

Before the United States International Trade Commission

Investigation No. 332-596

COVID-19 Diagnostics and Therapeutics: Supply, Demand, and
TRIPS Agreement Flexibilities

Written Testimony of
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March 29, 2023

Mister Chairman and Members of the Commission, thank you for the opportunity to testify today on the Commission’s investigation on COVID-19 diagnostics and therapeutics, market dynamics, supply and demand, price points, the relationship between testing and treating, and production and access.

I am Allana Kembabazi of the Initiative for Social and Economic Rights (ISER). ISER is a nonprofit organization based in Uganda that monitors and advocates for social economic rights primarily in Uganda but also within the African region. ISER has been an active member of a coalition of human rights advocates and lawyers including the Economic Social and Cultural Rights Network (ESCR-Net) drawing attention to how the failure to take all measures to ensure broad global access to and democratic production of COVID-19 healthcare technologies constitutes a violation of states’ obligations under human rights treaties they have ratified.

This submission argues in favour of immediately and unconditionally extending the June 17, 2022 World Trade Organization (WTO) Ministerial Decision on the TRIPS Agreement (hereinafter referred to as ‘TRIPS Decision’) to COVID-19 therapeutics and diagnostics. We call upon the U.S. government to support the adoption of the ‘Decision text on extension of the 17 June 2022 Ministerial Decision to COVID-19 Therapeutics and Diagnostics’ (WT/GC/W/860; IP/C/W/694) presented in the WTO by a group of developing countries in 2022.

1. For low and developing countries like Uganda, timely access to affordable therapeutics and diagnostics is critical to limit the damaging health and economic effects of COVID-19 which continues to evolve unpredictably.

Uganda like many African and other low and developing countries lacks timely access to affordable therapeutics and diagnostics. Many countries in Africa are not able to access therapeutics like Paxlovid which the World Health Organization endorsed as one of the “best therapeutic choice for high-risk patients to date” for patients with mild and moderate COVID-19. According to the Access to COVID-19 Tools Accelerator(ACT-A) and WHO, as of February 2023, 158,000 units of Paxlovid had been ordered by the WHO Partner’s Platform and the Test Treat Coordination Working Group Partner Pilot, only 40% of those were actually delivered. Almost all of the first six months of production of Paxlovid was committed to developed countries

including the United States which reserved 20 million doses for treatment.¹ It was only in December 2022 that a few thousand doses of Paxlovid became available in Africa, more than a full year after it was available in the United States. Even then it was only delivered to Zambia, which is the first African country to receive doses as part of only ten African countries that will receive these drugs through the Medicines Patent Pool.² The impact of this disparity in access to therapeutics can be seen from the case fatality rate of low-income countries, which is triple that of high-income countries (See Global Covid 19 Access Tracker, under “Therapeutics”). In Uganda, the failure to ensure timely access to Covid 19 vaccines and therapeutics was felt acutely during the Delta wave with the country facing an oxygen crisis and an overwhelmed public health system.³

In April 2022, WHO cautioned states against repeating the inequity witnessed with COVID-19, stressing that it is “extremely concerned” that developing countries “will again be pushed to the end of the queue when it comes to accessing treatment.”

2. Even when supplies do become available, prices based on monopoly control which are currently more than ten times the generic price (based on cost and set profit margin) mean developing countries simply cannot afford to provide their populations with access to key COVID tests and treatments.

The tiered pricing schemes used by pharmaceutical corporations in direct sales in developing countries still result in untenably high prices. Pfizer has charged more than \$500 for each course of Paxlovid in some developed countries and \$250 in some developing countries, multiple times higher than the price negotiated by the Clinton Foundation for generic Paxlovid (\$25/course-of-treatment). The estimated cost-of-production plus profit analysis produced by Harvard Researcher Melissa Barber found it to be \$15.08 (estimated generic price – (cost of production + 10% profit margin and 26.6% tax on profit)).

Without enabling generic production, developing countries will not be able to afford the price of diagnostics and treatment. As economies of developing countries struggle to recover, grappling with high debt levels, low reserves, unprecedented demand for social protection, they will not be able to afford the high price of diagnostics and treatment. Uganda, for example, spends more on debt repayment than on health, education, social protection combined and has just recovered from an Ebola epidemic. It can’t afford to pay at market rate the currently high price of Paxlovid and will be dependent on donations which often come late and with conditionalities as we saw with Covid 19 vaccines. Yet we know the virus rapidly evolves.

Moreover, whenever there is scarcity, the poor, refugees and other vulnerable groups are the last to get. In Uganda when we were only receiving a few Covid 19 vaccine donations, it was diplomats and government officials that got them before everyone else including vulnerable groups like older persons. It is only when we got more supply that the poor were able to get.

¹ White House, FACT SHEET: Biden Administration Increases Access to COVID-19 Treatments and Boosts Patient and Provider Awareness, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/26/fact-sheet-biden-administration-increases-access-to-covid-19-treatments-and-boosts-patient-and-provider-awareness/> (last available 22 March 2023).

