence shall be subject to judicial review or appeal at the WTO.<sup>11</sup>

Even though the compulsory licensing of patents is an important public health safeguard and a fundamental element for guaranteeing access to health technologies around the world, it is rarely used.<sup>12</sup> The limited use of compulsory licensing is primarily due to the pharmaceutical industry’s lobbying against them – a practice that is totally reprehensible given that the mechanism is entirely legitimate and fully regulated.

Moreover, the Covid-19 pandemic brought to light the limits of this mechanism for dealing with needs that arise in times of emergency. In the end, when facing a major health crisis, the last thing the world needs is obstacles that make it even more difficult to access technologies capable of mitigating the problem or even overcoming it definitively.

The emblematic case involving the Government of Bolivia, Biolyse (a small pharmaceutical company from Canada) and the Johnson & Johnson (J&J) transnational corporation, which produces its own vaccine against Covid-19, illustrates the problems of using compulsory licences in the context of a pandemic. In view of the shortage of vaccines, the World Health Organisation (WHO) asked the corporations to sign agreements with companies willing to

use their own facilities to produce vaccines to increase manufacturing capacity and close the immunization gap between rich and poor countries.<sup>13</sup>

Biolyse, which manufactures sterile injectable drugs, contacted several vaccine producers, including J&J, to offer its help in meeting global demand, saying that it wanted to be part of the solution to the vaccine shortage in poor countries. However, the transnational corporation declined its offer. It stated that the production of vaccines involves highly complex manufacturing processes, and it was working to expand production.<sup>14</sup>

After all attempts to negotiate had failed, Biolyse asked the Canadian government to issue a compulsory licence for the export of a generic version of the J&J vaccine. The Canadian pharmaceutical company also signed an agreement with the Bolivian government, which included the option of purchasing up to 15 million doses of the generic vaccine to be produced in the future if the Canadian government were to grant the compulsory licences it had requested.<sup>15</sup>

The procedure for compulsory licensing is, however, slow and bureaucratic. Furthermore, it is restricted to patents and does not include the transfer of the technology needed to produce the vaccine. Thus, even if the licence were granted, Biolyse would have difficulty in starting production, which would be faster with the collaboration of J&J.

This case illustrates how the monopoly on vaccines granted by intellectual property rights acts as a barrier to access to technologies to fight Covid-19. It also reveals the limits of compulsory licensing in ensuring the increase in the production and distribution of the vaccines.

#### 4 • The defence of the TRIPS Waiver as a solution to inequality of access to health technologies

In the international sphere, various proposals on how to deal with the global health crisis have emerged. Among them is the TRIPS Waiver which was originally proposed by India and South Africa in October 2020. This tool seeks to overcome the limits of compulsory licensing and it recognizes intellectual property rights more broadly as an obstacle to the right to life and the right to health for billions of people.<sup>16</sup>

The TRIPS Waiver proposal gives WTO member states the option of choosing not to apply, implement or enforce compliance with protections for patents, trade secrets, industrial design, copyrights and the other intellectual property rights related to medicines, vaccines, diagnostics and other health technologies used to combat Covid-19 temporarily.<sup>17</sup> Countries that adopt the TRIPS Waiver would be exempted from being sued or receiving sanctions for not fully implementing the TRIPS agreement in a pandemic. With this measure in place, intellectual property would cease to be a barrier and countries would be allowed to export, import or produce certain technologies without having to go through the cumbersome,

time-consuming procedures related to compulsory licensing.<sup>18</sup> These include negotiations with patent holders prior to the issuance of compulsory licences, restrictions on the transfer of health technologies, undue restrictions on transnational trade and the obligation to pay royalties to the holder of the suspended intellectual property right.

The TRIPS Waiver is an additional measure designed to allow countries to suspend the enforcement of certain intellectual property rights during the Covid-19 pandemic, making it possible to produce and supply essential products uninterruptedly until global immunity was reached. If the proposal were adopted as it stands now, the TRIPS Waiver would allow vaccines, diagnostic kits and therapeutic technologies to be manufactured and distributed freely, without the fatal constraints created by intellectual property rights.<sup>19</sup>

India and South Africa's first communication to the TRIPS Council in October 2020 called on WTO members to work together to ensure that intellectual property rights do not create barriers to the timely access to health and essential measures to combat Covid-19.<sup>20</sup> The document also stressed that the pandemic affects developing countries disproportionately in comparison to developed countries. It highlights that an effective response to the pandemic requires global and multilateral action to guarantee rapid access to affordable medical products. Furthermore, it urges countries to act in solidarity to ensure that technologies are shared without impediments and that enough affordable vaccines are available to meet global demand.<sup>21</sup>

The document also drew attention to the fact that product shortages and inequalities in distribution have led to deaths that could have been avoided and they are threatening to prolong the pandemic indefinitely. In fact, in relation to the economic aspect in particular, it also pointed out that the longer the global health crisis lasts, the greater the socioeconomic fallout will be.<sup>22</sup>

In May 2021, the text was revised and once again submitted to the TRIPS Council. This time, India and South Africa were joined by another 60 WTO members from the Global South, such as Kenya, Mozambique, Pakistan, Bolivia, Venezuela, Zimbabwe, Egypt, Maldives, Fiji and Namibia. The new text stressed the urgent need for global access and the diversification of the production and supply of vaccines due to the constant mutation and new variants of SARS-CoV-2.<sup>23</sup>

The current proposal is unprecedented in scope and strengthens the recognition of the fact that intellectual property restricts access to health goods, and solutions based on the voluntary actions of corporations are not enough. Up until last year, the recognition of intellectual property as part of the problem was only present in the discourse of developing countries, whereas developed countries strongly opposed the proposal with the support of a few developing countries such as Brazil, Chile, Colombia and Ecuador.

