

# ‘EQUITY’ IN THE PANDEMIC TREATY: THE FALSE HOPE OF ‘ACCESS AND BENEFIT-SHARING’

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**Abstract:** During COVID-19 the international community repeatedly called for the equitable distribution of vaccines and other medical countermeasures. However, there was a substantial gap between this rhetoric and state action. High-income countries secured significantly more doses than they required, leaving many low-income countries unable to vaccinate their populations. Current negotiations for the new Pandemic Treaty under the World Health Organization (WHO) attempt to narrow the gap between rhetoric and behaviour by building the concept of equity into the Treaty’s substantive content. But equity is difficult to define, much less to operationalize. Presently, WHO member states appear to have chosen “access and benefit sharing” (ABS) as the sole mechanism for operationalizing equity in the Treaty. This paper examines ABS as a mechanism, its use in public health, and argues that ABS is fundamentally flawed, unable to achieve equity. It proposes other options for an equitable international response to future pandemic threats.

**Keywords:** public international law, benefit sharing, equity, pandemic, COVID-19, solidarity, pathogens, global health law, Global health law, Access and Benefit Sharing, convention on biodiversity, Nagoya protocol

## I. INTRODUCTION

The process of developing a ‘convention, agreement or other international instrument for pandemic preparedness and response’ under the Constitution of the World Health Organisation (WHO) has begun in earnest.<sup>1</sup> The proposed instrument, commonly called the ‘Pandemic Treaty’,

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is intended to address the global failures in outbreak prevention, preparedness and response witnessed during COVID-19.<sup>2</sup> Unsurprisingly, given the vast inequity between countries highlighted during COVID-19, particularly with respect to access to vaccines and other medical countermeasures, the issue of equity has been central to the discussions thus far.<sup>3</sup> Advocates claim that a Pandemic Treaty grounded in “norms of solidarity, fairness, transparency, inclusiveness and equity” will overcome many of the shortcomings of the international COVID-19 response.<sup>4</sup>

Until recently, the concept of equity in the Pandemic Treaty has been decidedly vague – more of an aspiration, than anything clear and concrete. The aim of this article is to explore and critique the normative development of equity within the Pandemic Treaty negotiations. It begins by delineating the development of the general concept of equity within international law (Part Two), before exploring and contextualising the frequent calls for equity throughout the COVID-19 pandemic (Part Three). Part Four turns to the construction of equity in the Pandemic Treaty negotiations thus far, charting the use of the term equity in early proposals and drafts of the agreement, before mapping its current construction within negotiating texts. This mapping exercise to help evaluate whether current proposals to operationalise equity in the Treaty can achieve the intended outcome. It is argued that while “[e]quity is central to achieving and sustaining the objective(s)” of the Treaty, the that concept is being equated with a legal mechanism taken from international environmental law: ‘access and benefit sharing’ (ABS). In global health law, ABS is commonly interpreted as a transaction where countries provide pathogen samples to potential users in exchange for medical countermeasures (or an opportunity to receive medical countermeasures). Part Five highlights how the current discussions on equity within the Pandemic Treaty erroneously conflates equity with ABS. It is argued that equity can never be transactional and warn that ABS as a legal mechanism is incapable of delivering equity, particularly for low- and middle-income countries (LMICs), during future pandemics. Linking access to pathogens to the receipt of resulting ‘benefits’ such as vaccines and antiviral medications is both practically flawed and morally at odds with the drive towards equity. Part Six sets out an alternative approach to achieving the equity goals of the Pandemic Treaty, proposing the conceptual *delinkage* of access from benefit sharing in public health. It sketches out the contours of such delinkage, elucidating (possible) practical mechanisms to implement the proposal. In doing so, it argues for the development of models for access to pathogens for scientists and pharmaceutical companies around the world and, separately, the equitable distribution of medical countermeasures. This proposal is not based on the ABS transactional mechanism where countries essentially purchase access to medicines using their pathogen samples, but rather on the principle of solidarity in the face of a shared threat. Part Seven concludes by advocating for alternative approaches to delivering equity through the Pandemic Treaty, approaches that are not grounded in the flawed ABS transactional mechanism.

## II. DEFINING EQUITY

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<sup>1</sup> World Health Assembly, *The World Together: Establishment of an intergovernmental negotiating body to strengthen pandemic prevention, preparedness and response* 28 November 2021, SSA2/CONF./1Rev.1

<sup>2</sup> For an in-depth exploration of the development of the treaty to date, see: C Wenham, M Eccleston-Turner and M Voss, ‘The Futility of the Pandemic Treaty: Caught between Globalism and Statism’ (2022) 98 *International Affairs* 837.

<sup>3</sup> Equity was raised by over 60 member states at the World Health Assembly Special Session (WHASS), including: Gabon, Dominican Republic, Namibia, Tanzania, Mauritania, UK, Georgia, and Tonga.

<sup>4</sup> Joint Statement by Heads of States And WHO, *Covid-19 Shows Why United Action Is Needed for More Robust International Health Architecture*, (Geneva, Switzerland: World Health Organisation, 30/03/2021).

Despite having a history which can be traced back to the works of Aristotle and to Roman law,<sup>5</sup> attempts to provide a definitive answer to the question of just what equity is have faced difficulties because of the varying forms the concept takes within societies and legal systems around the world. To truly encapsulate all that equity is in one definition appears impossible.<sup>6</sup> Instead, it is more feasible to *describe* rather than to define it,<sup>7</sup> to reframe the question and to consider the *purpose* of equity as a concept in international law. A consensus is more easily reached here, with a common view being that the overarching goal or purpose of equity is to 'do justice' - requiring the presence of *fairness*, as well as recognition of difference(s) within and between peoples in the process. With a focus on the removal of the barriers and imbalances resulting from bias and the existence of hierarchies within societies, the demands of equity are distinguished from those of formal equality on the basis that equity requires 'equal things be treated equally' and the 'unequal treatment of unequal things',<sup>8</sup> as opposed to simply treating everyone the same regardless of their differences (equality).

Despite the clear need for equity to permeate law and society, on both a domestic and global level, questions surround the relationship between equity and law, particularly in international law. There is acceptance that equity is necessary to bridge the gap between international law and justice – particularly distributive justice<sup>9</sup> – and that the principles of equity form a vital part of international law, but opinions differ considerably in relation to both the substance and the scope of the concept in international law.<sup>10</sup>

#### A. *The Development of Equity in International Law*

In considering both the substance and the scope of equity in international law, both the reasoning and judgments of international courts and tribunals offer a useful starting point. The incorporation of the concept in legal reasoning from the International Court of Justice (ICJ) to the creation of claims commissions have functioned to place equity firmly in the "mainstream of international law".<sup>11</sup> This is perhaps most apparent with regards to the ICJ's jurisprudence on maritime boundary disputes which is seen as "equity's traditional stronghold".<sup>12</sup> Whilst the subject of much criticism, it was the seminal judgment of the ICJ in the *North Sea Continental Shelf Cases*<sup>13</sup> which marked the introduction of equity in maritime delimitation, an introduction which paved the way for references to, and the application of equity in a number of the maritime boundaries cases that followed.<sup>14</sup> The role of equity in maritime delimitation has attained an "iconic" status in international law, to the point that it tends to overshadow the role and importance

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<sup>5</sup> C Titi, *The Function of Equity in International Law* (OUP 2021)18.