² So far Zambia, Rwanda, Malawi, Laos

³ Initiative for Social and Economic Rights (ISER)(2021) How Did We Get Here? Uganda Medical Oxygen Crisis, <https://iser-uganda.org/publication/how-did-we-get-here-ugandas-medical-oxygen-crisis/> (last available 22 March 2023).

3. Patents, and other forms of intellectual property, have an adverse effect on prices and supply of COVID-19 diagnostics and therapeutics.

Patents, and other forms of intellectual property, have a huge effect on supply, prices and distribution. Patents, by according the patent holder a 20-year monopoly and allowing them to charge high prices, prevent other manufacturers from producing and supplying more affordable generic versions of the needed diagnostics and therapeutics impede access. We saw this with HIV Aids and more recently with Covid 19 vaccines and tests. The hefty cost of first line HIV treatment which was \$10439 per person per year was beyond the reach of developing countries . Relatives of mine, like so many in my country and the African continent, died in the 1990s simply because they could not get treatment. Access to generic drugs changed all that—acquiring HIV/AIDs is now no longer a death sentence. With regard to Covid 19, proprietary protections on machines and key chemical reagents for Covid 19 diagnostic tests made it difficult for South Africa to access Covid 19 diagnostic tests.⁴

4. High prices and lack of affordable supply options has artificially suppressed demand for COVID diagnostics and treatments.

The pharmaceutical industry disputes that the problem is one of access, noting it is the low demand for therapeutics and diagnostics as measured by the volume of orders placed for treatments and tests. However, demand for tests and treatments in developing countries like mine has been artificially suppressed simply because of the high prices and lack of affordable supply options. We saw this with Covid 19 vaccines where the limited supply resulted in hoarding by wealthier nations at the expense of countries like Uganda. Big biopharmaceutical and diagnostic manufacturers prioritized higher-price sales to powerful developed countries and blocs.

5. Failure to Take Measures to Ensure Equitable Global Access to and Distribution of Lifesaving COVID-19 Vaccines and Other Healthcare Technologies Entrenches Racial Discrimination

People of colour, predominantly situated in developing countries are less able to access Covid 19 vaccines, therapeutics and diagnostics if patents are enforced. This particularly affects women of colour facing intersecting discrimination due to race and gender barriers to access to medical treatment. Researchers found that “[t]he map of winners and losers in the COVID-19 vaccination race appears almost indistinguishable from the map of European colonialism.”⁵

In a stern statement, the UN Committee on the Elimination of Racial Discrimination (CERD) cautioned that the unequal access to vaccines and therapeutics reflects structural racism noting “the pattern of unequal distribution of lifesaving vaccines and COVID-19 technologies between

⁴ https://www.spotlightnsp.co.za/2020/05/05/covid-19-behind-sas-shortages-of-test-materials/?_cf_chl_managed_tk__=pmd_aN_Wd35uuZl7MpfHJPgtj6AwnF8324dqPxC.tAA1xCE-1634569427-0-gqNtZGzNA1CjcnBszOg9 (last available 22 March 2023).

⁵ Tammam Aloudat, Dena Arjan Kirpalani and Meg Davis, “Decolonisation and Global Health”, Geneva Graduate Institute, October 2021, <https://globalchallenges.ch/issue/10/decolonisation-and-global-health/> (last seen 23 March 2022).

and within countries manifests as a global system privileging those former colonial powers to the detriment of formerly colonized States and descendants of enslaved groups.”⁶ It noted this is “creating a pattern of unequal distribution within and between countries that replicates slavery and colonial-era racial hierarchies and which further deepens structural inequalities affecting vulnerable groups protected under the Convention.”⁷ The CERD reminded States that they “are obligated to eliminate all forms of racial inequities, be they by purpose or effect.”⁸ This mirrored an Open Letter from the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to the World Trade Organization’s Twelfth Ministerial Conference⁹ noting “international intellectual property law, perpetuates racial discrimination in access to lifesaving COVID-19 vaccines and medicines.” The Special Rapporteur calls for “adopting a comprehensive TRIPS waiver under the terms prominently proposed by certain WTO Members and civil society.”

Applying intellectual property restrictions to healthcare technology is not compatible with recognizing the right to life and equality of every human being. We all have the right to benefit from scientific progress. Immediately and unconditionally extend the June 17, 2022 World Trade Organization (WTO) Ministerial Decision on the TRIPS Agreement (hereinafter referred to as ‘TRIPS Decision’) to COVID-19 therapeutics and diagnostics.

⁶ https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_SWA_9548_E.pdf (last seen 23 March 2022).

⁷ Ibid.

⁸ Ibid.

⁹ Open Letter from the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to the World Trade Organization’s Twelfth Ministerial Conference, <https://www.ohchr.org/sites/default/files/2022-06/2022-06-13-WTO-Open-Letter.pdf>