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## Doha Twenty Years On – Has The Promise Been Betrayed?

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*The Doha Declaration's twentieth anniversary in November 2021 has taken place in the midst of the COVID-19 pandemic. The experience of the past two years has demonstrated that the very factors that necessitated the Declaration—the problems of inequitable access to medicines and other health technologies for the world's poor—continue to plague us.*

*Has the promise of the Doha Declaration been betrayed? In this contribution, we critically engage with this question, focusing our appraisal on whether the Doha Declaration has been successful in fulfilling its commitments to: (a) advancing access to health; (b) equity and fairness in the relations between WTO Members States; and (c) recognising perspectives from the developing world in formulating IP policy. Ultimately, we conclude that the promise of the Doha Declaration has failed to materialise.*

*There are many reasons for this. For instance, developed country governments have intentionally undermined the Declaration by their insistence on inserting more onerous TRIPS-plus provisions in free trade agreements and economic partnership agreements, which decimate the limited flexibilities permitted by the TRIPS Agreement. And where countries have sought to use such flexibilities, they have been assailed by an over-litigious pharmaceutical industry, and threats by governments such as the US 301 Watch List. For these reasons, we argue for the need for alternative paradigms to challenge Western hegemony and norms regarding IP and other trade-related issues, and for effectively challenging this through the application of a “decoloniality” approach.*

*El vigésimo aniversario de la Declaración de Doha, en noviembre de 2021, ha tenido lugar en medio de la pandemia de COVID-19. La experiencia de los dos últimos años ha demostrado que los mismos factores que hicieron necesaria la Declaración -los problemas de acceso desigual a los medicamentos y a otras tecnologías sanitarias para los pobres del mundo- siguen acechándonos.*

*¿Se ha traicionado la promesa de la Declaración de Doha? En esta contribución, abordamos esta cuestión de forma crítica, centrando nuestra evaluación en si la Declaración de Doha ha logrado cumplir sus*

*compromisos de (a) promover el acceso a la salud; (b) la equidad y la justicia en las relaciones entre los Estados miembros de la OMC; y (c) el reconocimiento de las perspectivas del mundo en desarrollo en la formulación de la política de PI. En última instancia, concluimos que la promesa de la Declaración de Doha no se ha materializado.*

*Hay muchas razones para ello. Por ejemplo, los gobiernos de los países desarrollados han socavado intencionadamente la Declaración al insistir en insertar disposiciones ADPIC plus más onerosas en los acuerdos de libre comercio y en los acuerdos de asociación económica, que diezman las limitadas flexibilidades permitidas por el Acuerdo ADPIC. Y en los casos en que los países han tratado de utilizar esas flexibilidades, han sido atacados por una industria farmacéutica demasiado litigiosa y por amenazas de gobiernos como la lista de vigilancia 301 de Estados Unidos. Por estas razones, defendemos la necesidad de contar con paradigmas alternativos que desafíen la hegemonía y las normas occidentales en materia de PI y otras cuestiones relacionadas con el comercio, y de desafiarlas eficazmente mediante la aplicación de un enfoque de "descolonialidad".*

*Le vingtième anniversaire de la Déclaration de Doha, en novembre 2021, a eu lieu en plein milieu de la pandémie de COVID-19. L'expérience de ces deux dernières années a démontré que les facteurs mêmes qui ont rendu la Déclaration nécessaire - les problèmes d'accès inéquitable aux médicaments et aux autres technologies de santé pour les pauvres du monde - continuent de nous accabler.*

*La promesse de la Déclaration de Doha a-t-elle été trahie ? Dans cette contribution, nous abordons cette question de manière critique, en concentrant notre évaluation sur la question de savoir si la Déclaration de Doha a réussi à remplir ses engagements en matière de : (a) de faire progresser l'accès à la santé ; (b) d'assurer l'équité et la justice dans les relations entre les États membres de l'OMC ; et (c) de reconnaître les perspectives du monde en développement dans la formulation de la politique de PI. En conclusion, nous estimons que la promesse de la déclaration de Doha ne s'est pas concrétisée.*

*Il y a de nombreuses raisons à cela. Par exemple, les gouvernements des pays développés ont intentionnellement affaibli la Déclaration en insistant sur l'insertion de dispositions ADPIC-plus onéreuses dans les accords de libre-échange et les accords de partenariat économique, qui réduisent à néant les flexibilités limitées autorisées par l'Accord sur les ADPIC. Et lorsque les pays ont cherché à utiliser ces flexibilités, ils ont été attaqués par une industrie pharmaceutique trop prestigieuse et par des menaces de gouvernements tels que la liste de surveillance 301 des États-Unis. Pour ces raisons, nous argumentons sur la nécessité de paradigmes alternatifs pour remettre en question l'hégémonie et les normes occidentales en matière de PI et d'autres questions liées au commerce, et de les remettre en question efficacement par l'application d'une approche de "décolonialité".*

## 1. Introduction

A debate held in London on the fifth anniversary of the adoption of the Declaration on the Agreement on Trade Related Aspects of Intellectual Property Rights and Public Health (Doha Declaration), laid bare the challenges of realising the aims of the Declaration, and concluded it had failed to deliver cheap drugs to developing countries.[1] This would indeed be an overly harsh indictment on an important development in the endeavour to secure universal access to health products, as there are no doubt a multiplicity of factors which account for the lack of access to drugs.

In a recent study which found that the shortage of medicines is a global issue affecting low, middle, and high-income countries, Shukar et al.[2] assert that among the causes are supply, demand and regulatory issues. By supply issues, they mean that "manufacturers are unwilling or unable to produce enough medicines to satisfy the demand" and categorise them further into manufacturing problems, unavailability of raw materials, business reasons, and logistical problems. Business reasons cited include low-profit margin, small market size, cost of raw materials and capacity constraints. To the list of business reasons could be added the desire of manufacturers to maintain monopoly control of the medicines market through intellectual property (IP) protections—a key problem that the Declaration sought to address.

A South Centre Policy Brief observed, on the 10th anniversary of the adoption of the Declaration that despite its landmark achievement in clarifying the relationship between IP and public health and, in particular, on the members' right to use the flexibilities in the TRIPS Agreement to advance public health, "(i)t is appalling that ten years since the Doha Declaration, multinational pharmaceutical companies and developed countries continue to exert commercial and political pressure on developing countries not to make use of TRIPS flexibilities for public health." [3]

[1] Adrian O'Dowd, "Doha Declaration has failed to deliver cheap drugs to developing countries, Oxfam says", *the BMJ*, vol. 333, No. 7577 (November 2006), p. 1036. Available from [https://www.southcentre.int/wp-content/uploads/2013/06/PB7\\_-Doha-Declaration-on-TRIPS-and-Health\\_-EN.pdf](https://www.southcentre.int/wp-content/uploads/2013/06/PB7_-Doha-Declaration-on-TRIPS-and-Health_-EN.pdf) (accessed 23 January 2022).

[2] Sundus Shukar and others, "Drug Shortage: Causes, Impact, and Mitigation Strategies", *Frontiers in Pharmacology: Drugs Outcomes Research and Policies*, vol. 12 (July 2021). Available from <https://www.frontiersin.org/articles/10.3389/fphar.2021.693426/full> (accessed 23 January 2022).

[3] South Centre, "The Doha Declaration on TRIPS and Public Health Ten Years Later: The State of Implementation", Policy Brief 7, (November 2011). Available from [https://www.southcentre.int/wp-content/uploads/2013/06/PB7\\_-Doha-Declaration-on-TRIPS-and-Health\\_-EN.pdf](https://www.southcentre.int/wp-content/uploads/2013/06/PB7_-Doha-Declaration-on-TRIPS-and-Health_-EN.pdf) (accessed 23 January 2022).

It is within such a context that this reflection on the twentieth anniversary of the Doha Declaration[4] proceeds. The Doha Declaration, in its formulation, commits itself to promoting the advancement of a number of goals, which we have grouped into three core “promises”,[5] namely: (a) advancing access to health;[6] (b) equity and fairness in the relations between WTO members states;[7] and (c) recognising perspectives from the developing world in forming IP policy.[8]

Have the worthy aspirations of the Doha Declaration have been betrayed? In this contribution, we critically engage with this question, focusing our appraisal on whether the Declaration has been successful in fulfilling its commitments. Ultimately, we conclude that the Declaration has failed on all counts.

In this contribution, we critically engage with the reasons for each of the failures focusing on what we perceive to be the primary reasons for these shortcomings, and argue for the need for alternative paradigms to challenge Western hegemony and norms regarding IP and other trade-related issues, and for effectively challenging this through the application of a “decoloniality” approach.