<sup>6</sup> *ibid.*, 2.

<sup>7</sup> SK Chattopadhyay, 'Equity in International Law: Its Growth and Development' (1975) 5 *Georgia Journal of International and Comparative Law* 381., 382.

<sup>8</sup> W. Fahmy, 'Equitable Principles from the Perspective of International Law of the Sea' (2018) 1 *Economics, Law and Policy* 46.

<sup>9</sup> M Janis, 'The Ambiguity of Equity in International Law' (1983) 9 *Brooklyn Journal of International Law* 7; R. Lapidoth, 'Equity in International Law' (1987) 22 *Israel Law Review* 161.

<sup>10</sup> Titi (n 5).

<sup>11</sup> *ibid.* 29, 135.

<sup>12</sup> *ibid.*, 28.

<sup>13</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Reports p.3.

<sup>14</sup> For more on this, see: *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Reports p.18; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Reports p.13; *Fisheries Jurisdiction (United Kingdom v. Iceland)* [1973] ICJ Reports. 3.

of equity to *all* areas of international law.<sup>15</sup> As Titi notes, “[f]rom international cultural heritage law to environmental law, from judgments on transboundary disputes to procedural decisions on security for costs in investment arbitration”<sup>16</sup> the relevance, importance, and application of equity in international law is far greater than its starring role in maritime delimitation cases may suggest.

Its use and application in the reasoning and judgments of international courts and tribunals offers support for equity being recognised as something of a principle of international law. The question remains, however, as to how equity functions within sources of international law. Perhaps the most obvious and undisputed means of recognising equity as an emerging general principle of international law is via its inclusion within treaties and international instruments. Indeed, the incorporation of equity or equitable considerations within the scope of international legal instruments and texts has occurred with much greater frequency in recent years. Such references can be found within the *United Nations Convention on the Law of the Sea (UNCLOS)*;<sup>17</sup> the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty)*;<sup>18</sup> the non-binding *Pandemic Influenza Preparedness (PIP) Framework* under the auspices of the World Health Organisation (WHO);<sup>19</sup> and the *United Nations General Assembly Declaration on the Establishment of a New International Economic Order*,<sup>20</sup> to name but a few. The incorporation of equity or equitable considerations into treaty law and other international texts here cements the principle as a legal requirement or norm in many areas of international law, indicating not only the importance of equity for international law but also the importance of international law as a potential vehicle for the pursuit of equity.

The recognition of equity as an emerging (or emergent) principle or norm of international law in circumstances where it is not explicitly incorporated into treaties and international instruments is a much more contentious issue. Judicial opinion from the Permanent Court of International Justice – albeit dissenting opinion – states that certain maxims of equity constitute ‘general principles of law recognised by civilised nations’ under the ICJ Statute.<sup>21</sup> Equity can perhaps be understood to constitute customary international law, at least in the context of maritime delimitation. As Titi explains, the recognition of equity as part of customary international law finds considerable support in jurisprudence; with the judgment of the ICJ in the *North Sea Continental Shelf Cases*, for example, offering support for this argument.<sup>22</sup> Additionally, the ICJ has also made reference to customary international law and equitable considerations in both the *Gulf of Maine Case*<sup>23</sup> and the *Jan Mayen Case*,<sup>24</sup> with the requirements of customary law in relation to maritime

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<sup>15</sup> Titi, (n 5), 11.

<sup>16</sup> *ibid*, 3.

<sup>17</sup> United Nations Convention on the Law of the Sea (UNCLOS) 1833 UNTS 3 (concluded 10 December 1982, entered into force 16 November 1994). References to equity are found throughout the UNCLOS, including the Preamble, art 74, and art 83.

<sup>18</sup> Agreement Governing the Activities of States on the Moon and Other Celestial Bodies 1363 U.N.T.S. 22, (Concluded 5 December 1979; entered into force 11 July 1984); art 11(7).

<sup>19</sup> Pandemic Influenza Preparedness Framework for the sharing of influenza viruses and access to vaccines and other benefits (henceforth PIP Framework) (adopted 24 May 2011; Second edition, 2021) A64/VR/10.

<sup>20</sup> Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (VI), 4 U.N. Doc. A/3201 (May 1, 1974).

<sup>21</sup> *Diversion of Water from the Meuse (The Netherlands v Belgium)* (Dissenting Opinion of MANzilotti) [1937], P.C.I.J. (Ser. A/B) No. 70; *Diversion of Water from the Meuse (The Netherlands v Belgium)* (Individual Opinion of Hudson) [1937], P.C.I.J. (Ser. A/B) No. 70

<sup>22</sup> Lapidoth (n 9).; 144.

<sup>23</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area* [1984] ICJ Reports p. 246.

<sup>24</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen* [1993] ICJ Reports p.38

boundaries requiring an 'equitable solution'. The statements of the ICJ in these cases offer support for the role of equity and equitable considerations in international law beyond recognition as a general principle or norm of law to perhaps rising to the level of customary international law, if only in the context of maritime delimitation.

Although disagreements may remain with regards to its form and scope, equity has become embedded within international law and can be understood to constitute a normative principle, whether that be through its incorporation into jurisprudence, as an objective of treaty law, or as part of customary international law. The emergence of equity within treaty law and other international legal instruments has solidified the role of international law more broadly as a potential vehicle for the pursuit and achievement of justice within many fields, including global health. As Part Three demonstrates, global health law is one such area where clear, concrete, legally binding steps towards equity (and the equitable distribution of medical countermeasures) could alleviate some of the global inequities of the COVID-19 pandemic.

### III. EQUITY, GLOBAL HEALTH, AND THE COVID-19 PANDEMIC

According to the WHO 'health equity is achieved when everyone can attain their full potential for health and well-being',<sup>25</sup> with timely and sufficient access to vaccine and other medical countermeasures being paramount to the realisation of equity in a health emergency. The consistent inability of developing states to access medical countermeasures during a pandemic<sup>26</sup> therefore presents a problem not just for global public health but for the realisation of health equity and justice on an international scale. One such driver of this inequity – particularly in the development of pharmaceuticals – is the private enclosure by industrialised nations of upstream resources and research tools (including genetic resources, technology and specialised knowledge) needed to develop new health and medical products.

The enclosure of genetic resources can be traced back to a long history of biopiracy and colonialism where the Global North would extract genetic resources and local knowledge<sup>27</sup> from the Global South for use within their own territories without first seeking permission or providing adequate compensation to the originating state.<sup>28</sup> Genetic resources were frequently utilised in the development and production of medical technologies, which are afforded protection by an ever expanding intellectual property rights regime.<sup>29</sup> Meanwhile, the genetic resources themselves were treated as 'public goods' that could be appropriated from the Global South by 'the privatised property regime' of the Global North.<sup>30</sup> A number of barriers make it increasingly difficult – if not

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<sup>25</sup> World Health Organisation, 'Health Equity' available at: [https://www.who.int/health-topics/health-equity#tab=tab\\_1](https://www.who.int/health-topics/health-equity#tab=tab_1).

