

To fight Covid-19, we must fight intellectual property, trade and investment rules

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South Africa and other states must ignore the restrictive web of trade, investment and intellectual property rules hindering the rapid manufacturing of ventilators and other medical equipment. The Treatment Action Campaign showed what is possible when, with international support, they successfully challenged those profiteering from the HIV crisis. The same can be done today, if the state is willing to place the sanctity of human lives over the profits of those holding ventilator patents.

As the world battles the Covid-19 pandemic, most countries are facing a shortage of life-saving ventilators, crucial in assisting the most critically ill patients with breathing. Ventilator production is ramping up globally, but trade agreements, intellectual property and investment protections governing ventilator manufacturing are designed to maximise profits, leaving ventilator production concentrated in only a few countries.

Even the wealthiest countries are understocked. The United States has less than 200 000 ventilators but may need more than a million to handle the pandemic. The United Kingdom has less than 10 000 but may need more than 30 000. Some of the worst affected regions of the world have experienced devastating shortages, with medical professionals in Italy having to decide who gets to live by using a ventilator, and who does not. In New York, hospitals have begun placing two patients on one ventilator.

The response to Covid-19 has largely been nationalist, with states or blocs hoarding equipment to protect their populations, rather than treating this as an international crisis. The Global Trade Alert put out by the Washington-based think-tank Centre for Economic and Policy Research recently reported that 54 governments around the world had placed export restrictions on coronavirus-related medical supplies and drugs. Most of the export restrictions have been placed on personal protective equipment such as masks and gloves, but a number of countries have restricted exports of ventilators as well.

The European Union has begun an internal stockpile of crucial medical equipment, and now requires explicit authorisation for the export of much such equipment. The EU export restrictions do not yet include ventilators, but personal protective equipment is included. The bloc's enormous stockpile means European ventilator production capacity is devoted to supplying the EU, thereby starving the rest of the world of much-needed medical supplies.

Intellectual property rights, investment agreements and trade rules stand in the way of the urgently needed expansion in production of inexpensive ventilators. These rules and regulations act only to protect the profitability of entrenched industries. They cannot be allowed to supersede the basic human right to health. Generic versions of these machines can be built if the firms that own intellectual property are required to give them up. The World Trade Organisation's (WTO's) Agreement on Trade-Related Aspects of Intellectual Property Rights (Trips) lays out a global

baseline of intellectual property standards. Most of the technology involved in ventilator production would fall under the Trips definition of patents, requiring a minimum of 20 years of intellectual property protection. But 20-year patents are no longer conscionable, because they increase the cost of equipment and the length of time before it reaches patients.

The Trips agreement does contain an article allowing for exceptions in the case of a “national emergency or other circumstances of extreme urgency” (Article 31b). The Covid-19 pandemic is undoubtedly a “circumstance of extreme urgency”. It is often argued that pharmaceuticals and medical supplies should be produced through compulsory licensing, use without permission from the rights holder. But this exception contains restrictive conditions, including paying the rights holder “adequate remuneration” (Article 31h) and use “predominantly for the supply of the domestic market” (Article 31f).

The global shortage of ventilators speaks to larger issues of ownership and production. A single ventilator can cost more than \$50 000. A plan in the US to use a General Motors factory to produce ventilators was overturned when the price tag for 80 000 units came to more than \$1 billion.

The high costs of medical devices reinforce class and geographical inequalities, as seen in the EU’s stockpiling of ventilators, the US states attempting to outbid each other for privately manufactured ventilators and individuals buying machines for themselves. The EU’s “rescEU” stockpile of ventilators and other equipment has a budget of €80-million. The US’s strategic national stockpile is allocated more than \$550-million a year to stock emergency medical supplies. Such massive purchases are largely out of reach for most of the world.

South Africa has roughly 4 000 ventilators in the private health sector, and perhaps only 2 000 in the public sector. This will not be enough to handle a surge in Covid-19 patients. The country has not been idle in responding to the shortage. Among the initiatives is the South Africa National Ventilator Project, which is spearheaded by engineers, doctors and business professionals and has sought to create a domestic manufacturing capability.