## 2. Advancing Access to Health: Revisiting the Barriers

### 2.1 High Prices

One of the most commonly identified barriers to access to medicines is the prohibitively high drug prices, which in the developing world often lead to avoidable disease and death.[9] This was witnessed most clearly during the height of the AIDS pandemic, but it continues to be the case that many people are barred from accessing drugs they need due to the prices set by pharmaceutical companies.[10] These mark-ups are enabled by the strong IP protections that exist under the TRIPS regime. There is a long history of objections to these protections on the grounds that they

provide a vehicle for the pharmaceutical industry to profit at the expense of those too poor to afford their medicines, while at the same time stifling local development of generics and providing little incentive for research on diseases that do not afflict the affluent.[11]

### 2.2 Strong IP Protections

Another barrier relates to a difficulty raised by developing countries even prior to the promulgation of TRIPS, namely, that the standard of IP protection mandated by this agreement requires technical and administrative capacity that few developing countries possess the resources or knowledge to meet.[12] This is unsurprising, given that TRIPS was modelled after the IP regime of the United States.[13] The US patent system, tailored explicitly for the benefit of its pharmaceutical and other industries, adopts a relatively low standard to establish patentability, with the result that patents are readily granted on inventions with a lower standard of inventiveness. By insisting on a single global harmonised standard in the TRIPS Agreement, the US secured optimal conditions for the protection of its pharmaceutical industry, despite the protestations of many countries which used the policy space previously available to access cheaper medicines through generic competition in the absence of strong patent rights.[14] This raises critical questions about the appropriateness of imposing a Western approach to policy on IP in developing countries, and can be viewed as the continuation of the colonial practices of northern countries that dictated the IP laws of their colonies. These parallels, and their implications, are explored in more detail below.[15]

### 2.3 Trade Agreements

In addition, another well documented barrier to access includes the drive by powerful countries and trading blocs to convince developing countries to agree to levels of IP protection that exceed those required by TRIPS through bilateral and regional trade agreements.[16] Some of these so-called “TRIPS-plus” provisions involve the extension of

[4] WTO, The Doha Declaration on the TRIPS Agreement and Public Health, document WT/MIN (01)/DEC/W/2. Available from <https://www.who.int/medicines/areas/policy/tripshealth.pdf?ua=1>.

[5] So determined through an aggregation of the various claims and commitments made in the text of the Doha Declaration.

[6] Doha Declaration paras 4; 5.

[7] Doha Declaration paras 6; 7.

[8] Doha Declaration paras 1; 5(a).

[9] Ellen 't Hoen, “TRIPS, Pharmaceutical Patents and Access to Essential Medicines: Seattle, Doha and Beyond” *Journal of International Law*, vol. 39, No. 1 (2002), p. 41.

[10] Md Deen Islam and others, “Impacts of Intellectual Property Provisions in Trade Treaties on Access to Medicine in Low and Middle Income Countries: A Systematic Review”, *Globalization and Health*, vol. 15, (December 2019), p. 88.

[11] Pedro Roffe, Christoph Spennemann and Johanna Von Braun, “From Paris to Doha: The WTO Doha Declaration on the TRIPS Agreement and Public Health”, in *Negotiating Health: Intellectual Property and Access to Medicines*, Pedro Roffe, Geoff Tansey and David Vivas-Eugui, eds. (Earthscan, 2006) p. 11.

[12] Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (Routledge, 2005) p. 321.

[13] *Ibid.* p. 322.

[14] See section 3.2 below.

[15] See section 4.1 below.

[16] 't Hoen, “TRIPS, pharmaceutical patents and access to essential medicines” p. 322.



the patent term beyond 20 years, data exclusivity (which prohibits the use of test data on drug efficacy and safety for a period, thus delaying the approval of generic products), linking drug registration and patent protection (to the extent that drug regulators are obliged to refuse to register a competing generic where a patent exists on the innovator product), and imposing limitations on the grounds on which compulsory licences may be granted.

[17] Another increasing trend has been to include provisions for investor-state dispute settlement (ISDS) in bilateral investment treaties, which allow foreign investors to challenge any government action that is perceived to interfere with an investor's "legitimate" expectations of profit. Such provisions have been criticised as lacking the safeguards and transparency of domestic legal systems, and potentially threatening public access to health technologies.[18] In the post-Doha era, trade agreements are one of the major impediments to advancing access to health, for reasons we expand upon below.

### 2.3.1 Trade Agreements with African Countries since the Doha Declaration

Recent trade and bilateral treaties entered into or being negotiated between Northern countries on the one hand, and African countries or regional economic blocs on the other, indicate significant attempts to introduce investment-related provisions as outlined above. A common feature of several of the agreements relates to the provisions on dispute avoidance and settlement. The relevant clauses provide for the sequence of dispute resolution commencing with consultations, followed by mediation, and arbitration. If there is a deadlock with regard to the appointment of a mediator or arbitrator, the authority is vested in the Chair of the Trade and Development Committee (or similar structure) under the relevant agreement to make the appointments. The agreements also contain further provisions catering for compliance with the rulings and the right of the

complaining party to "apply appropriate measures." Only the arbitration panel may review and terminate such appropriate measures, with no recourse to judicial review. The jurisdiction of domestic courts appears to have been ousted, with predictable disadvantages for resource-strapped developing countries. Among such agreements are the following:

- Interim Agreement between the Eastern and Southern Africa States and the European Community (ESA/EC); [19]
- Agreement for Association between the United Kingdom and the Kingdom of Morocco (UK/Morocco); [20]
- Agreement for Association between the United Kingdom and the Arab Republic of Egypt (UK/Egypt);[21]
- Stepping Stone Economic Partnership Agreement between the United Kingdom and Cote d'Ivoire (UK/Cote d'Ivoire);[22]
- Economic Partnership between the European Union and its Member States, and the SADC EPA States (EU/SADC EPA);[23]
- Economic Partnership agreement between the United Kingdom and the Republic of Kenya (UK/Kenya);[24]
- Interim Agreement between the United Kingdom and the Republic of Cameroon (UK/Cameroon);[25] and

Available from

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/854581/CS\\_Morocco\\_2.2019\\_UK\\_Morocco\\_Agreement\\_establishing\\_an\\_Association.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854581/CS_Morocco_2.2019_UK_Morocco_Agreement_establishing_an_Association.pdf) (accessed 30 January 2022).

[21] Government of the United Kingdom, *Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Arab Republic of Egypt* (5 December 2020) Available from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/943572/CS\\_Egypt\\_1.2020\\_Agreement\\_establishing\\_an\\_Association\\_with\\_Egypt.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943572/CS_Egypt_1.2020_Agreement_establishing_an_Association_with_Egypt.pdf) (accessed 30 January 2022).

[22] Government of the United Kingdom, *Stepping Stone Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and Cote d'Ivoire, of the other part* (15 October 2020). Available from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/934343/UK\\_Cote\\_d\\_Ivoire\\_Stepping\\_Stone\\_EPA\\_1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/934343/UK_Cote_d_Ivoire_Stepping_Stone_EPA_1.pdf) (accessed 30 January 2022).

[23] Official Journal of the European Union, *Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part* (16 September 2016). Available from [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A0916\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A0916(01)&from=EN) (accessed 30 January 2022).

[24] Government of the United Kingdom, *Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Kenya, a Member of the East African Community, of the other part* (8 December 2020). Available from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/945516/MS\\_9.2020\\_Economic\\_Partnership\\_Agreement\\_UK\\_Kenya\\_Member\\_of\\_East\\_Africa\\_Community.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945516/MS_9.2020_Economic_Partnership_Agreement_UK_Kenya_Member_of_East_Africa_Community.pdf) (accessed 30 January 2022).

[25] Government of the United Kingdom, *Interim Agreement establishing an Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part and the Republic of Cameroon, of the other part* (9 March 2021). Available from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/978691/MS\\_2.2021\\_UK\\_Cameroon\\_Interim\\_Agreement\\_Economic\\_Partnership.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978691/MS_2.2021_UK_Cameroon_Interim_Agreement_Economic_Partnership.pdf) (accessed 30 January 2022).

[17] Carlos Correa, "Implications of bilateral free trade agreements on access to medicines", *Bulletin of the World Health Organization*, vol. 84, No. 5 (May 2006). Available from <http://www.who.int/bulletin/volumes/84/5/399.pdf> (accessed 30 January 2022).

[18] Brook K Baker and Katrina Geddes, "Intellectual Property Rights and Public Health", in *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, Kavaljit Singh and Burghard Ilge, eds. (2016) p. 189. Available from <https://ssrn.com/abstract=2883169> (accessed 30 January 2022).

[19] Official Journal of the European Union, *Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the one part, and the SADC EPA States, of the other part* (24 April 2012). Available from [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22012A0424\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22012A0424(01)&from=EN) (accessed 30 January 2022).

[20] Government of the United Kingdom, *Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Morocco* (26 October 2019).

- Interim Agreement between the United Kingdom and the Republic of Ghana (UK/Ghana).[26]

Some of these agreements, for example, those involving the UK/Kenya and the UK/Ghana, provide the option of a resort to the WTO dispute settlement mechanism, but not concurrently with the process mandated by the relevant agreement.