<sup>26</sup> See: M Turner, 'Vaccine Procurement during an Influenza Pandemic and the Role of Advance Purchase Agreements: Lessons from 2009-H1N1' (2016) 11 *Global Public Health* 322; M Eccleston-Turner, 'Operationalizing the Right to Health through the Pandemic Influenza Preparedness Framework. *Global Health Governance*' (2018) XII *Global Health Governance* 22.

<sup>27</sup> M Eccleston-Turner and M Rourke, 'Arguments against the Inequitable Distribution of Vaccines Using the Access and Benefit Sharing Transaction' (2021) 70 *International and Comparative Law Quarterly* 825.

<sup>28</sup> K Kariyawasam and M Tsai, 'Access to Genetic Resources and Benefit Sharing: Implications of Nagoya Protocol on Providers and Users' (2018) 21 *The Journal of World Intellectual Property* 289.

<sup>29</sup> World Trade Organisation, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

<sup>30</sup> Eccleston-Turner and Rourke, 'Arguments against the Inequitable Distribution of Vaccines Using the Access and Benefit Sharing Transaction' (n 27), 830. Developing states pushed back against the expanding intellectual property regime by claiming sovereignty over their natural resources (including pathogenic genetic resources) – using the legal

impossible – for developing states to access medical countermeasures during a pandemic. These barriers have typically emerged in relation to problems with health system financing and infrastructure in LMICs; the frequent use of Advanced Purchase Agreements and the hoarding of medical countermeasures by developed states;<sup>31</sup> limited manufacturing capacity that is bolstered by an overzealous intellectual property regime;<sup>32</sup> and, as most recently evidenced by experiences during the COVID-19 pandemic, widespread nationalism exhibited by the wealthiest states.<sup>33</sup>

A. *COVID-19, Vaccine Nationalism, and the Empty TRIPS Waiver*

The experiences of developing states throughout the COVID-19 pandemic have once again served to highlight the significant disparities between developed and developing states in relation to accessing vaccines and other medical countermeasures during infectious disease emergencies. Whilst the devastating impact of COVID-19 has been felt globally, the actions of many developed states have presented significant hurdles for developing states with regards to accessing medical countermeasures, particularly vaccines.<sup>34</sup> Vaccine financing and limited manufacturing capacity have once again played a significant role in the inability of developing states to access COVID-19 vaccines in a timely manner, along with the widespread vaccine nationalism of wealthy states.<sup>35</sup>

Vaccine access was identified as a global priority early in the pandemic and accordingly, the COVAX mechanism was formed as an alliance between key global health actors: the WHO, Gavi (The Vaccine Alliance) and the Coalition for Epidemic Preparedness Innovations (CEPI), with UNICEF as a delivery partner. The original goal of COVAX was to facilitate vaccine equity by delivering 2 billion doses of vaccine to countries around the world by the end of 2021. This goal was to be met by COVAX acting as the key purchasing agent for the world – pooling demand and allowing significant market shaping and equitable allocation powers.<sup>36</sup> This assumed that high-income countries would use COVAX for the purchase of vaccines, thereby, ‘delegating authority over R&D and allocation decisions to a new global partnership’.<sup>37</sup> However, this turned out to be ‘overly ambitious and unrealistic’<sup>38</sup> and fewer than half of 1 billion doses were delivered under COVAX by the end of 2021. This was a failure precipitated by developed states that, by March 2021, were responsible for unilaterally pre-ordering around 70% of the COVID-19 vaccine supply

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tools developed by the North to protect the natural wealth of the Global South. See A Anghie, *Imperialism, Sovereignty and the Making of International Law* (1st edn, Cambridge University Press 2005). This is further discussed in Part 5.

<sup>31</sup> Turner (n 26); M Eccleston-Turner and H Upton, ‘International Collaboration to Ensure Equitable Access to Vaccines for COVID-19: The ACT-Accelerator and the COVAX Facility’ (2021) 99 *The Milbank Quarterly* 426.

<sup>32</sup> M Wibisono, ‘Responsible Virus Sharing and Benefit Sharing: A Balance between Humankind and the Pandemic Threa’ in M Caballero-Anthony (ed), *Pandemic Preparedness in Asia* (2009).124.

<sup>33</sup> See: L Gruszczynski and C Wu, ‘Between the High Ideals and Reality: Managing COVID-19 Vaccine Nationalism’ (2021) 12 *European Journal of Risk Regulation* 711. Indeed, as articulated in S Thambisetty and others, ‘Addressing Vaccine Inequity during the Covid-19 Pandemic: The TRIPS Intellectual Property Waiver Proposal and Beyond’ (2022) 81 *The Cambridge Law Journal* 384. “The COVID-19 pandemic has shed light on an existing problem of inequality within the TRIPS system which has kept LMICs in an IP importer dependency position. The call for a waiver as an emergency measure is thus symptomatic of deep inequalities that are entrenched in international and national legislation protecting IP. Notably, it demonstrates the failure of HICs to realise the promise they made at the time of the conclusion of the TRIPS negotiations in 1994, that by agreeing to the terms of TRIPS, LMICs would benefit from technology transfer and the building of productive capacity.”

<sup>34</sup> See discussion in Thambisetty and others (n 33).

<sup>35</sup> *ibid.*

<sup>36</sup> Eccleston-Turner and Upton (n 31).

<sup>37</sup> WHO, External Evaluation of the Access To COVID-19 Tools Accelerator (ACT-A) October 10, 2022 at [https://www.who.int/publications/m/item/external-evaluation-of-the-access-to-covid-19-tools-accelerator-\(act-a\)](https://www.who.int/publications/m/item/external-evaluation-of-the-access-to-covid-19-tools-accelerator-(act-a))

<sup>38</sup> *ibid.*

available that year, to cover approximately 16% of the global population.<sup>39</sup> Canada alone ordered five times the quantity of vaccine required for vaccination of its entire population.<sup>40</sup> The ability of developed states to dominate vaccine procurement and hoard life-saving medical supplies – working against the global procurement model initially foreseen in the COVAX mechanism<sup>41</sup> and denying developing states the opportunity to self-procure – serves to highlight the failings of an international system that, despite its good intentions, continues to operate in favour of the wealthiest nations at the expense of developing states.

