

**FAO: Secretary of State for International Trade**  
Department for International Trade

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Dear Secretary of State

We act on behalf of Global Justice Now<sup>1</sup> and Just Fair.<sup>2</sup>

We are writing regarding the United Kingdom's response to the formal proposal submitted by India and South Africa to the World Trade Organization (WTO) for a temporary waiver of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in relation to products and technologies for the prevention, treatment or containment of COVID-19 ("the TRIPS waiver") (revised on 21 May 2021 (IP/C/W/669/Rev.1)).

More than 100 WTO Members have expressed support for the TRIPS waiver, and more than 60 WTO Members have agreed to co-sponsor the proposal. The United States has supported the waiver as it applies to SARS-CoV-2 vaccines. However, the United Kingdom has to date declined to support the waiver proposal and, along with a small number of other WTO members, has prevented its adoption by consensus.

The consequences of a failure to adopt the TRIPS waiver could result in millions of lives lost, both in those countries that have little or no access to necessary products and technologies and in countries such as the United Kingdom where residents

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<sup>1</sup> <https://www.globaljustice.org.uk/>

<sup>2</sup> <http://justfair.org.uk/about-us/>

continue to be vulnerable to new variants of COVID19 which spread more easily in regions with low vaccination rates.

For the reasons set out below, our clients consider a failure by the UK Government to support the waiver at the forthcoming WTO Ministerial Meeting scheduled for 30 November – 3 December 2021 would contravene the UK's obligations in international law and under the ECHR.

## The TRIPS waiver

The proposed waiver would remove certain legal barriers under the TRIPS Agreement that currently impede rapid scale-up of access to urgently needed, lifesaving COVID-19- related health products and technologies. More specifically, it would waive the obligations of WTO Members to create or maintain provisions in the areas of copyright, industrial designs, patents and undisclosed data, insofar as these relate to health products and technologies for the prevention, treatment and containment of COVID-19, including diagnostics, therapeutics, vaccines, medical devices, personal protective equipment, their materials or components, and their methods and means of manufacture. These provisions are impeding equitable access to such health products, including by hindering cross-border cooperation in capacity-building, creating uncertainties for potential existing and future generic manufactures. The proposed waiver would be a necessary step towards facilitating the manufacture and distribution of lower-cost, generic products, including across borders to countries in need (and particularly those with limited or no domestic manufacturing capacity).

By excluding the possibility of WTO dispute settlement proceedings under the waived provisions of the TRIPS Agreement, the proposed waiver would remove the threat of retaliation between WTO Members for measures such as issuing compulsory licences,

exporting to countries in need or engaging in other cross-border cooperation to share know-how and technology. Many of the leading vaccines and treatments on the market enjoy a complex thicket of patents and trade secrets which would be hard to overcome by an individual country needing to introduce a compulsory license, and such processes are beset by difficulties including pressure from companies and governments. A broad-based waiver would eliminate these difficulties, as well, potentially, as removing disincentives to vaccine producers sharing their vaccine ingredients and knowhow.

## The response of the United Nations

The UN Secretary General observed on September 22, 2021 at the COVID-19 Global Summit that although 5.7 billion vaccines have been distributed globally, high-income countries have administered 61 times more doses per inhabitant than low income countries and just 3 percent of Africans have been vaccinated. He emphasised that the G7 commitment to pledge a billion doses was demonstrably inadequate and that low and middle-income countries must be able to develop and access health technologies. He reiterated that the incontrovertible fact that the:

*“larger the pool of unvaccinated people, the more the virus will keep circulating and evolving into new variants – and the greater the economic and social disruption.”*

The General Secretary called for a global plan to meet the WHO recommendation that *“2.3 billion doses are equitably distributed through COVAX to reach 40 per cent of people in all countries by the end of this year and 70 percent in the first half of 2022, as WHO recommends.”* He explained that such a plan is necessary in order to overcome the problems of inter alia intellectual property and that *“[l]ow- and middle-income countries must be able to develop and access health technologies.”*

The UN Committee on Economic, Social and Cultural Rights (CESCR) issued a ‘*Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property (E/C.12/2021/1)*’ on April 21, 2021 the Committee stated that the TRIPS waiver is an essential element of complementary strategies to address the pandemic and that failing to approve it 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.

On October 14, 2021 a number of UN human rights special procedures mandate holders issued a letter to the UK and other States that are refusing to support the TRIPS waiver, emphasizing in their Communique that:

*“States have a collective responsibility to use all available means to facilitate faster access to vaccines, including by introducing a temporary waiver of relevant intellectual property rights under [TRIPS], to ensure that protection of patents concerning the vaccines does not become a barriers to the effective enjoyment of the right to health.”*

### The UK’s international human rights obligations

The obligation to perform treaty obligations in good faith, as required by Article 26 of the Vienna Convention on the Law of Treaties (*pacta sunt servanda*), is recognised as *jus cogens*, a peremptory norm of international law and as such is enforceable domestically. Failing to act at the WTO, in response to the TRIPS waiver proposal, in accordance with the UK’s obligations under international human rights law and the UN Charter to co-operate internationally and to engage in joint action to combat a global pandemic in which millions of lives are at risk, is contrary to the UK’s obligation to perform its obligations under international human rights treaties in good faith.