Somewhat different is the agreement between the Republic of Mauritius and the People's Republic of China (Mauritius/China),[27] which expressly excludes the WTO dispute settlement option. It empowers the complaining party in a dispute to select the forum, to the exclusion of all other fora. The agreement does require the parties to engage in consultations with a view to resolving the dispute and, failing that, they may opt for conciliation and mediation. The final resort is to an arbitral tribunal, in which one arbitrator is selected by each party with the third arbitrator chosen by the first two. Significantly, the authority to resolve any deadlock in the appointment of arbitrators is vested in the Director-General of the WTO. There is also an express provision indicating that the investing party in a country cannot be compelled to undertake technology transfer, another TRIPS-plus measure potentially nullifying the provisions of Article 66.1 and 67 of TRIPS. The Mauritius/China text does provide for exceptions to that rule, namely, that it would not apply in the case of a compulsory licence granted in terms of Article 31 or to measures requiring the disclosure of proprietary information consistent with Article 39 (relating to undisclosed information) of TRIPS.

### 2.3.2 Concluding Comments on Trade Agreements and Access to Health

Several analyses of free trade agreements indicate that US negotiators typically pursue a pharmaceutical industry agenda to restrict IP regulatory flexibility.[28] The question that arises is: why do developing countries persist in entering into agreements that can adversely affect the

health of their populations? Abbott suggests that their negotiators concede flexibility in the pharmaceutical sector in order to achieve gains in other sectors, but points out that "gains for a developing country's textile or agricultural producers do not directly translate into higher public or private expenditures",[29] thus potentially undermining health outcomes.

## 3. Equity and Fairness in the Relations Between WTO Member States: The Challenge of Western Hegemony

### 3.1 Concept of Hegemony Entrenched During Uruguay Round

The high level of protection afforded to the IP-rich industries of the global North (in the TRIPS Agreement and the subsequent decisions of the WTO) has been enabled by the hegemonic position of the economically powerful countries (the US, Europe, Japan – also referred to as the "major powers").[30] This is primarily because the Uruguay Round of General Agreement on Tariffs and Trade (GATT) negotiations were conducted under conditions of asymmetry between countries of the global North and South. Drahos[31] suggests that there are three pre-conditions for democratic bargaining among sovereign states. These are: (a) all relevant interests have to be represented in the negotiating process; (b) those involved in the process must have full information about the consequences of possible outcomes; and, (c) no one party must coerce the others. In the negotiations leading up to the TRIPS Agreement, none of these conditions were satisfied. On the first requirement, he asserts that most developing countries had effectively been excluded from meaningful participation as the negotiating positions were decided by a small inner circle of consensus and then foisted on those outside this circle. Such a practice made the fulfilment of the second requirement virtually impossible, as the US and European delegations had

[26] Government of the United Kingdom, *Interim Agreement establishing an Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part and the Republic of Ghana, of the other part* (2 March 2021). Available from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/978684/CS\\_Ghana\\_1.2021\\_UK\\_Ghana\\_Interim\\_Trade\\_Partnership\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978684/CS_Ghana_1.2021_UK_Ghana_Interim_Trade_Partnership_Agreement.pdf) (accessed 30 January 2022).

[27] Republic of Mauritius, *Free Trade Agreement between the Government of the Republic of Mauritius and the Government of the People's Republic of China* (1 January 2021). Available from <https://www.mauritiustrade.mu/ressources/pdf/doc-1-Mauritius-China-FTA-Text.pdf> (accessed 30 January 2022).

[28] See for example, Frederick M Abbott, "The Cycle of Action and Reaction: Developments and Trends in Intellectual Property and Health", in *Negotiating Health: Intellectual Property and Access to Medicines*, Pedro Roffe, Geoff Tansey and David Vivas-Eugui, eds. (Earthscan, 2006) pp. 27-40.

[29] Ibid., p. 33.

[30] In this context, the term "hegemony" is defined as "(a) concept in international relations describing the military, economic, or political preponderance of one country over all others. It can be used to refer to such domination being present on either a regional or a global level, whereby the hegemon is the ultimate gatekeeper and manager based upon an amalgamation of force and consensus." Chris Ogden, *A Dictionary of Politics and International Relations in India* (Oxford University Press, 2019). Available from <https://www.oxfordreference.com/view/10.1093/acref/9780191848117.001.0001/acref-9780191848117-e-95#:~:text=A%20concept%20in%20international%20relations,one%20country%20over%20all%20others.> (accessed 27 January 2022).

[31] Peter Drahos, "Negotiating Intellectual Property Rights", in *Global Intellectual Property Rights: Knowledge, Access and Development*, Peter Drahos and Ruth Mayne, eds. (Oxfam, 2002) p. 163-172.

access to every circle of consensus, and were privy to the maximum amount of information to the exclusion of an increasing number of other countries. And finally, the threats of coercive measures contained in the US “301 Watch List”[32] and the reality of these materialising meant that coercive measures were at play, nullifying the third requirement.

US ascendancy in international relations was consolidated in the post-World War II period heralding the beginning of the so-called “golden age” of multilateralism, with the advent of the United Nations, the Bretton Woods financial institutions—the International Monetary Fund and the World Bank—and the GATT. Laidi observes that:

what is most striking is that this universalist system was de facto based on the overwhelmingly dominant position of the West in general and of the United States in particular. Thus even though the United Nations assumed and guaranteed the sovereign equality of states, it nonetheless accepted the privileged position of the great powers in the Security Council, where four of the five permanent members were initially either Western or completely tied to the West. Western hegemony over the Bretton Woods institutions was equally clear.[33]

Such a situation enabled the major powers to prevail in the Uruguay Round of GATT negotiations, which commenced in 1986, with their agenda to advance trade liberalisation and which included the protection of IP rights within the trading system.

US (and “Western”) hegemony operates through a combination of power and acquiescence. Schmidt’s review of the concept concludes that “there is a fundamental division between, on the one hand, hegemony as overwhelming power and, on the other hand, the exercise of some form of leadership.”[34] He critically reflects on the position adopted in realist theory and observes that “equating hegemony with a preponderance of power is highly problematic as power is also a contested term.”[35]

Other theorists draw on the works of Gramsci who expounded that in the societal context, the concept comprises two distinct elements: “the ‘spontaneous’ consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group” and “the apparatus of state coercive power which ‘legally’ enforces discipline on those groups who do not “consent either actively or passively.”[36] For theorists such as Cox, hegemony “means dominance of a particular kind where the dominant state creates an order based ideologically on a broad measure of consent, functioning according to general principles that in fact ensure the continuing supremacy of the leading state or states and leading social classes but at the same time offer some measure or prospect of satisfaction to the less powerful.”[37]

In the context of the Uruguay Round discussions, the demands of the developed countries who sought, for example, the inclusion of non-tariff issues such as IP, competed with those of developing countries who prioritised agriculture. According to Laidi, this arrangement played out as follows:

The result of these different crosscutting pressures was to lead to something of a rebalancing act that yielded several new features – the most important perhaps being the single undertaking rule that stipulated that no final agreement could be signed until all parties were agreed on everything beforehand. Developed countries however wanted to ensure that any concessions they might make on agriculture would be compensated through the opening of goods and services markets in developing countries.[38]

Developing countries were thus lured into agreements that catered generously to the needs of the hegemonic powers, with weak protections for matters of priority to themselves.

The hegemony of dominant interests is maintained in a number of ways, one of which includes the entrenchment and maintenance of strong forms of IP protection. IP rights are a form of government regulation of the market, predominantly to the advantage of rights holders.

[32] US Trade Act Section 301 requires the US trade representative to identify foreign countries for possible trade sanctions for perceived failure, for example, to provide adequate protection of intellectual property rights.

[33] Zaki Laidi, “Towards a post-hegemonic world: The multipolar threat to the multilateral order”, *International Politics* vol. 51 (2014), p. 353. Available from <https://spire.sciencespo.fr/hdl/2441/37cij62efo83vb6ber70ldern/resources/2014-laidi-towards-a-post-hegemonic-world-vauteur.pdf> (accessed 26 January 2022).

[34] Brian Schmidt, *Expert Comment, Hegemony: A conceptual and theoretical analysis* (2018), Dialogue of Civilizations Research Institute. Available from [https://doc-research.org/wp-content/uploads/2018/08/Schmidt\\_Hegemony\\_PDF\\_web.pdfcontent/uploads/2018/08/Schmidt\\_Hegemony\\_PDF\\_web.pdf](https://doc-research.org/wp-content/uploads/2018/08/Schmidt_Hegemony_PDF_web.pdfcontent/uploads/2018/08/Schmidt_Hegemony_PDF_web.pdf) (accessed 27 January 2022).

[35] Ibid.

[36] Antonio Gramsci, *Selections from the Prison Notebooks* (edited and translated by Quentin Hoare and Geoffrey Nowell Smith (1999), ElecBook 145. Available from <https://abahlali.org/files/gramsci.pdf> (accessed 27 January 2022).