Furthermore, many developed states made efforts to block or significantly dilute a waiver on certain intellectual property obligations under the World Trade Organisation's (WTO's) *Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement*. The waiver, first proposed by India and South Africa in October 2020,<sup>42</sup> may have helped to facilitate greater production of COVID-19 vaccines and other medical countermeasures by and for developing states.<sup>43</sup> COVAX did not interfere with the status quo, treating intellectual property protections as 'sacrosanct',<sup>44</sup> and although a decision to waive certain protections relating to COVID-19 vaccines was agreed to at the 12<sup>th</sup> WTO Ministerial Conference in June 2022<sup>45</sup> (nearly two years after the initial proposal), the final, heavily modified agreement has been the subject of much criticism.<sup>46</sup> The waiver is much narrower in scope than the original proposal, focusing only on patents on vaccines, meaning it does not waive intellectual property rights on all necessary medical countermeasures. Instead, the waiver directs that a decision be taken by the end of 2022 on the extension of the waiver to 'cover the production and supply of COVID-19 diagnostics and therapeutics'.<sup>47</sup>

Ultimately, no decision was possible by the end of 2022 and the issue will be revisited in 2023 by the membership of the WTO. In its current form, the June 2022 waiver decision fails to deliver a solution to the intellectual property barriers faced by developing states (beyond the sorts of flexibilities that were already present in the text of the TRIPS Agreement).<sup>48</sup> While it is clear that the TRIPS waiver on its own, even in its original form, would not have significantly increased the ability of developing states to protect their own populations, the resistance of wealthy nations to removing intellectual property barriers to access was seen as an indication of their willingness (or lack thereof) to genuinely consider actions under international law that could enhance equitable access to medicines. With the experiences of LMICs during COVID-19 in mind, calls to realise equity in global health – particularly in accessing and distributing medical countermeasures during

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<sup>39</sup> See: O Wouters and others, 'Challenges in Ensuring Global Access to COVID-19 Vaccines: Production, Affordability, Allocation, and Deployment' (2021) 397 *The Lancet* 1023.

<sup>40</sup> Gruszczynski and Wu (n 33), 713.

<sup>41</sup> Wibisono (n 32), 14.

<sup>42</sup> World Trade Organisation, 'Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19 - Communication from India and South Africa' (2 Oct 2020) IP/C/W/669. See also WORLD TRADE ORGANISATION, 'Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19 - Revised Decision Text' (25 May 2021) IP/C/W/669/Rev.1.

<sup>43</sup> Gruszczynski and Wu (n 33), 714.

<sup>44</sup> Thambisetty and others (n 33).

<sup>45</sup> World Trade Organisation, 'Ministerial Decision on the TRIPS Agreement' (17 June 2022) WT/MIN(22)/30; WT/L/1141.

<sup>46</sup> See e.g., the South Centre, 'TRIPS Waiver: An Insufficient Multilateral Response. Trips- Consistent National Actions Are Called For' (<https://www.southcentre.int/wp-content/uploads/2022/06/SC-Statement-TRIPS-waiver-FINAL-1.pdf>, 1 June 2022) <<https://www.southcentre.int/wp-content/uploads/2022/06/SC-Statement-TRIPS-waiver-FINAL-1.pdf>>.

<sup>47</sup> WTO, (n 45), para 8.

<sup>48</sup> See: A Green, 'WTO Finally Agrees on a TRIPS Deal. But Not Everyone Is Happy' (Devex, 17 June 2022) <<<https://www.devex.com/news/wto-finally-agrees-on-a-trips-deal-but-not-everyone-is-happy-103476>>>.

a pandemic – are louder than ever, and these efforts are now coalescing around the WHO's Pandemic Treaty negotiations.

#### IV. A HISTORY OF EQUITY IN THE PANDEMIC TREATY NEGOTIATIONS

Set against the stark inequities experienced by developing states during the COVID-19 pandemic, equity became a prominent issue in the early development of the Pandemic Treaty, both in terms of being a guiding principle to develop the text, but also as a desired outcome of the instrument itself. Indeed, early proponents of the Pandemic Treaty grounded their arguments in 'norms of solidarity, fairness, transparency, inclusiveness and equity', framing equity as the cornerstone of future global health security and the key to overcoming many of the shortcomings in the global response to COVID-19.<sup>49</sup>

In September 2021, the Member States' Working Group on Strengthening WHO Preparedness for and Response to Health Emergencies (WGPR) published an analysis exploring options for strengthening future pandemic preparedness. The WGPR emphasised that a new instrument, grounded in equity, could provide authoritative structure and cohesion to the global governance of pandemic preparedness.<sup>50</sup> The WGPR argued that such an instrument could move ideas of equity from being a 'soft law' aspiration, to become an active, legally-binding, operational aspect of pandemic preparedness and response.<sup>51</sup> They highlighted the need for 'ensuring economic and social protection and advancing respect for human rights, providing for equitable access to healthcare services and medical countermeasures, including vaccines, and ensuring equitable representation and participation (including considering gender, geographic and socioeconomic status) in global pandemic preparedness and response activities' as being key to 'operationalise' equity in a future instrument.<sup>52</sup> The WGPR recommended that equity be added as a distinct category for a future program of work on reform of WHO pandemic preparedness and response, to develop "specific measures to address inequalities" such as "timely and equitable distribution of countermeasures including vaccines, therapeutics, diagnostics... sharing of technology and know-how for broadening manufacturing capacity across all regions through voluntary licenses and technology transfer and capacity-building".<sup>53</sup> The WGPR acknowledged that "[w]hile each of these areas are complex, *equity is at the core of the breakdown in the current system*" [emphasis added]<sup>54</sup> and expressed hope that these issues "could be meaningfully addressed under the umbrella of a potential new instrument and through discussions in several other relevant global forums".<sup>55</sup>

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<sup>49</sup> Joint Statement by Heads of States And WHO, (n 4).

<sup>50</sup> World Health Organisation, Member States Working Group on Strengthening WHO Preparedness for and Response to Health Emergencies (WGPR): Secretariat analysis for consideration by the Working Group to further identify the incentives for a new instrument on pandemic preparedness and response and the options for strengthening the effectiveness of the International Health Regulations (2005), including a consideration of the benefits, risks and legal implications, 30 September 2021, A/WGPR/3/6.

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.*

<sup>53</sup> World Health Organisation, Bureau's summary report of the second meeting of the Working Group on Strengthening WHO Preparedness and Response to Health Emergencies (1–3 September 2021), 1 October 2021, A/WGPR/2/4.

<sup>54</sup> World Health Organisation, Draft report of the Member States Working Group on Strengthening WHO Preparedness and Response to Health Emergencies to the special session of the World Health Assembly, 12 November 2021, A/WGPR/5/2.

<sup>55</sup> *Ibid.*

During these early discussions, the idea of equitable provision of certain pandemic-related benefits, like enhanced laboratory capacities, was tied to the idea of pathogen access, but only in subtle ways. For instance, when the WGPR reported gaps 'that need to be addressed to strengthen pandemic preparedness and response', some of the gaps identified were 'strengthening laboratory capacities, enabling transparent immediate sharing of data on outbreaks, sharing pathogens, and promoting equitable sharing of benefits arising from shared information and resources.'<sup>56</sup> Through the WGPR, Member States agreed that pathogen sample sharing by "enhancing and expanding networks, mechanisms and incentives for sharing pathogens, genetic information, biological samples and the benefits derived therefrom" was a key priority for any future mechanism under the auspices of WHO.<sup>57</sup> They further emphasised that any future instrument concerned with the sharing of data, samples, technology and benefits in the context of pandemic preparedness and response would be required to 'take into account the reality and needs of pandemic preparedness and response'.<sup>58</sup>

To this end, at the Special Session of the World Health Assembly (WHASS) in December 2021, WHO Member States unanimously agreed to establish an Intergovernmental Negotiating Body (INB) to draft the Treaty under Constitution of the WHO. Member states emphasised their 'commitment...to develop a new instrument for pandemic prevention, preparedness and response with a whole-of-government and whole-of-society approach, *prioritising the need for equity*' [emphasis added].<sup>59</sup> Indeed, at this Special Session, equity was raised by more than sixty WHO Member States, demonstrating the emphasis members were placing on the concept, right from the earliest days of the Pandemic Treaty's development.<sup>60</sup>