In particular:

1. Article 28 of the Universal Declaration of Human Rights recognizes that everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.
2. The UK is committed under the UN Charter (Articles 55 and 56) to joint action for achievement of solutions to health and related problems and universal respect and observance of human rights for all.
3. The UK is required under article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to adopt measures individually and through international assistance and co-operation, especially economic and technical, to realize the rights set out in the ICESCR by all appropriate means, including particularly the adoption of legislative measures. Two rights recognized in the ICESCR are of particular relevance:
  - a. Article 12 of the ICESCR guarantees the right of everyone to the highest attainable standard of physical and mental health. Article 12(2)(c) creates explicit obligations to prevent, treat and control epidemic diseases and Article 12(2)(d) specifies that states have an obligation to create conditions to ensure all people have access to medical service and medical attention. In its General Comment 14 on the right to health the UN Committee on Economic, Social and Cultural Rights (CESCR) sets out that Article 12(2)(d) requires State parties to undertake joint efforts to make available relevant technologies and to implement or enhance immunization programmes and other strategies of infectious disease control (para.16/17/36). At paragraphs 38/9 CESCR sets out the

normative content of the obligation to engage in international cooperation with a view to ensuring international economic institutions such as the WTO respect, protect and fulfil the right to health:

*“38....In the spirit of Article 56 of the Charter of the United Nations, the specific provisions of the Covenant (arts. 12, 2.1, 22 and 23) and the Alma-Ata Declaration on primary health care, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to health. In this regard, States parties are referred to the Alma-Ata Declaration which proclaims that the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries.*

*39. To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required. States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health.”*

- b. Article 15 of the ICESCR establishes the right to “enjoy the benefits of scientific progress and its applications” In its General Comment on

Article 15, the CESCR has clarified that “*States parties should recognize the essential role of international cooperation for the achievement of the rights recognized in the Covenant.*” The General Comment states that intellectual property is a social product and has a social function and that States parties thus have a duty to prevent unreasonably high costs for access to essential medicines.

4. Article 6 of the International Covenant on Civil and Political Rights establishes the right to life. The UN Human Rights Committee, in its General Comment on the right to life and in its jurisprudence, has clarified that article 6 requires State parties to take appropriate measures to address the prevalence of life-threatening diseases such as AIDS, tuberculosis and malaria; take measures to ensure access without delay by individuals to essential health care; and to ensure access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.
5. The equal enjoyment of the right to health without discrimination is also protected under the Convention on the Elimination of All Forms of Discrimination against Women (Article 12), the Convention on the Elimination of All Forms of Racial Discrimination (Article 5) the Convention on the Rights of Persons with Disabilities (Article 25) and the Convention on the Rights of the Child (Article 24).

Supporting the proposed waiver of TRIPS obligations is consistent with WTO Members’ own previous agreements regarding the interpretation and application of TRIPS. In fact, the WTO Agreement explicitly contemplates this possibility of a waiver (WTO Agreement art IX:3(b)). Moreover, there is precedent for a waiver in response to the widespread and uncontrolled outbreak of a disease, in the form of the WTO

General Council's decision to implement paragraph 6 of the Doha Declaration. The Doha Declaration in respect of public health was adopted by the Ministerial Conference, as a result of the HIV/AIDS epidemic in Southern Africa in 2001.

The UK has the ability to avoid any potential conflict between the TRIPS Agreement and international human rights obligations by agreeing to the TRIPS waiver. Doing so is both in keeping with WTO Members' own previous agreement to interpret and implement TRIPS to support efforts by Members to protect public health and promote universal access to medicines, and gives effect to its legal obligations to respect, protect and fulfil – including through international assistance and cooperation – the universal rights to enjoy the benefits of scientific progress, to enjoy the highest attainable standard of health, and to life. As such, taking the step of supporting the proposed TRIPS waiver is in keeping with the correct interpretation of the TRIPS Agreement (pursuant to VCLT's rules of treaty interpretation requiring attention to WTO Members' own Doha Declaration) and with the UK's obligations under the VCLT to perform its human rights treaty obligations in good faith.

The vast majority of the international community has settled upon the TRIPS waiver as a necessary aspect of international cooperation to protect the rights to life and health of millions of people across the world. This has been recognised by the UN and international human rights institutions. CESCR explained 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 in production and distribution of vaccines to the levels that are now technically possible and urgently required to achieve herd immunity as soon as possible. That is imperative in order to avoid millions of preventable deaths, overcome the economic and social disruptions created by the pandemic and reduce the risks of dangerous mutations of the virus.”

In refusing to recognise that the TRIPS Waiver is the single most likely way that the international community will collaborate effectively to uphold human rights in the face of this unprecedented public health emergency the UK is failing to perform its international treaty obligations in good faith.

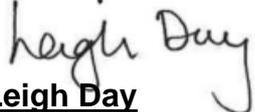
## The Human Rights Act 1998

Whilst citizens of the UK have enjoyed preferential access to vaccines they nevertheless remain at serious risk of harm from new, possibly vaccine resistant, variants emerging in unvaccinated parts of the world. Continued opposition by the UK to the TRIPS waiver may prove decisive in preventing a rapid upscaling in vaccine production that would prevent or limit the risk of new variants developing. This engages Articles 2, 3 and 8 ECHR in relation to persons residing in the UK who may face illness or death and/or further restrictions on their liberty because of state measures taken to address any such variant.

## Conclusions

The UK has the opportunity to join the vast majority of the world's states in supporting a temporary waiver to intellectual property rights and thereby help save millions of lives. There can be no doubt that the choice it makes will engage its legal obligations and test its commitment to the international human rights legal order. Our clients urge the Government to act in the interests of its citizens and those in countries less fortunate and support the growing consensus in favour of the TRIPS Waiver.

Yours faithfully

  
**Leigh Day**