[37] Quoted in Schmidt “Hegemony”.

[38] Laidi “Towards a post-hegemonic world” p. 356.

At the international level, the hegemony alluded to has been exercised through the “international regulatory capture of the WTO process by concentrated producer interests in the form of pharmaceutical, film and software TNCs (transnational corporations) all holding large intellectual property portfolios and therefore with much to gain from government intervention.”[39]

Paradoxically, while reaping the benefits of this type of regulation, TNCs have been quick to eschew those aspects of the regulatory arrangement that tend to constrain their rights, for example, compulsory licences and other limitations on their rights. This has been painfully evident in their opposition to various measures introducing competition aimed at increasing access to pharmaceuticals, notably during the AIDS and COVID-19 pandemics.[40]

Draho points out that there exists a major contradiction between the globalised IP framework and a development policy agenda pursued by developing countries. Far from elevating such countries economically through investments and other measures, a globalised IP system results in net trade gains for developed countries. This “flow of revenue from the less developed to the more developed” constitutes a wealth transfer from the poor to the rich and entrenches structural inequality globally.[41]

In our view, the hegemony alluded to remains the primary cause of unequal and unfair relations between WTO Member States, despite some ground having been gained through the Doha Declaration. In order to illustrate this, in the following section, we apply the conceptual framework described above in a discussion of some of the watershed events leading up to, and following from, the Doha Declaration. This brief historical analysis will help understand the extent to which Western hegemony prevailed, and how the counter-hegemonic challenge (of which the Doha Declaration was a watershed moment) was obstructed.

### 3.2 The Pre-TRIPS Era

Prior to TRIPS, not all countries provided for patent protection, and even if they did, pharmaceutical products were often excluded. In this sense, the adoption of the TRIPS Agreement is regarded as a milestone event, as it resulted in many WTO Member States giving formal recognition to IP rights for the first time.[42] However, the terms in which this recognition was couched failed to strike an equitable balance between incentivising innovation and promoting public welfare.[43] With provisions ensuring a minimum patent term of 20 years, and non-discrimination with regard to the technologies covered,[44] the regime under TRIPS is heavily weighted in favour of IP rights holders, in particular the pharmaceutical industry. Kerry and Lee concisely state the situation prior to TRIPS as it pertains to developing countries:

Before 1995, LMICs engaged in a robust trade in generic and recently marketed drugs produced in countries where patent rights were unrecognised. For the importing country, this trade was a source of cheaper medicines, especially critical to countries under severe resource constraints facing major public health problems such as HIV/AIDS. Compliance with TRIPS since 1995 has required WTO Member States to restrict such trade, and to grant to patent holders exclusive rights to produce and sell protected drugs.[45]

The Uruguay Round of GATT negotiations began in 1986 after four years of intense lobbying by developed countries to include items that have not historically been on the trade agenda, for example, trade in services and intellectual property.[46] The US led the charge on the inclusion of IP on the agenda, with the clear objective that the IP protections of US innovators were as extensive and effectively enforced globally as in the US. In this, it was supported by Japan and the European Union (EU). Pitted against them were developing countries who opposed the inclusion of IP within the GATT framework, as they regarded WIPO as the more appropriate forum for such discussion. As Trebilcock and others note:

[39] Peter Draho, “Introduction” in *Global Intellectual Property Rights: Knowledge, Access and Development*, Peter Draho and Ruth Mayne, eds. (Oxfam, 2002), p. 4.

[40] These issues have been extensively documented in the literature. See, for example: Vanessa B. Kerry and Kelley Lee, “TRIPS, the Doha Declaration and Paragraph 6 Decision: What Are the Remaining Steps for Protecting Access to Medicines?”, *Globalization and Health*, vol. 3, No. 1 (May 2007); Vandana Shiva, “The Historic Significance of Seattle”, *The Society for International Development*, vol. 43, No. 2 (June 2000); Melody Okereke, “Towards Vaccine Equity: Should Big Pharma Waive Intellectual Property Rights for COVID-19 Vaccines?”, *Public Health in Practice*, vol. 2 (November 2021); M Okereke and MY Essar, “Time to Boost COVID-19 Vaccine Manufacturing: The Need for Intellectual Property Waiver by Big Pharma”, *Ethics, Medicine, and Public Health*, vol. 19 (December 2021).

[41] Draho “Introduction” p. 6.

[42] Abbott, “The Cycle of Action and Reaction” p. 10.

[43] These sometimes competing imperatives are contained in Articles 7 and 8 of the TRIPS Agreement.

[44] Articles 33 and 27.1 respectively of the TRIPS Agreement.

[45] Kerry and Lee, “TRIPS, the Doha Declaration and Paragraph 6 Decision” p. 2.

[46] WTO, *The Uruguay Round*. Available from [https://www.wto.org/english/thewto\\_e/minist\\_e/min98\\_e/slide\\_e/ur.htm](https://www.wto.org/english/thewto_e/minist_e/min98_e/slide_e/ur.htm) (accessed 31 January 2022). The original negotiating mandate covered 15 items: tariffs, non-tariff barriers, natural resource products, textiles and clothing, agriculture, tropical products, GATT articles, Tokyo Round codes, anti-dumping, subsidies, intellectual property, investment measures, dispute settlement, the GATT system, and services.

Developing countries, in particular, bristled at the notion that their domestic legal systems, and the level of scarce administrative and enforcement resources allocated to those systems, should have to pass muster according to American standards. There was considerable merit in the developing country position. Operating a truly effective patent system is a costly enterprise, given the high demand for patent registration, and the substantial component of technical expertise required to make such a system work properly.[47]

During the negotiations, the major powers wore down the opposition through a combination of persuasion and coercion. The US, Switzerland, Japan and the European Community flooded the table with detailed and complex proposals. Immense pressure was exerted on opponents of this agenda in the small room discussions. A group of ten developing countries attempted to hold out, maintaining that a comprehensive deal on IP could not be negotiated within GATT. All this while, the US pursued opponents through the aggressive use of its big stick in the form of section 301 of its Trade Act. Brazil, India, Argentina, Egypt and Yugoslavia were all listed for bilateral action. The GATT Secretariat also used “dirty tricks” to sow division among the southern countries. Cooperation between them began to falter, and the budding unity and resistance fell apart.[48]

### **3.3 The WTO Third Ministerial Conference in Seattle in December 1999**

The Seattle Conference, which famously collapsed, was a watershed moment due largely to unprecedented levels of cooperation and joint action amongst developing countries. The collapse of the Conference may be attributed to a number of factors, including: (a) the absence of a consensus among the major powers; (b) the legions of demonstrators in Seattle who were protesting the US practices of enabling industry profiteering in the midst of a pandemic and; (c) the combined actions of the African, Caribbean and Latin American trade representatives in resisting unfavourable proposals from the major powers as well as calling them out on their unfair and exclusionary modus operandi in the meetings.[49]

Notwithstanding its collapse, from the perspective of developing countries, Seattle was a victory. Even before the conference began, LDCs around the world presented a united front in tabling 67 proposals aimed primarily at calling on the WTO to take meaningful measures to levelling the playing field in relation to competition in the market.[50] The African Group, specifically, engaged in a collective effort over several months leading up to the Seattle Conference, culminating in a joint official position formulated in the September 1999 meeting of the African Ministers of Trade in Algiers.[51] The joint position – which was built with inputs from activist groups, experts, and several other institutions – highlighted the difficulties faced by African States in relation to TRIPS. This document has been praised as raising a number of progressive issues. [52] For instance, in addition to the difficulties associated with implementing TRIPS, the African Group drew attention to the fact that while Article 66.2 of TRIPS endeavours to promote technology transfer to developing countries by calling on developed countries to provide “incentives” to their industries, the provision is couched in non-committal language that effectively creates no obligation on developed countries to act.[53]

The events of the Seattle Conference were significant, as they established developing countries as a force that needed to be taken seriously in multilateral trade negotiations. Until that point, the major powers had essentially proceeded unopposed, with their internal consensus dictating the global direction.[54] However, it was patently obvious from the approach of the developing countries during the Seattle Conference—specifically their conviction to oppose any consensus that might have been formed[55]—that they could no longer be side-lined, nor could the issues they raised continue to be ignored. These events, and those that followed, laid the groundwork for

[50] UNCTAD, *Marginalized Countries Table Comprehensive Trade Agenda for WTO Ministerial Conference* (Geneva, 1999). Available from: <https://unctad.org/press-material/marginalized-countries-table-comprehensive-trade-agenda-wto-ministerial-conference> (accessed 28 January 2022).

[51] WTO, *Preparations for The 1999 Ministerial Conference: Communication from Kenya on behalf of the African Group, 6 August 1999* (Geneva, 1999). Available from <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/GC/W302.pdf&Open=True> (accessed 28 January 2022).

[52] Keet, “The Challenges Facing African Countries Regarding the WTO “Trade” Regime Since the Third Ministerial Meeting in Seattle”.