The Special Session acknowledged, 'the need to address gaps in preventing, preparing for, and responding to health emergencies, *including in development and distribution of, and unhindered, timely and equitable access to, medical countermeasures such as vaccines, therapeutics and diagnostics*'<sup>61</sup> [emphasis added]. The decision further emphasised the need for a 'the commitment of Member States to develop a new instrument for pandemic prevention, preparedness and response with a whole-of-government and whole-of-society approach, *prioritising the need for equity*' [emphasis added].<sup>62</sup> The decision was adopted unanimously by Member States, without editing, or watering down the language around equity within the text.<sup>63</sup>

Thus began the process of developing a text for the Pandemic Treaty in earnest, taking forward some of the work started by the WGPR. Notably, the issue of equity 'both as a principle and as an outcome' was identified as being 'critically important' and an area that warranted further attention. Discussion in the WGPR's report to the WHO Executive Board in early 2022, highlighted the importance of equity, 'including with respect to capacity-building, equitable and timely access to and distribution of medical countermeasures and addressing barriers to timely access to and distribution of medical countermeasures'.<sup>64</sup>

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<sup>56</sup> World Health Organisation, A/WGPR/2/4.

<sup>57</sup> World Health Organisation, A/WGPR/5/2.

<sup>58</sup> WHO, Report of the Member States Working Group on Strengthening WHO Preparedness and Response to Health Emergencies to the special session of the World Health Assembly: Report by the Director-General, 23 November 2021, SSA2/3.

<sup>59</sup> World Health Assembly, (n 1).

<sup>60</sup> Wenham, Eccleston-Turner and Voss (n 2).

<sup>61</sup> World Health Assembly, (n 1).

<sup>62</sup> *ibid.*

<sup>63</sup> World Health Assembly, The World Together: Establishment of an intergovernmental negotiating body to strengthen pandemic prevention, preparedness and response, 1 December 2021, SSA2(5).

<sup>64</sup> WHO, WGPR interim report to EB150, 10 January 2022, A/WGPR/6/3.

In his opening remarks to the INB in March 2022, the WHO Director-General proposed 'establishing global access and benefit sharing for all pathogens and determining a global policy for the equitable production and distribution of countermeasures' as one of the 'five ways to bring about a world better prepared to prevent and respond to pandemic threats'.<sup>65</sup> As is evident from discussions preceding these remarks, the frequent reference to 'equitable sharing of benefits arising from shared information and resources'<sup>66</sup> belies a sense that access to pathogens should be associated with the sharing of benefits that those pathogens are used to develop. But it is in these remarks that we first see the issue of the equitable distribution of medical countermeasures directly and clearly connected to the issue of access to pathogens through the mechanism of 'access and benefit-sharing', or ABS.

This term has a very specific meaning in international law, one that has been in existence for three decades, since the adoption of the United Nations' *Convention on Biological Diversity* (CBD) in 1992.<sup>67</sup> This widely-adopted Convention recognises that States have sovereign rights over their genetic resources<sup>68</sup> and that use of sovereign genetic resources in research and development should occur with the prior informed consent of the country of origin, and on mutually agreed terms.<sup>69</sup> Furthermore, this is to be done 'with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilisation of genetic resources' with the country of origin.<sup>70</sup> Thus the CBD sets up the basic rules for what has become known as ABS: access to genetic resources and the sharing of benefits associated with their use in research and development. ABS has been implemented as a

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<sup>65</sup> World Health Organisation, first report of the first meeting of the Intergovernmental Negotiating Body to draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response, 22 March 2022 A/INB/1/4 Rev.1. The full paragraph reads: "In his opening remarks, the Director-General congratulated the elected Bureau members and proposed for consideration by Member States five ways to bring about a world better prepared to prevent and respond to pandemic threats. These were [1] building national, regional and global capacities based on a whole-of-government and whole-of-society approach; [2] establishing global access and benefit sharing for all pathogens, and determining a global policy for the equitable production and distribution of countermeasures; [3] establishing robust systems and tools for pandemic preparedness and response; [4] establishing a long-term plan for sustainable financing to ensure support for global health threat management and response systems; and [5] empowering WHO to fulfil its mandate as the directing and coordinating authority on international health work, including for pandemic preparedness and response." p. 1.

<sup>66</sup> World Health Organisation, A/WGPR/2/4, 3.

<sup>67</sup> United Nations, The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69) (hereinafter Convention on Biological Diversity). The international ABS legal landscape is dominated by the Convention on Biological Diversity (CBD) and its supplementary agreement, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol). The Nagoya Protocol is a binding international agreement on Contracting Parties that aims to ensure that the benefits arising from the utilisation of genetic resources are shared in a fair and equitable way, Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, entered into force 12 October 2014) UN Doc UNEP/CBD/COP/DEC/X/1 (hereinafter Nagoya Protocol)

<sup>68</sup> Convention on Biological Diversity, 1992, art 3; "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies..."

<sup>69</sup> Convention on Biological Diversity, 1992. art 15.

<sup>70</sup> Convention on Biological Diversity, 1992. art 15(7). For a useful commentary on the CBD, see L Glowka, F Burhenne-Guilmin and H Synge, 'A Guide to the Convention on Biological Diversity' (Gland;, 1994) <<https://policycommons.net/artifacts/1373501/a-guide-to-the-convention-on-biological-diversity/1987728/> on 25 Oct 2022. CID: 20.500.12592/28fmsd.>.

transactional mechanism, designed to generate fair and equitable benefits for channelling into the conservation of biological diversity, and the sustainable use of its components.<sup>71</sup>

From the convening of the March 2022 WHO INB, the language of ABS becomes increasingly apparent; access to pathogens and the sharing of associated benefits (like vaccines and antiviral medications) are linked throughout the negotiating documents as a way to *operationalise the goal of equity*. Following the March 2022 meeting of the WHO INB, the first draft annotated outline of the potential Pandemic Treaty text was released in mid-2022. Equity featured heavily in this text, being listed as a guiding principle.<sup>72</sup> Equity was also positioned as central to the objective of the instrument which was stated as being ‘to save lives and protect livelihoods by addressing the gaps and challenges that exist in pandemic prevention, preparedness, response and recovery, across the four cross-cutting strategic themes of *equity*, governance and leadership, systems and tools, and financing’ [emphasis added].<sup>73</sup> Crucially, substantive elements to address these gaps and challenges were listed as: access to both medical countermeasures; access to pathogen samples and data; transfer of technology and know-how; coordination, collaboration and cooperation.<sup>74</sup> It is important to note that the term ‘access’ here is used to refer to both the timely sharing of pathogen samples and pathogen genetic sequences and to pandemic countermeasure strategic stockpiles and their equitable distribution (including diagnostics, vaccines and therapeutics).<sup>75</sup>