Given the complicated nature of ventilators, the group identified the Penlon Nuffield 200, an outdated but nonetheless effective model, to build domestically. The Nuffield 200’s comparatively simple design would allow it to be built much more rapidly and easily in South Africa than other, more sophisticated ventilators. The National Ventilator Project contacted Penlon, asking for design drawings to reverse engineer the Nuffield 200 domestically. Penlon, a medical device company in the UK, initially refused the request, but has now backtracked and will give the drawings and technical advice for it to be manufactured locally, according to News24.

In the US, General Motors has begun organising its factories to produce ventilators. Ford has committed to building 50 000 ventilators in 100 days. Mercedes Formula One is set to begin producing Continuous Positive Airway Pressure (CPAP) machines in the UK.

South Africa has vehicle manufacturing plants for BMW, Mercedes-Benz, Toyota, Ford and other global firms. Where possible, these plants must be retooled to produce ventilators. The state must direct such manufacturers to produce ventilation devices at cost price, nationalising the plants if necessary. Such an effort requires the state to lead, working with organised labour, engineers and medical professionals to rapidly produce this equipment.

The United Auto Workers in the US have been involved in the plan to produce ventilators at a Ford factory. Similar union involvement must be emulated in South Africa. Unions have the most knowledge of the relevant factories, organising potential, and labour rights concerns, all of which are necessary for retooling to be done rapidly and safely. A coalition of unions, engineers, medical

professionals, and the state needs to be mobilised to swiftly begin the manufacturing of ventilators.

The manufacturing plants alone are not enough to allow for mass production of ventilators. In the cases of General Motors, Ford, and Mercedes Formula One, the vehicle manufacturers have worked closely with medical device companies or engineers to design appropriate ventilators. Ford is using a General Electric ventilator (a simplified, electricity-free design), General Motors is set to produce a Ventec Life Systems design and Mercedes' CPAP machines were designed in coordination with a university.

Any attempts to use vehicle manufacturing plants in South Africa for ventilation production may run further afoul of numerous trade agreements. Many of these plants are foreign owned, and therefore subject to investment agreements. As a WTO member state, South Africa is bound by the Agreement on Trade-Related Investment Measures (Trims). This agreement sets a standard of protection for foreign investments, which is often increased by other agreements, either bilateral or bloc based.

Some manufacturers may be willing to retool their plants for ventilator production. To prepare for the worst of the Covid-19 pandemic, it is possible that the state would be required to infringe on these foreign investments, either through mandatory retooling or even nationalisation. This would be subject to challenge under the protection provided through Trims. The consequences for breaching WTO protocols, whether in relation to investment (Trims), intellectual property (Trips) or other trade issues, can be dire. Long and costly proceedings can drag on for years. If a state is found to be in contravention of rules, and refuses to rectify its actions, other states may apply import duties or other penalties on the products or services of the offending state. In other words, access to global markets can be limited or made prohibitively expensive.

The South African government and institutions are taking action regarding the manufacturing of ventilators locally, as evidenced by the National Ventilator Project and other initiatives such as the Central University of Technology, Defy and the state-owned arms manufacturer, Denel. The government has called for proposals for the supply of ventilators to either reverse engineer an existing ventilator, obtain a manufacturing licence for an existing ventilator or develop a new ventilator from scratch. The hope is that the project can build 10 000 ventilators by the end of June, with perhaps even more built for export. This is a commendable initiative, but it remains restrained by intellectual property. The government's Call for Proposals notes that any proposals must mention the relevant intellectual property, and "any restrictions for access to or use of intellectual property". The document does not mention its intentions in regards to handling intellectual property issues, only that respondents must make note of intellectual property barriers to production.

To manufacture the necessarily large number of high-quality ventilators in a short period, the state must prevent crisis profiteering.

The stark reality is that the pandemic is already killing people and it is likely to get worse. To address this global crisis, South Africa and other states must ignore the restrictive web of trade, investment and intellectual property rules hindering the rapid manufacturing of ventilators and other medical equipment. The Treatment Action Campaign showed what is possible when, with international support, they successfully challenged those profiteering from the HIV crisis. The same can be done today, if the state is willing to place the sanctity of human lives over the profits of those holding ventilator patents.

The Covid-19 crisis reveals the necessity of new systems of trade, public health, innovation, and intellectual property based on a global commons.

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