[53] Ibid.

[54] Mayur Patel, “New Faces in the Green Room: Developing Country Coalitions and Decision-Making in the WTO”, GEG Working Paper No.2007/33 (Oxford, ECONSTOR). Available from <https://www.econstor.eu/handle/10419/196296> (accessed 26 January 2022).

[55] Keet “The Challenges Facing African Countries Regarding the WTO “Trade” Regime Since the Third Ministerial Meeting in Seattle”.

[47] Trebilcock, Howse and Eliason, “The Regulation of International Trade” p. 321.

[48] Peter Drahos and John Braithwaite, *Who Owns the Knowledge Economy? Political Organising Behind TRIPS* (2004). Available from <http://www.thecornerhouse.org.uk/resource/who-owns-knowledge-economy#index-15-00-00-00> (accessed 31 January 2022).

[49] Dot Keet, “The Challenges Facing African Countries Regarding the WTO “Trade” Regime Since the Third Ministerial Meeting in Seattle”, *Transnational Institute*, 1 May 2006. Available from <https://www.tni.org/en/article/the-challenges-facing-african-countries-regarding-the-wto-trade-regime-since-the-third> (accessed 28 January 2022).



future developments that entailed a more public health-friendly interpretation of TRIPS.

On sober reflection, the proposals advanced by the African Group, while progressive, were largely framed within the TRIPS paradigm. As Keet explains, this is partly due to the effect of the technical assistance provided by entities such as WIPO and UN institutions—all with a vested interest in the preservation of the WTO—on the development of the joint position.[56] As a result, none of the issues raised confronted the more fundamental question of whether allegiance to the WTO was in the interest of developing countries in Africa. In our view, this is an important question to pose, especially in light of what followed the aborted Seattle Conference.

### 3.4 The Doha Declaration

The Doha Declaration was the culmination of a growing tide of discontent in response to the pernicious effects of TRIPS on the developing world—building upon the momentum of the Seattle Conference. The aim of the Declaration was to more fairly balance the protections of IP rights holders with the very real need to address the public health crises faced by developing countries, by circumventing patents on pharmaceuticals.

Before reflecting on the outcomes of Doha, it is important to revisit why it was necessary. The TRIPS Agreement already contained flexibilities which could ostensibly be used for these purposes. It was to a large extent the actions of some developing countries—most notably South Africa and Brazil, in attempting to implement these flexibilities—that exposed the limitations of the TRIPS compact.[57] When Mandela's Government sought to amend legislation to introduce parallel importation to facilitate access to antiretrovirals and other medicines through amendments to its Medicines Act, 39 pharmaceutical companies together launched a lawsuit in 1998 to stop this legitimate use of a TRIPS flexibility. The US also instituted retaliatory action against Brazil at the WTO in early 2001 in response to its intention to grant compulsory licences in order to provide free drugs to HIV infected people.[58] In both these cases, the major powers aligned themselves with the pharmaceutical industry in trying to stymie the legitimate actions of developing country governments to respond effectively to a public

health crisis.[59] Such actions exposed both the US Government and the European Commission, in supporting pharmaceutical companies in the midst of the AIDS pandemic, as vigorously defending pharmaceutical industry profits even at the expense of the loss of thousands of lives.[60] These events made it clear that the text in TRIPS, as it stood, left key issues open to interpretation, and thus clarity was required to ensure there were no further impediments to the use of the public health-oriented flexibilities.

Against this backdrop, the African Group proposed in April 2001, a special session of the TRIPS Council to clarify the relationship between the TRIPS Agreement and public health and, in particular, “the right of WTO Members to formulate their own public health policies and implement them by adopting measures to protect public health.”[61] A key concern expressed was the efficacy of a compulsory licence in a country with little or no manufacturing capacity, given the provisions of Article 31(f). The meeting was unable to reach consensus on this issue, and in the event the Ministerial Meeting in Doha resolved to “instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.”[62]

The adoption of the Doha Declaration has been hailed as a victory for developing countries in the history of the WTO. [63] As 't Hoen explains, Doha has been well received by advocates and activists as “an important achievement because it gave primacy to public health over private intellectual property, and clarified WTO Members' rights to use TRIPS safeguards.”[64]

### 3.5 The Paragraph 6 Solution

The negotiations on this aspect were no less contentious. The US once again sought to resist the use of the compulsory licensing mechanism, proposing a moratorium on WTO complaints against countries exporting medicines to countries in need, but limited its scope to a few diseases, namely, AIDS, TB and malaria.

[56] Ibid.

[57] Abbott, “The Cycle of Action and Reaction” p. 17.

[58] Médecins Sans Frontières, “US action at WTO threatens Brazil's successful Aids programme”, 1 February 2001. Available from <https://www.msf.org/us-action-wto-threatens-brazils-successful-aids-programme> (accessed 31 January 2022).

[59] <https://msfaccess.org/1998-big-pharma-versus-nelson-mandela>.

[60] 't Hoen, “TRIPS, Pharmaceutical Patents and Access to Essential Medicines” p. 44.

[61] South Centre, *The TRIPS Agreement: A Guide for the South. The Uruguay Round Agreement on Trade Related Intellectual Property Rights* (November 1997), South Centre and UNCTAD. Available from [https://www.unctad.org/en/docs/ite1\\_en.pdf](https://www.unctad.org/en/docs/ite1_en.pdf). (accessed 31 January 2022).

[62] Doha Declaration, para 6.

[63] Abbott, “The Cycle of Action and Reaction”.

[64] 't Hoen, “TRIPS, Pharmaceutical Patents and Access to Essential Medicines” p. 4.

Developing countries vehemently rejected the idea of a limited scope on disease coverage. They proposed either an amendment to Article 31(f) of TRIPS (to effectively waive the domestic use requirement) or an authoritative interpretation of Article 30 to permit an exception to the patent holder's rights. The latter option was much favoured by public health advocates, and was also supported in a WHO submission to the TRIPS Council as the most consistent approach with the public health principle that countries lacking capacity for domestic production should not be disadvantaged by compulsory licence provisions nor have to surmount greater procedural hurdles.[65]

The US reluctantly supported the solution of a temporary waiver of Article 31(f), but insisted on the following stringent conditions: the export licences should be restricted to grave crises such as the 3 diseases mentioned; the flexibility be limited to the public and non-commercial sectors; requiring multiple administrative and procedural steps; strict anti-diversion guarantees and limitations on re-export.[66]

Although the US eventually dropped its insistence on disease limitations, many of the other conditions were retained in the Paragraph 6 Solution, resulting in this mechanism having been used only once in 9 years, and being described as neither expeditious nor a solution.[67] It has subsequently been codified as the only amendment to TRIPS in the form of Article 31bis. This "compromise solution" remains unworkable and represents a setback from the gains made at Doha.

### 3.6 COVID-19 Waiver

In October 2020, India and South Africa tabled a proposal at the WTO for the "waiver from the implementation, application and enforcement of Sections 1, 4, 5, and 7 of Part II of the TRIPS Agreement in relation to prevention, containment or treatment of COVID-19" (waiver proposal). [68] Such a waiver, which has the support of over 100 member countries, is permitted under WTO rules.[69]

Some of the most powerful countries, led by the European Union have opposed the proposal by denying its necessity, stating that existing mechanisms under TRIPS, such as voluntary and compulsory licences, are sufficient to address the problems of access raised by the sponsors of the proposal. While the WHO Director-General has endorsed the waiver proposal, the new WTO Director-General, Dr. Ngozi Okonjo-Iweala, has not expressed support.[70]

Despite a series of both formal and informal meetings of the TRIPS Council, consensus on the waiver proposal remains elusive. The support of the Biden Administration for a waiver on vaccines in May 2021, raised the hopes of many.[71] The proponents have proposed text-based negotiations on a revised proposal which addresses concerns about the scope and duration of the waiver. Text-based negotiations were expected to take place during the remainder of 2021,[72] but as at 27 January 2022 little progress had been reported on this front. An informal meeting convened by the Chair of the General Council looked at issues related to cross-border trade flows and the proposal to waive certain IP protections related to COVID-19 countermeasures. The WTO Director-General urged members to conclude discussion on the waiver by the end of February 2022, stressing that "most delegations see the facilitator (Ambassador Walker's) text as the basis to proceed despite the existing divergences." [73] Walker's proposal has been criticised by proponents of the waiver as sidestepping the core IP issues, and instead promoting greater trade liberalisation.[74]

[70] Cullinan K, Fletcher ER, "Proposed IP Waiver on COVID vaccines & medicines gets burst of public support – but 'third way' approach by WTO more likely", Health Policy Watch, 26 February 2021. Available from <https://healthpolicy-watch.news/proposed-ip-waiver-on-essential-covid-health-products-gets-burst-of-public-support-ahead-of-wto-general-council-meeting/> (accessed 31 January 2022).