A further working draft was made publicly available in July 2022 and formed the first comprehensive draft outline of the Pandemic Treaty’s text. The preamble to the draft states that members are, ‘[d]eeply concerned by the gross inequities that prevailed in timely access to medical and other COVID-19 pandemic response products’<sup>76</sup> and “[r]ecognis[es] that equity should remain as a principle, an indicator and an outcome of pandemic prevention, preparedness and response’.<sup>77</sup> The working draft’s preamble further ‘[u]nderscor[es] the importance to promote early, safe, transparent, and rapid sharing of samples and genetic sequence data of pathogens, taking into account .... the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity, and the Pandemic Influenza Preparedness Framework’.<sup>78</sup>

Equity is explicitly defined within the July 2022 working draft as, ‘fair, equitable, effective and timely response to pandemics requires ensuring fair access to affordable pandemic response products, among and within countries, including between groups of people, irrespective of their

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<sup>71</sup> See Convention on Biological Diversity, art 1. It is worth noting that the third objective of the CBD, in full, is “the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding”. So, ABS was never meant to be the *sole* way to generate resources for the other two objectives of conservation and sustainable use of biodiversity. Nor does ABS necessarily have to be linked to conservation and sustainable use of biodiversity in order to be considered “access and benefit-sharing” under the CBD and its associated agreements.

<sup>72</sup> World Health Organisation, Draft annotated outline of a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response, 14 June 2022, A/INB/1/12.

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

<sup>76</sup> World Health Organisation, Working draft, presented on the basis of progress achieved, for the consideration of the Intergovernmental Negotiating Body at its second meeting, 13 July 2022, A/INB/2/3.

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

social or economic status'.<sup>79</sup> Equity is further listed as one of the objectives of the instrument, firstly as an 'overarching principle', but also as a core objective of the instrument to 'ensure availability and equitable access to affordable medical and other pandemic response products'.<sup>80</sup> And indeed, the working draft envisions that states parties to the Pandemic Treaty will have a general, overarching obligation 'to adopt and implement legislative, executive, administrative and/or other measures for fair, equitable, effective and timely pandemic prevention, preparedness and response'.<sup>81</sup>

In November 2022, the WHO INB produced a conceptual zero draft of the Treaty,<sup>82</sup> the first detailed indication of what elements will be the basis for future negotiations by Member States, with a further and most recent draft being provided in February 2023, and referred to as the 'CA+ draft'.<sup>83</sup> The 'CA+' nomenclature stands for convention, agreement or other international instrument on pandemic prevention, preparedness and response, and signals a shift away from referring to the instrument as a pandemic treaty or accord. These drafts both give prominence to equity in the preamble, noting that Members remain '[d]eeply concerned by the gross inequities that hindered timely access to medical and other COVID-19 pandemic response products, notably vaccines, oxygen supplies, personal protective equipment, diagnostics and therapeutics'<sup>84</sup> and '[r]eiterat[ed] the determination to achieve health equity through resolute action on social, environmental, cultural, political and economic determinants of health, such as eradicating hunger and poverty, ensuring access to health and proper food, safe drinking water and sanitation, employment and decent work and social protection in a comprehensive intersectoral approach'.<sup>85</sup> Finally, the preamble of the conceptual zero draft and the CA+ draft recognises that 'all lives have equal value, and that therefore equity should be a principle, an indicator and an outcome of pandemic prevention, preparedness and response'.<sup>86</sup> Equity also appears in Article 4 of the November 2022 conceptual zero draft, under the heading 'Principles', explaining that an 'effective response to pandemics requires ensuring fair, equitable and timely access to affordable, safe and efficacious pandemic response products, among and within countries, including between groups of people irrespective of their social or economic status',<sup>87</sup> although this language had been removed by the February 2023 CA+ draft, and been replaced by the more expansive, definition of equity;

The absence of unfair, avoidable or remediable differences, including in their capacities, among and within countries, including between groups of people, whether those groups are defined socially, economically, demographically, geographically or by other dimensions of inequality, is central to equity. Effective pandemic prevention, preparedness, response and recovery cannot be achieved without political will and commitments in addressing the structural challenges in inequitable access to fair, equitable and timely access to affordable, safe and efficacious pandemic-related products and services, essential health services, information and social support, as well as

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<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

<sup>82</sup> World Health Organisation, 'Conceptual zero draft for the consideration of the Intergovernmental Negotiating Body at its third meeting' 25 November 2022, A/INB/3/3.

<sup>83</sup> World Health Organisation, 'Zero draft of the WHA CA+ for the consideration of the Intergovernmental Negotiating Body at its fourth meeting' 1 February 2023 A/INB/4/3.

<sup>84</sup> Preamble, A/INB/3/3; Preamble, A/INB/4/3.

<sup>85</sup> Preamble, *ibid.*; Preamble, *ibid.*

<sup>86</sup> Preamble, *ibid.*; Preamble, *ibid.*

<sup>87</sup> art 4, *ibid.*

tackling the inequities in terms of technology, health workforce, infrastructure and financing, among other aspects.<sup>88</sup>

The working draft from July 2022, the conceptual zero draft from November 2022 and the CA+ draft from February 2023 all elaborate on the mechanisms through which equity is to be operationalised in the proposed Pandemic Treaty with the most recent of these, the February 2023 CA+, containing a whole chapter, Chapter III, dedicated to 'achieving equity'. A central feature of this chapter is Article 10, which makes provision for a 'WHO Pathogen Access and Benefit-Sharing System' (the 'PABS System'). Once again, equity is linked explicitly to ABS, with the CA+ draft recognising 'the need for a multilateral, fair, equitable and timely sharing of, on an equal footing, pathogens with pandemic potential and genomic sequences, and benefits arising therefrom, that applies and operates in both inter-pandemic and pandemic times'.<sup>89</sup>

The PABS System is intended to 'cover all pathogens with pandemic potential, including their genomic sequences, as well as access to benefits arising therefrom', and work 'synergistically' with other access and benefit sharing instruments.<sup>90</sup> The PABS System obliges Member States to "in a rapid, systematic and timely manner: (i) provide pathogens with pandemic potential .... to a laboratory recognized or designated as part of an established WHO coordinated laboratory network; and (ii) upload the genomic sequence of such pathogens with pandemic potential to one or more publicly accessible databases of its choice".<sup>91</sup> Under the current draft of Article 10, 'rapid' is not (yet) defined, but it appears there are efforts to place a definite time limit in hours on when samples should be shared.<sup>92</sup>

Benefit sharing is proposed to be addressed by way of WHO Standard Material Transfer Agreements to contract with producers of 'pandemic vaccines or other pandemic-related products, irrespective of the technology' who are assumed to use pathogens with pandemic potential (including the genomic sequence), and therefore access PABS biological material.<sup>93</sup> The WHO will then use this contractual agreement with the manufacturers to secure benefits in return for the abovementioned access.<sup>94</sup> The CA+ envisions such benefits as (but not limited to) 'real-time access by WHO to 20% of the production of safe, efficacious and effective pandemic-related products, including diagnostics, vaccines, personal protective equipment and therapeutics', stating that 'pandemic-related products shall be provided to WHO on the following basis: 10% as a donation and 10% at affordable prices to WHO' to enable 'equitable distribution, in particular to developing countries, according to public health risk and need and national plans that identify priority populations'.<sup>95</sup> The PABS system is heavily inspired by the WHO's non-binding PIP Framework, which we discuss in detail below. Notably, however, and in contrast with the current PIP Framework, the current draft of the CA+ states that a type of benefit sharing under the PABS system could include, 'commitments by the countries where manufacturing facilities are located that they will facilitate the shipment to WHO of these pandemic-related products by the manufacturers within their jurisdiction, according to schedules to be agreed between WHO and

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<sup>88</sup> art 4, A/INB/4/3.

