March 26, 2020

Senators Mitch McConnell and Charles Schumer
Representatives Nancy Pelosi and Kevin McCarthy

Re: Proposal by the President of Costa Rica to the World Health Organization to create a pool for rights in technology and data related to the prevention, detection and treatment of the coronavirus/COVID-19 pandemic

Dear Senators McConnell and Schumer and Representatives Pelosi and McCarthy

KEI and Public Citizen would like to call your attention to an initiative proposed by the President of Costa Rica, asking the World Health Organization (WHO) to create a global pool of rights in the data, knowledge and technologies useful to the prevention, detection and treatment of the coronavirus/COVID-19 pandemic. [Link] The Director-General of the WHO has since welcomed the proposal, and joined the call for pooled rights. [Link]

Costa Rica correctly saw this as a pool with a diverse set of rights, including those relating to patents on inventions and designs, regulatory test data, and research data including outcomes, know-how, cell lines, copyrights and blueprints for manufacturing, as these rights relate to equipment, diagnostic tests, devices, medicines, vaccines, and other medical tools.

Such a pool would allow for competitive and accelerated production of needed COVID-19 technologies, and expand the global capacity to address the need for affordable products.

The inputs to such a pool could come from governments that fund research and development or buy innovative products, as well as from universities, research institutes, charities, private companies and individuals who control rights.

The United States government is funding a significant amount of COVID-19 research and development, but many other governments around the world, such as Germany, Japan, Canada, France, China, the European Union, the UK and Australia, are also leading efforts. A pool structure could help ensure broader access to rights of R&D funded by other governments. This could result in the quicker national introduction of needed medicines and vaccines, for example.

This is a moment for governments to demonstrate there will be global cooperation in fighting the pandemic. The new coronavirus could continue to pose a threat, with possibilities for mutation and seasonal circulation, unless it is eradicated globally.

In the new funding authority relating to this pandemic, the U.S. will be able to use “Other Transactions Authority” (OTA), as well as other procurement authorities. Among the approaches the United States can take to expand access and increase the supply of products is to use federal funds to buy out patent and data rights, and/or to offer incentives like innovation inducement prices and market entry rewards to delink the incentives for development from the grants of legal monopolies, in order to effectively make the R&D a public good. If well-designed and linked to a reasonable reward, these measures can be very effective in ensuring that products can be made everywhere and sourced at prices that reflect the costs of manufacturing. The benefits of such measures would be global, and the United States can and should encourage other governments to collaborate in paying for patent/data rights buyouts or innovation inducement prizes. Of course, this is just one possible approach to be taken, but it illustrates how it can be in the U.S. interest to engage other governments and even private funders of R&D to work toward the sharing of the costs of public goods.

The Costa Rica proposal is measured, and begins with an initial memorandum of understanding between governments and other entities funding R&D that will enable future assignments of rights, with the opportunity to decide on the specific technologies and terms for assignments later.

Given the need to act quickly, we encourage your office to write Vice President Mike Pence and Secretary of Health and Human Services Alex Azar as soon as practicable, to encourage the United States government to support the Costa Rica proposal.

To be concrete about the next steps, the WHO could be asked to ask funders of R&D and rights holders to sign a very short agreement, as a first step, that reads like this:

..... [Funder, rights holder] agrees to consider requests by the World Health Organization to obtain a limited assignment of rights in U.S. funded patent rights for biomedical inventions related to the detection, prevention or treatment of coronavirus related illnesses for use worldwide in collaboration with its member states. The terms and conditions associated with such an assignment, if so granted, will be determined by the [Funder/Rights holder] The WHO agrees the [Funder/rights holder] is under no obligation to grant any such requests, but only to consider them.

If signed by the United States, this would enable the United States to reference this option in funding agreements, under 35 U.S.C. § 202(c)(4), as well as in CRADAs, Cooperative Agreements, and “Other Transactions Authority” (OTA) agreements.

Moreover, if the U.S. shows leadership on this, it will be far easier for the United States to obtain access to rights in data, including clinical trial test data, inventions and other data and technology rights, funded by others, including foreign governments, many of whom are also mobilizing significant resources for new R&D.

Robert Weissman, Public Citizen James Love, Knowledge Ecology International