[71] Third World Network, "In 'monumental' decision, US expresses support for TRIPS waiver", TWN Info Service on WTO and Trade Issues, 9 May 2021. Available from <https://twn.my/title2/wto.info/2021/ti210509.htm> (accessed 31 January 2022).

[72] WTO Members approach text-based discussions for an urgent IP response to COVID-19 (Geneva, 2021). Available from [https://www.wto.org/english/news\\_e/news21\\_e/trip\\_09jun21\\_e.htm](https://www.wto.org/english/news_e/news21_e/trip_09jun21_e.htm) (accessed 31 January 2021).

[73] WTO, *COVID-19: Members discuss way forward in dedicated meeting on WTO pandemic response* (Geneva, 2022). Available from [https://www.wto.org/english/news\\_e/news22\\_e/gc\\_27jan22\\_e.htm](https://www.wto.org/english/news_e/news22_e/gc_27jan22_e.htm) (accessed 29 January 2022).

[74] Third World Network, "What's Cooking for MC12? Two processes that could reshape the WTO in the interest of the most powerful", Third World Network, 14 November 2021. Available from [https://www.twn.my/title2/briefing\\_papers/MC12/briefings/WTO%20reform%20&%20WTO%20pandemic%20response%20TWNBP%20MC12.pdf](https://www.twn.my/title2/briefing_papers/MC12/briefings/WTO%20reform%20&%20WTO%20pandemic%20response%20TWNBP%20MC12.pdf) (accessed 29 January 2022).

[65] South Centre, "The TRIPS Agreement" p. 5.

[66] Ibid.

[67] Médecins Sans Frontières, "Neither Expeditious, Nor A Solution: The WTO August 30th Decision Is Unworkable", August 2006. Available from [https://msfaccess.org/sites/default/files/MSF\\_assets/Access/Docs/ACCESS\\_briefing\\_NeitherExpeditiousNorSolution\\_WTO\\_ENG\\_2006.pdf](https://msfaccess.org/sites/default/files/MSF_assets/Access/Docs/ACCESS_briefing_NeitherExpeditiousNorSolution_WTO_ENG_2006.pdf) (accessed 31 January 2022).

[68] WTO, *Waiver from certain provisions of the TRIPS agreement for the prevention, containment and treatment of COVID-19* (Geneva, 2020). Available from <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True> (accessed 31 January 2022).

[69] WTO, *WTO Analytical Index: WTO Agreement – Article IX (Jurisprudence)* (Geneva, 1994). Available from [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/wto\\_agree\\_art9\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/wto_agree_art9_jur.pdf) (accessed 31 January 2022).

The Waiver proposal represents the most recent counter-hegemonic challenge to the TRIPS Agreement. Already, familiar patterns are emerging of obstruction, filibustering and refusal to negotiate in good faith. There is a reasonable fear that these negotiations will follow the course of past challenges.

### **3.7 Concluding Comments on the Doha Declaration and Absence of Equitable and Fair Relations Between WTO Member States**

From the very inception of the Uruguay Round, the hegemony of the US and its allies has been dominant, using a combination of persuasion and, mostly, coercion to stamp its identity and agenda on discussions. In doing so, it has ridden roughshod over the legitimate concerns of developing countries every step of the way. As Drahos and Braithwaite ask, regarding the signing of the TRIPS Agreement:

Why did more than one hundred nations that were large net importers of intellectual property rights sign a TRIPS agreement that was so transparently against their interests as well as being an economic and health disaster for them? [75]

They answer by identifying three factors. Firstly, most developing countries were not present when key technical details were being discussed and finalised. Secondly, many of these countries did not have a clear understanding of their own interests, the impact of what they were expected to endorse, or were misinformed. And thirdly, they were threatened by US trade power.[76] Their subordinate economic, political and technical position rendered most developing countries outsiders to the process.

The Seattle Meeting presented the strongest promise of an advance, with the African Caribbean and Pacific (ACP) group of countries relatively better prepared, more united, and presenting strong proposals. The mobilisation of public support for their positions outside the conference gave muscle to their demands. While the mass demonstrations were a public relations disaster for the major powers, the WTO Secretariat, sensing defeat, precipitously ended the meeting. This was a somewhat Pyrrhic victory for developing countries, as the momentum developed in the build-up to Seattle largely dissipated. The hegemonic forces understand well the advantages of a strategic retreat, and being able to live to fight another day.

In Doha, developing countries were able to muster some energy and momentum, and on the back of a consolidation of positions, particularly by the African Group, and the shock effects of 9/11 and the anthrax scare in the US, managed to emerge with a powerful Declaration with plenty of promise. Sadly, this promise was to be betrayed in the ineffectual Paragraph 6 Solution, the rolling back of many gains in ensuing bilateral and regional trade agreements and investment treaties, and in the relentless march of IP maximalism, even during the worst pandemic in a century.

The waiver proposal holds the promise of a single all-embracing solution, particularly as developing countries generally and Africa in particular have struggled to exercise the public health TRIPS flexibilities[77] which require substantial resources and political capital. However, prospects of a resolution on the waiver during this pandemic are fading.

These experiences confirm the dominance of the major powers in the decision-making structures of the WTO, drowning out the voices of the overwhelming majority. To a large extent, such hegemony is maintained through the practice of decision-making by consensus, which allows a few powerful countries to effectively exercise a veto over the will of the majority. The Marrakesh Agreement does make provision for a three-quarters majority vote,[78] but this mechanism has not been utilised to date.

## **4. Recognizing Perspectives From the Developing World in Forming IP Policy: The Neo-Colonialism of the Global Regime[79]**

### **4.1 TRIPS and Neo-Colonialism**

The current global IP regime has all the features of neo-colonialism, which is loosely defined as “the control of less-

[77] See Yousuf Vawda and Bonginkosi Shoji, *Eighteen Years After Doha: An Analysis of the Use of Public Health TRIPS Flexibilities in Africa*, Research Paper No. 103 (Geneva, South Centre, February 2020). Available from [https://www.southcentre.int/wp-content/uploads/2020/02/RP103\\_Eighteen-Years-After-Doha-An-Analysis-of-the-Use-of-Public-HealthTRIPS-Flexibilities-in-Africa\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2020/02/RP103_Eighteen-Years-After-Doha-An-Analysis-of-the-Use-of-Public-HealthTRIPS-Flexibilities-in-Africa_EN.pdf) (accessed 31 January 2022).

[78] Article IX (3)(a) of the *Marrakesh Agreement Establishing the World Trade Organization* (1994) states: “A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths of the Members.”

[79] This section draws substantially from the manuscript: Yousuf Vawda, “Rethinking Intellectual Property Through Decoloniality and Other Lenses”, in *Intellectual Property Rights in the Post Pandemic World – An Integrated Framework of Sustainability, Innovation and Global Justice*, Taina Pihlajarinne, Jukka Mahonen and Pratyush Upreti, eds. (forthcoming) Edward Elgar.

[75] Drahos and Braithwaite, “Who Owns the Knowledge Economy” p. 29.

[76] Ibid.

developed countries through indirect means.”[80] One of Africa’s foremost anti-colonial leaders Kwame Nkrumah expounded it as follows: “The essence of neo-colonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from outside.”[81] Nkrumah viewed this phenomenon as the biggest threat to Africa’s development.

In the context of IP discourse, the key proposition here is that IP is a knowledge system developed in the global North, and forcibly imposed through conquest and colonialism. Its history dates back to the empires of the late nineteenth century and early twentieth century. The colonising countries adopted the Paris and Berne Conventions[82] and subsequently imposed the same rules on the colonies. Even after independence from their colonial powers, the IP laws of the colonies, where they had been adopted, remained intact. At the advent of the WTO, and the adoption of TRIPS, the colonial imposition continued to guarantee the protection of mainly foreign property in the former colonies. In this sense, for many developing countries, IP is an essentially colonial construct.[83] And it is this colonial construction of IP that, in our view, most significantly contributes to the continued marginalisation of perspectives from the developing world in the formulation of both global and national IP policies. In essence, IP continues to be constructed through a colonial lens, and no progress can be made towards truly inclusive policies until IP is decolonised. In the following sections, we explore what this may entail.

[80] Sandra Halperin, “neocolonialism”, Britannica (undated). Available from <https://www.britannica.com/topic/neocolonialism> (accessed 27 January 2022). “Colonialism” on the other hand, refers to conquest, subjugation and control of the colonies for the benefit of colonisers.

[81] Kwame Nkrumah, “Neo-Colonialism, the Last Stage of Imperialism”, 1965. Available from <https://www.marxists.org/subject/africa/nkrumah/neo-colonialism/introduction.htm> (accessed 27 January 2022).

[82] The Paris Convention for the Protection of Industrial Property, 1883; The Berne Convention for the Protection of Literary and Artistic Works, 1886.