<sup>89</sup> Art 10(1), A/INB/4/3.

<sup>90</sup> Art 10(2), A/INB/4/3.

<sup>91</sup> Art 10(3)(a), A/INB/4/3.

<sup>92</sup> At present the CA+ draft states "For purposes hereof, "rapid" shall be understood to mean within XX hours from the time of identification of a pathogen with pandemic potential;" at *ibid*.

<sup>93</sup> Art 10(3)(f), A/INB/4/3.

<sup>94</sup> Art 10(3)(g), A/INB/4/3.

<sup>95</sup> Art 10(3)(h), A/INB/4/3.

manufacturers'.<sup>96</sup> This appears to be an effort to prevent the ability of vaccine-producing states to compulsorily acquire vaccine doses before leaving their borders, an oversight that significantly undermines the utility of the PIP Framework.<sup>97</sup> Notably, however, the current commitment would not form a binding obligation applicable to all Member States, but rather takes the form of a benefit-sharing *option*.<sup>98</sup> More generally, whether such commitments will make it into the final treaty, or be abided by during a future pandemic remains to be seen. As should be clear, significant questions remain regarding the ability of the PABS provisions to deliver equity, a point which will be explored further in the next section.

Numerous other provisions are included under Chapter III on 'achieving equity' in the February 2023 CA+ zero draft. These draft provisions propose, among other things, the creation of a WHO-led Global Pandemic Supply Chain and Logistics Network,<sup>99</sup> as well as the 'promotion of sustainable and equitably distributed production and transfer of technology and know-how'<sup>100</sup> on the basis that '[t]he Parties recognize that inequitable access to pandemic-related products (including but not limited to vaccines, therapeutics and diagnostics) should be addressed by increased manufacturing capacity that is more equitably, geographically and strategically distributed'.<sup>101</sup> Additional provisions under Chapter III aim at regulatory strengthening<sup>102</sup> as well as increasing research and development.<sup>103</sup>

The above provisions, while admittedly in draft form, have been criticised for merely giving the 'illusion of equity', failing 'to create any real legal obligation on States or other actors to ensure equity in any relevant concerns'.<sup>104</sup> The draft provisions on a Global Pandemic Supply Chain and Logistics Network, for example, are absent any "legally binding commitment" to ensure unhindered, universal and equitable access to medicines and other health products required for pandemic [prevention, preparedness, response and recovery].<sup>105</sup>

Given the significant emphasis placed on equity within the development of the Pandemic Treaty as an international legal instrument and through the negotiation process thus far, the extent to which equity can be realised in a pandemic will likely be a key factor as to whether the instrument will be adopted by many states parties and whether it can be considered a success. While it is still early days and the details of the Pandemic Treaty will continue to evolve throughout the negotiation process, the criticism that the draft text merely gives the 'illusion of equity',<sup>106</sup> together with the heavy (if partial) reliance on ABS to operationalise the concept of equity in the Pandemic Treaty is deeply concerning.

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<sup>96</sup> Art10(3)(h), A/INB/4/3.

<sup>97</sup> See: M Rourke, 'Access by Design, Benefits If Convenient: A Closer Look at the Pandemic Influenza Preparedness Framework's Standard Material Transfer Agreements' (2019) 97 *The Milbank Quarterly* 91; Eccleston-Turner and Rourke, 'Arguments against the Inequitable Distribution of Vaccines Using the Access and Benefit Sharing Transaction' (n 27).

<sup>98</sup> N Ramakrishnan and KM Gopakumar, 'WHO: Zero Draft of the Pandemic Instrument Creates an "Illusion" of Equity' *Third World Network* (Geneva, 27 February 2023) <<https://www.twon.my/title2/health.info/2023/hi230207.htm>>.

<sup>99</sup> Art 6(2), A/INB/4/3

<sup>100</sup> Art 7, A/INB/4/3.

<sup>101</sup> Art 7(1), A/INB/4/3

<sup>102</sup> Art 8, A/INB/4/3

<sup>103</sup> Art 9/A/INB/4/3

<sup>104</sup> Ramakrishnan and Gopakumar (n 98).

<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.*

The next section focuses on a particular aspect of the operationalisation of equity within the February 2023 CA + zero draft: that of the proposed PABS mechanism. It is argued that attempts to operationalise equity in the Pandemic Treaty via ABS for pathogens are unlikely to result in equitable outcomes during a pandemic. In making this argument, a fuller explanation of the ABS mechanism in international environmental law is given, explaining how after three decades, ABS has failed to deliver on the promise of fair and equitable benefit sharing in international environmental law, and how it is unlikely to be capable of achieving anything approaching equity in the public health space.

## V. ACCESS AND BENEFIT-SHARING

Central activities for pandemic prevention, preparedness, response, and recovery – including testing, surveillance, risk assessments, and the development of strain-specific vaccines and other medical countermeasures – rely on prompt access to novel pathogen samples and their associated genetic sequence data. For much of the past seventy years, the international scientific community treated pathogen samples as resources in common, informally sharing samples in order to carry out the above vital activities.<sup>107</sup> LMICs are often the site of pathogen emergence and re-emergence and have long complained that they are expected to provide pathogen samples to the international public health community but are then priced out of the market for the resulting medical countermeasures.<sup>108</sup> This leads to vast inequities in access to medicines for infectious disease threats.<sup>109</sup>

A significant international shift in how pathogens were managed came about via the CBD and its Nagoya Protocol (2010).<sup>110</sup> The genetic resources that were once considered the common heritage of all humanity (belonging to all in theory, and free for the taking in practice) are now treated as the sovereign resources of the country of origin.<sup>111</sup> To comply with these international instruments, users of genetic resources must now obtain the prior informed consent of the country of origin,<sup>112</sup> and come to mutually agreed terms about how the genetic resources will be used<sup>113</sup> as

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<sup>107</sup> M Eccleston-Turner and M F Rourke, 'Common Heritage or Sovereign Resource? The World Health Organisation's Inconsistent Approach to Pathogen Sharing' in C Lawson, F Humphries and M Rourke (eds), *Access and Benefit Sharing of Genetic Resources – Problems and Solutions* (Routledge 2023). See also S Halabi and Rebecca Katz, 'Viral Sovereignty, Technology Transfer, and the Changing Global System for Sharing Pathogens for Public Health Research' in S Halabi and R Katz (eds), *Viral Sovereignty and Technology Transfer* (1st edn, Cambridge University Press 2020). And Chapter 1: Uncertain Legal Status of Microbial Genetic Resources in a Conflicted Geopolitical Environment. J Reichman, P Uhlir and T. Dedeurwaerdere, *Governing Digitally Integrated Genetic Resources, Data, and Literature: Global Intellectual Property Strategies for a Redesigned Microbial Research Commons* (Cambridge University Press 2016).

