‘TRIPS waiver’ texts: how they compare

The 2022 India-EU-South Africa-US (Quad) compromise and the 2021 revised India-South Africa proposal

	2021 India-South Africa draft	2022 Quad draft
Type of instrument	*Waiver* (Article 9.3 and 9.4 of the WTO Agreement)	General Council *decision* (Article 9.1 of the WTO Agreement)
Preamble	Has preamble	No preamble (yet)
Coverage **1. Intellectual property types**	Copyright, industrial designs, patents, trade secrets, enforcement	Patent *rights* Part of trade secrets on *test data*: normal confidentiality rules cannot obstruct covered authorisation from taking effect
Coverage **2. Product types**	Diagnostics, therapeutics, vaccines, medical devices, personal protective equipment, their materials or components	Vaccines (Consider adding within 6 months COVID-19 diagnostics and therapeutics)
Duration	3 years, extended automatically unless (consensus) decision to *terminate*	3 or 5 years (to be decided). Extension not automatic. Requires (consensus) decision to *extend*
Exemption: entertainment (copyright)	Exemption included	Not relevant (copyright not covered)
Least-developed countries	Specifically preserves right not to protect intellectual property (TRIPS Agreement Art66.1)	Not mentioned because coverage is different
All developing countries	Not mentioned because coverage is all countries	“Eligible members” are developing countries with a share of less than 10% of vaccine doses exported in 2021. This excludes China.
General Council review	Annually, under WTO rules on waivers (Article 9.4 of the WTO Agreement)	Annually, as written into the decision
Nullification and impairment	No challenge under GATT Article23.1(b) and 1(c), no recourse to dispute settlement	Similar. Dispute settlement not mentioned.
Transparency	Not mentioned	Information to be shared with the WTO membership (and the public) through notifications to the TRIPS Council as soon as possible

	2021 India-South Africa draft	2022 Quad draft
		• Authorisation under the decision and related measures • Name and address of authorised entity (ie, company, agency, organisation, etc) • Products covered • How long the authorisation lasts • All patents involved Also as soon as possible after the information is available: • Quantities authorised • Countries supplied
Legal certainty	Not mentioned	• Not mentioned although transparency helps • Questions remain over pending and pipeline patents
Products leaking to non-waiver markets	Not mentioned	**Importing country**: undertake all reasonable efforts to prevent re-export **All countries**: have legal procedures to deal with covered products improperly imported
Article 31 flexibilities (use without the owner's consent)	Not relevant because the waiver removes all need	• Negotiating a voluntary licence first not needed (debatable whether this is already covered if a pandemic is an emergency) • Products covered do not need to be predominantly for the domestic market, allowing large volume exports (avoids procedures of Art31(f)bis) • Payment to the right-holder still needed but clarified: take into account "humanitarian and not-for-profit" purposes aimed at providing the vaccines at affordable prices; use existing guidelines
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