[83] See, for example: Ruth L Okediji, “The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System”, *Singapore Journal of International & Comparative Law*, vol 7 (2003). Available from

<http://www.commonlii.org/sg/journals/SJILIntCompLaw/2003/14.pdf> (accessed 24 November 2021); Michael D Birnhack, “A Post-colonial Framework for Researching Intellectual Property History” in *Handbook on Intellectual Property Research: Lenses, Methods, and Approaches*, Irene Calboli and Maria Lilla Montagnani, eds. (Oxford University Press, 2021). Available from

<https://ssrn.com/abstract=3160947> (accessed 24 November 2021); Andreas Rahmatian, “Neo-Colonial Aspects of Global Intellectual Property Protection” *The Journal of World Intellectual Property*, vol. 12, No. 1 (January 2009). Available at

<https://onlinelibrary.wiley.com/doi/10.1111/j.1747-1796.2008.00349.x> (accessed 24 November 2021); Caroline B Ncube, “Decolonising Intellectual Property Law in Pursuit of Africa’s Development”, *The WIPO Journal*, vol. 8, No. 1 (June 2016).

## 4.2 Decoloniality

“Coloniality” may be understood to signify a continuation of colonialism by different means:

Like colonialism, coloniality involves the expropriation of land and resources. Unlike traditional colonialism in which expropriation primarily takes place through direct forms of conquest of one group over another, under modernity/coloniality expropriation happens also through the logic of the market and of modern nation-states.[84]

Many features of colonialism remain, such as extractive market practices and protectionism, the creation of monopolies and rent-seeking, which are enabled in the modern era by strong IP protections and their abuses. The discourse on the “decolonisation” of IP rules and systems is a developing one.[85] Western countries created IP norms and rules in order to, ultimately, protect such objects globally. Inherent in the IP legal framework are a set of assumptions about the creative and inventive processes. “By and large, these are Western-Eurocentric, modern, and capitalistic tools to promote various individual and social interests, which ‘do not necessarily or perfectly fit the creative process in colonized territories.”[86]

The “non-western”, traditional or indigenous paradigms, on the other hand, operate on an entirely different set of assumptions. These paradigms are largely ignored in western and colonial systems, their works and inventions not recognised in the law, and discouraged and marginalised.[87] However, non-western and indigenous systems are not homogenous but characterised by their “diversity and distinctiveness.”[88]

Colonialism entailed not only the political, economic, legal and social conquest of colonised regions, but also the

[84] Nelson Maldonado-Torres, “Outline of Ten Theses on Coloniality and Decoloniality” (Foundation Frantz Fanon, 2016) [http://fondation-frantzfanon.com/wp-content/uploads/2018/10/maldonado-torres\\_outline\\_of\\_ten\\_theses-10.23.16.pdf](http://fondation-frantzfanon.com/wp-content/uploads/2018/10/maldonado-torres_outline_of_ten_theses-10.23.16.pdf) accessed on 24 November 2021.

[85] See for example, Yousuf A Vawda, “The TRIPS COVID-19 Waiver, Challenges for Africa and Decolonizing Intellectual Property” (South Centre Policy Brief No 99, August 2021). Available from <https://www.southcentre.int/wp-content/uploads/2021/08/PB-99.pdf> (accessed 24 November 2021).

[86] Birnhack, “A Post-colonial Framework for Researching Intellectual Property History”.

[87] Ibid.

[88] Miye N Tom, Elizabeth S Huaman and Teresa L McCarty, “Indigenous knowledges as vital contributions to sustainability”, *International Review of Education*, vol. 655 (February 2019), p. 1. Available from <https://link.springer.com/article/10.1007/s11159-019-09770-9> (accessed 26 November 2021).



destruction of indigenous knowledge systems in order to establish the dominance of those of the coloniser. This phenomenon is described as epistemicide.[89] De Sousa Santos asserts that the “winners” in conflict situations obliterate indigenous knowledge, leaving western norms and rules dominant. Western knowledge and rationality are endorsed while indigenous knowledge devalued and repressed: “That the colonised and the enslaved were humans who had sciences, religions and histories of their own was a truth that empire could not and cannot live with.”[90]

Richardson[91] argues that some practices of global public health, for example, are intimately tied to “colonialism and scientific imperialism”.[92] Describing coloniality as a “matrix of power relations that persistently manifests despite a former colony’s achievement of nationhood” he identifies colonial, racist and patriarchal traits within, for example, the discipline of epidemiology. Reflecting on experiences of the Ebola epidemic in West Africa, he asserts, for example, that the term “superspreader” event to describe the transmission of disease reflects a colonial character by masking systemic failures of global health. This is accomplished through interpretations that place the blame on the victims and favour elites, for example, by failing to regulate, enforce taxes on, and sanction mining companies whose operations create the conditions that make their workers susceptible to infection and disease. [93]

A similar argument may be made against the notion of “expertise”. Some writers argue for the decolonisation of expertise and divest it of its elitist connotations. This means non-Western knowledge should not be marginalised as native, indigenous or anecdotal, but accorded

recognition as expert, thereby amplifying rather than limiting the diversity of excellence.[94]

### 4.3 Neo-Colonialism During COVID-19

Neo-colonialism amply demonstrated its essential features of extraction, protectionism, inequity and exploitation during COVID-19. It manifested in the refusal of IP rights holders to share their technology, in hoarding of a range of essential supplies and vaccine apartheid, and in effectively leaving the poorer regions of the world behind in the queue to access vaccines which are in short supply primarily because of market monopolies:

In this extremely dire situation, the role of Intellectual Property (IP) looms large. The shortages of essential health products are not primarily due to the scarcity of raw materials, resources or even manufacturing capacity. They have been artificially created through the refusal of IP rights holders to share their technology and know-how with multiple producers in both developed and developing countries in the midst of the worst pandemic in the past century. As at November 2021, a total of 7.5 billion doses of vaccines had been administered, sufficient to vaccinate 42.3 per cent of the global population.[95] While the US, UK and Europe registered vaccination rates above 60 per cent of their populations, Africa’s vaccination rate stood at around 6 per cent with 128 million people who had received the vaccines.[96] These supply constraints are not merely the result of market failures, but are ‘hardwired into the global IP system, and portend continuing production and supply challenges’.[97]

[89] See, for example, Boaventura de Sousa Santos “Beyond Abyssal Thinking”, 2007. Available from <http://www.boaventuradesousasantos.pt/documentos/AbyssalThinking.PDF> (accessed 26 November 2021); Ngugi wa Thiong’o, *Decolonising the Mind: The Politics of Language in African Literature* (James Currey, 2018).

[90] Melissa Steyn and William Mpofu, “The Trouble with the Human”, in *Decolonising the human: Reflections from Africa on difference and oppression*, Steyn and Mpofu, eds. (Wits University Press, 2021). Available from [https://library.oapen.org/bitstream/handle/20.500.12657/46908/9781776146789\\_WEB.pdf?sequence=1&isAllowed=y](https://library.oapen.org/bitstream/handle/20.500.12657/46908/9781776146789_WEB.pdf?sequence=1&isAllowed=y) (accessed on 24 November 2021).

[91] Eugene T Richardson, *Epidemic Illusions: On the Coloniality of Global Public Health* (MIT Press, 2021).

[92] Duke Global Health Institute, “Epidemic Illusions: On the Coloniality of Global Public Health”, 9 February 2021. Available from [https://www.youtube.com/watch?v=0xttPnEQ9g&ab\\_channel=DukeGlobalHealthInstitute](https://www.youtube.com/watch?v=0xttPnEQ9g&ab_channel=DukeGlobalHealthInstitute) (accessed 24 November 2021).

[93] Ibid.

[94] Christopher H Trisos, Jess Auerbach and Madhusudan Katti, “Decoloniality and anti-oppressive practices for a more ethical ecology”, *Nature Ecology and Evolution*, vol. 5 (May 2021), p. 1205.

[95] Pharmaceutical Technology, “Covid-19 Vaccination Tracker – Latest news, statistics, daily rates and updates”, Pharmaceutical Technology, 14 November 2021. Available from COVID-19 Vaccination Tracker: Daily Rates, Statistics & Updates (pharmaceutical-technology.com) (accessed on 23 November 2021).

[96] allAfrica, “Africa’s Covid-19 Vaccine Delivery ‘Leaves Much to be Desired’”, 15 November 2021. Available from Africa’s Covid-19 Vaccine Delivery ‘Leaves Much to be Desired’ - allAfrica.com (accessed on 23 November 2021). See also Yousuf A Vawda, “Global Health Equity – An Unfulfilled Promise”, *Intl Rev of Intellectual Property and Competition Law*, vol. 52 (November 2021) p. 1287. Available from [https://link.springer.com/epdf/10.1007/s40319-021-01124-z?sharing\\_token=osls2CII-0Dfpp8Ag\\_S9v\\_e4RwlQNchNBYi7wbcMAY7oJeCsQ8ULLUozBBp19AqQ\\_L2N\\_zAbETL-NeZajDdvDHi8mH4zkjNTqpBjLIhtKYE44tgDvEQBazaRic1Pcky-sVrNPzxZzrBlyOMLa4q4C1PxV5zsJTCbe5PW4gQTts%3D](https://link.springer.com/epdf/10.1007/s40319-021-01124-z?sharing_token=osls2CII-0Dfpp8Ag_S9v_e4RwlQNchNBYi7wbcMAY7oJeCsQ8ULLUozBBp19AqQ_L2N_zAbETL-NeZajDdvDHi8mH4zkjNTqpBjLIhtKYE44tgDvEQBazaRic1Pcky-sVrNPzxZzrBlyOMLa4q4C1PxV5zsJTCbe5PW4gQTts%3D) (accessed 23 November 2021).