However, in April 2020, the US government began to show signs of a change in its stance. This culminated in an announcement by President Joe Biden on May 5, 2021,

that the country was going to support the TRIPS Waiver negotiations, as “extraordinary circumstances call for extraordinary measures”.<sup>24</sup>

Following this announcement, other countries also declared their support for the negotiations, including Brazil, which was under pressure from national civil society to change the Ministry of Foreign Affairs’ position.<sup>25</sup> The proposal is currently backed by more than 100 countries and negotiations on its text are underway; the European bloc is its main opponent. The fact that this debate has been taken up at the WTO, with a broad support base, and that the proposal has gone from the debate to the negotiating phase means that this is a historic moment for the social movements who have been mobilizing for decades to ensure that public health interests are put before commercial interests.

The risk of the negotiations foundering, the outcome being below expectations or countries taking too long to come to an agreement is still very real. However, it is important to note that the political importance given to the TRIPS Waiver comes from the fact that it originated in a global grassroots mobilization process that involves social movements from not only the health sector, but several other fields, as well as intellectual property experts, former heads of state, celebrities, religious authorities, scientific authorities, health professionals and the general population, who have expressed their support through petitions, letters and protests.<sup>26</sup>

## 5 • Conclusion

Throughout history, in the context of geopolitical relations, rich countries have imposed their will in relation to trade and neglected the realization of human rights all over the world. By doing so, they have contributed to the vulnerability of entire populations, especially in the Global South. The struggle for access to health technologies has occupied a central place in tensions between countries from the South and the Global North.

It is becoming increasingly clear that the intensification of the social contradictions exposed by the health crisis originates in the current model of capitalist accumulation, which concentrates income, power and technology in the hands of a few and exploits bodies and labour in the periphery. The intellectual property system is part of this dynamic, as it enables large pharmaceutical corporations to generate profit at the expense of lives thanks to the monopolies it creates. It is by no means a coincidence that we are witnessing the rise of nine new vaccine billionaires.<sup>27</sup>

The Covid-19 pandemic exposes how the current system puts profit before lives and demonstrates that the solutions adopted by countries of the Global North – concentrating vaccines in their territories and defending the intellectual property of transnational pharmaceutical corporations – increase inequality and stop the world from putting an end to a virus that does not respect borders.

The TRIPS Waiver and the push for compulsory licences can correct distortions and promote rights in the short term. Both these processes should be on the political agenda of all social movements committed to social justice and a human rights-based approach to the fight against the pandemic. This level of awareness has much to contribute to achieving deeper systemic change, regardless of whether this proposal is approved at the WTO.

It is perhaps safe to say that the political process triggered by the TRIPS Waiver proposal is the biggest challenge to the current intellectual property regime since its creation in the 1990s. However, to envisage promising paths that will decisively contest the current economic model and its most perverse outcomes, we will have to be much bolder and capable of imagining a world without pharmaceutical monopolies.

## NOTES

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**ALAN ROSSI SILVA** – *Brazil*

Alan Rossi Silva is pursuing a Ph.D. in Law at the Rio de Janeiro State University (UERJ) and has a Master of Law and Innovation degree from the Federal University of Juiz de Fora (UFJF). He is a lawyer at the Associação Brasileira Interdisciplinar de AIDS (ABIA, Brazilian Interdisciplinary AIDS Association) and a member of the Working Group on Intellectual Property of the Brazilian Network for the Integration of Peoples (GTPI/REBRIP).



**CLARA ALVES SILVA** – *Brazil*

Clara Alves Silva is an internationalist and is pursuing a Master of Collective Health degree at the Rio de Janeiro State University (UERJ). She is a project assistant at the Associação Brasileira Interdisciplinar de AIDS (ABIA, Brazilian Interdisciplinary AIDS Association) and a member of the Working Group on Intellectual Property of the Brazilian Network for the Integration of Peoples (GTPI/REBRIP).



**FELIPE DE CARVALHO BORGES DA FONSECA** – *Brazil*

Felipe de Carvalho is a journalist and holds a Master of International Political Economy degree from the Federal University of Rio de Janeiro (UFRJ). He works for the Associação Brasileira Interdisciplinar de AIDS (ABIA, Brazilian Interdisciplinary AIDS Association) as the coordinator of the Working Group on Intellectual Property. He is a specialist on access to medicines, diagnostics and vaccines, intellectual property, research and development, global health and multilateral cooperation.

**PEDRO VILLARDI** – *Brazil*

Pedro Villardi is the coordinator of the Working Group on Intellectual Property of the Brazilian Network for the Integration of Peoples (GTPI/REBRIP). He has a Bachelor of International Relations degree from PUC-Rio, a Master of Bioethics and Applied Ethics degree from PPGBIOS and a Ph.D. in Human Sciences and Health from the Institute of Social Medicine of the UERJ (IMS/UERJ).

**SUSANA RODRIGUES CAVALCANTI VAN DER PLOEG** – *Brazil*

Susana Rodrigues Cavalcanti van der Ploeg has a Master of Law and Innovation degree from the Federal University of Juiz de Fora (UFJF). She is a lawyer at the Associação Brasileira Interdisciplinar de AIDS (ABIA, Brazilian Interdisciplinary AIDS Association) and a member of the Working Group on Intellectual Property of the Brazilian Network for the Integration of Peoples (GTPI/REBRIP).

email: [susanaploeg@abiids.org.br](mailto:susanaploeg@abiids.org.br)

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