[97] Vawda, “Global Health Equity” p. 1288.

The WHO, on 26 November 2021, designated the COVID-19 variant Omicron a variant of concern.[98] This declaration followed the identification of the variant by researchers in South Africa and Botswana.[99] Coordinating these efforts is the Network for Genomic Surveillance in South Africa, which includes many of Africa's leading institutions such as the National Institute for Communicable Diseases, the South African Medical Research Council, the Department of Science and Innovation, Stellenbosch University and the University of KwaZulu-Natal.[100]

During the HIV/AIDS pandemic, racist tropes about Africans abounded, and the continent as a whole was portrayed as homogenous, backward, sexually permissive and desperately in need of control and assistance from outside.[101] Crewe and Aggleton state:

As with colonial writings, modern writings about Africa are always seeking that which is different – ways of describing Africa as a 'nation' or continent apart, out of the mainstream of the international community. Through this, it appears, there is a desire to create problems rather than solutions. This is most clearly expressed through notions of cultural exclusion, and the oft-repeated statements by outsiders about what 'African culture' will and will not allow, thereby fuelling the epidemic and mitigating against prevention success. This overly static vision of culture glosses over complex social inequalities as well as the complex issues raised by a changing, modernising and shifting world.[102]

This trend appears to have re-emerged during the COVID-19 pandemic. Ironically, the ground-breaking work of scientists in Southern Africa in identifying the Omicron

variant was, instead of reciprocal collaboration, met with knee-jerk colonial and racist responses from some Western countries, such as travel bans on visitors from mainly African countries, and the Canadian Government's bizarre questioning of COVID-19 tests conducted in South Africa. [103] This is despite the fact that the Omicron variant was found to be circulating in Belgium since mid-November 2021, some weeks before the first case was confirmed in South Africa.[104] The ban on travel from Southern African countries perpetuates colonial and racist attitudes regarding the spread of infection and disease. No such bans were applied against Belgium in this instance, or against any Northern countries which were the epicentres of the Beta and Delta variants of the coronavirus causing COVID-19. One commentator put it thus:

In politically putting a Black face on the Omicron variant in a pandemic that has taken 5.2 million lives of all colors, the United States and the predominantly White West defaulted to one of the oldest tropes in the book of racism. By sealing off all of Southern Africa from the developed world, as predominantly White populations freely cross borders, the global North and Australia once more have, in essence, declared Black people the dirtiest of humanity on the planet, hoping in vain to prevent their germs from co-mingling with the rest of civilization.[105]

Neo-colonial and racist topes continue to run deep in contemporary discourse in public health and international relations.

## 5. Conclusion – Towards an Agenda for a More Equitable Framework to Ensure Access to Health

At the outset, we had proposed that the Doha Declaration could be understood as making three promises, namely: (a) advancing access to health; (b) equity and fairness in the relations between WTO Member States; and (c) recognising perspectives from the developing world in formulating IP

[98] WHO, "Update on Omicron", 28 November 2021. Available from <https://www.who.int/news/item/28-11-2021-update-on-omicron> (accessed 28 January 2022).

[99] Isaac Chotiner, "How South African Researchers Identified the Omicron Variant of COVID", *The New Yorker*, 30 November 2021. Available from <https://www.newyorker.com/news/q-and-a/how-south-african-researchers-identified-the-omicron-variant-of-covid> (accessed 28 January 2022); Josh Sharfstein, "Omicron in South Africa: The Latest News", Johns Hopkins Bloomberg School of Public Health, 20 December 2021, . Available from <https://publichealth.jhu.edu/2021/omicron-in-south-africa-the-latest-news/> (accessed 28 January 2022).

[100] National Institute for Communicable Diseases, "Tracking SARS-COV-2 Variants" (undated). Available from <https://www.nicd.ac.za/diseases-a-z-index/disease-index-covid-19/sars-cov-2-genomic-surveillance-update/> (accessed 31 January 2022).

[101] See for example, Mary Crewe and Peter Aggleton, "Racism, HIV/AIDS and Africa: Some Issues revisited", *South African Journal of International Affairs*, vol. 10, No. 1, (2003). Available from [https://www.tandfonline.com/doi/pdf/10.1080/10220460309545417?](https://www.tandfonline.com/doi/pdf/10.1080/10220460309545417?casa_token=qpJE4fHkypkAAAAA:5uX4u15fQxhQibCyZxCoqVwgvVjeuDqQ4Lye1KkfuiovfZkCTNusBEUOy2s49mufV-3Pd7HIT3V3)

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[102] Ibid p. 146.

[103] Mia Malan, "Debunked: The cruel and racist logic of Omicron travel bans", *Mail and Guardian*, 8 December 2021. Available from <https://mg.co.za/health/2021-12-08-debunked-the-cruel-and-racist-logic-of-omicron-travel-bans/> (accessed 8 December 2021).

[104] Agnes Szucs, "Omicron variant was in Belgium weeks earlier than it was announced: Report", *Anadolu Agency*, 6 December 2021. Available from <https://www.aa.com.tr/en/latest-on-coronavirus-outbreak/omicron-variant-was-in-belgium-weeks-earlier-than-it-was-announced-report/2439987> (accessed 28 January 2022).

[105] Derrick Z Jackson, "The Equation - Omicron in Blackface: Racist US Travel Ban Scapegoats Africa", *Union of Concerned Scientists*, 3 December 2021. Available from <https://blog.ucsusa.org/derrick-jackson/omicron-in-blackface-racist-us-travel-ban-scapegoats-africa/> (accessed 28 January 2022).

policy. Throughout this discourse, we appraised these promises that the Declaration aspired to, and outlined the manner in which these have failed to materialise—providing a critical discussion of what we viewed as the main reasons for these shortcomings.

All things considered, none of the problem factors we discussed is more compelling than the hegemonic position of the major powers and their allies in determining the outcomes in the WTO. This was vividly illustrated in our review of the challenges mounted by developing countries to such hegemony with reference to various “watershed” events, and our exploration of IP norms and systems through the lens of decoloniality. In both these discussions, it became evident that the counter-hegemonic challenges described (including the Doha Declaration) had ultimately failed, not because of a lack of commitment or intent by developing countries, but because the global architecture of the IP regime had set them up for failure. The COVID-19 pandemic has exposed many things—the fragility of our health systems; deep global inequities; the predatory nature of the pharmaceutical and biotechnology industries; and the preference for nationalistic tendencies over international solidarity—all playing out in the face of a looming climate catastrophe. Our analysis is that if the current multilateral system of global IP governance is unable, or worse, unwilling to accommodate reasonable and legally permissible remedial measures to effectively tackle and end arguably the worst health crisis in the past century, then that system is not fit for purpose. It is in that context that we assert that the promise of the Doha Declaration has been betrayed.

Many proposals have been made over the past 20 years to reform, modify and mitigate aspects of the TRIPS and WTO system, through attempts to use, for example, the public

health TRIPS flexibilities.[106] Successes have been few and far between. Solutions will have to be sought outside this framework. They will have to be articulated outside the colonial IP paradigm. It will require “the IP leg of the WTO to be sawn off.”[107] It will entail the process of decolonising intellectual property, of stripping it of the imbalances that presently disserve all but the world’s richest, and ensuring that it will never again hold global health to ransom. Better and more equitable instruments to address global health must be established. The balance of power in multilateral institutions must change. The forces which led the counter-hegemonic challenges must re-group, if necessary, outside the WTO and begin to chart a new course.

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[106] See, for example, Michele Boldrin and David K Levine, “The Case Against Patents”, Research Division Federal Reserve Bank of St Louis, Working Paper Series (September 2012). Available from <https://deliverypdf.ssrn.com/delivery.php?ID=973027002121127082016077100105125102121064057008063030022092020122071078004092105006055120040032010124035121107116084081074117058020029085067031025065090118009091057093041009001073011109019002122102089064127087019088098075023016024103109066071067003&EXT=pdf&INDEX=TRUE> (accessed 31 January 2022); Martin Khor, “Rethinking Intellectual Property Rights and TRIPS”, in *Global Intellectual Property Rights: Knowledge, Access and Development*, Peter Drahos and Ruth Mayne, eds. (Oxfam, 2002) p. 201-213.

[107] Khor “Rethinking Intellectual Property Rights and TRIPS” p. 212.

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