<sup>108</sup> See E Sedyaningsih and others, 'Towards Mutual Trust, Transparency and Equity in Virus Sharing Mechanism: The Avian Influenza Case of Indonesia' (2008) 37 *Annals Academy of Medicine Singapore* 482; M Rourke, 'Restricting Access to Pathogen Samples and Epidemiological Data: A Not-So-Brief History of "Viral Sovereignty" and the Mark It Left on the World' in M Eccleston-Turner and I Brassington (eds), *Infectious Diseases in the New Millennium*, vol 82 (Springer International Publishing 2020).

<sup>109</sup> M Eccleston-Turner and H Upton, 'The Procurement of a COVID-19 Vaccine in Developing Countries: Lessons from the 2009-H1N1 Pandemic' in S Arrowsmith, L Butler and A La Chimia (eds), *Public Procurement in (A) Crisis: Global Lessons from the COVID-19 Pandemic* (Hart 2021).

<sup>110</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization 2014, CBD Decision X/1 (2010) Annex I.

<sup>111</sup> CBD, art 15(1).

<sup>112</sup> CBD, art 15(5).

<sup>113</sup> CBD, art 15(4).

well as what associated benefits will be shared with the country of origin.<sup>114</sup> This is the ABS transaction in a nutshell: access to sovereign genetic resources is exchanged for benefits associated with their use in scientific research and development. Just before the adoption of the Nagoya Protocol in 2010, the term 'genetic resources' came to be understood to include pathogen samples,<sup>115</sup> and two pressing global health issues – prompt access to pathogen samples and access to essential pharmaceuticals – became linked through the ABS transaction.<sup>116</sup> In summary, access to pathogen samples is often required for the development and manufacture of medical countermeasures, and so the facilitation of access to pathogen samples from national territories is now often associated with requests for sharing medicines and vaccines.

The explicit framing of access to pathogen samples in exchange for medical countermeasures led to the adoption of the WHO's *Pandemic Influenza Preparedness Framework* (PIP Framework) in 2011<sup>117</sup> which 'recognise[s] the sovereign right of States over their biological resources'.<sup>118</sup> The objective of the PIP Framework is to create a 'fair, transparent, equitable, efficient, effective system' for the sharing of influenza viruses with human pandemic potential, and 'access to vaccines and sharing of other benefits'.<sup>119</sup>

The PIP Framework is a highly specific multilateral ABS instrument, under which Member States can share their sovereign influenza viruses with human pandemic potential with the global network of WHO-affiliated influenza laboratories;<sup>120</sup> and the WHO can then share these samples with third-party entities that operate outside of the WHO's network. These third-party users of 'PIP biological materials' include pharmaceutical companies and vaccine manufacturers. The third-parties are required to commit to providing associated benefits back to the WHO for distribution to Member States in the event of an influenza pandemic, including, and most notably, vaccines.<sup>121</sup> Vaccine manufacturers who wish to access PIP biological materials through the PIP Framework are typically expected to commit 'at least 10% of real time pandemic vaccine production to WHO' or to '[r]eserve at least 10% of real time pandemic vaccine production at affordable prices to WHO'.<sup>122</sup> In the event of an influenza pandemic, the stockpile of donated vaccines will be distributed to states 'according to public health risk and need'.<sup>123</sup> The 2016 WHO review of the PIP Framework stated that '[t]he PIP Framework is a foundational model of reciprocity for global public health that could be applied to other pathogens'<sup>124</sup> and others have suggested that it offers a good starting point for the developing an ABS system for other

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<sup>114</sup> CBD, art 15(7).

<sup>115</sup> In 2006, Indonesia forced the issue – refusing to provide the WHO their H5N1 influenza samples, citing their sovereign rights over the samples under the CBD. See Sedyaningsih and others (n 108); Rourke (n 108).

<sup>116</sup> Eccleston-Turner and Rourke, 'Arguments against the Inequitable Distribution of Vaccines Using the Access and Benefit Sharing Transaction' (n 27).

<sup>117</sup> Sedyaningsih and others (n 108); Rourke (n 108).

<sup>118</sup> Preamble, PIP Framework.

<sup>119</sup> Art 2, PIP Framework.

<sup>120</sup> Art 5.1, PIP Framework.

<sup>121</sup> Art 6.11, PIP Framework.

<sup>122</sup> SMTA 2, Art 4.1.1, Annex 2, PIP Framework. It is worth noting that the stockpile is a 'virtual' one. Influenza vaccine manufacturers commit via an ABS agreement to supply a proportion of their real-time vaccine production to the WHO, and in the event of an influenza pandemic, vaccine manufacturers supply x% of their real-time production to the WHO, and the WHO will then transfer from the stockpile to recipient states. Said vaccines do not yet exist, as due to frequent mutations within influenza viruses, we do not yet know which strain of influenza will cause the next pandemic.

<sup>123</sup> Art 6.9.2, PIP Framework.

<sup>124</sup> World Health Organisation, Executive Board 140: Review of the Pandemic Influenza Preparedness Framework – Report by the Director-General. EB140/16 Annex 1, p. 13

pathogens.<sup>125</sup> As noted above, the proposed PABS system set out under the current CA+ zero draft is modelled upon the PIP Framework. As the international community starts seriously negotiating the details of the proposed Pandemic Treaty, it is necessary to make sure that all possible solutions are considered, not just repurposing ABS. The next section shows why ABS is an unfit mechanism for operationalising equity in the Pandemic Treaty.

#### A. *Why ABS cannot deliver equity*

As discussed, the negotiation process for the Pandemic Treaty is still underway. There is every chance that the references to ABS (and perhaps even equity) in the early drafts of the Treaty will either evolve or be jettisoned as the negotiation process continues.<sup>126</sup> One likely scenario for the ABS provisions of the Pandemic Treaty is that the final version of the Treaty will contain wording to indicate that the WHA intends to design a pathogen ABS mechanism for adoption at a later date. This does appear to be what the drafters of the most recent CA+ zero draft have in mind. In these types of scenarios, where there is an agreement to commit to *something* without much sense of what precisely that *something* might look like, it is common for analyses and critiques to state that the devil will be in the (yet to be decided) detail. That is not the case for pathogen ABS in the Pandemic Treaty, where the devil lurks in the mechanism itself.

The ABS transactional mechanism was devised during the negotiations for the CBD at the end of the 1980s – a time when there was a great deal of faith in the ability of market-based solutions to fix a suite of global problems.<sup>127</sup> This period saw the enclosure and commodification of goods and services that were previously dealt with as common resources, and the CBD was part of this trend, reaffirming that states had sovereign rights over their genetic resources.<sup>128</sup> The way the CBD frames ABS is as a bilateral contractual agreement between the provider country and the user of a genetic resource, coming together to arrive at mutually agreed terms about accessing and using their sovereign genetic resources.<sup>129</sup> The expectation was that these bilateral contracts would generate sufficient benefits to incentivise biodiverse provider countries to conserve their genetic resources, safeguarding biodiversity for future generations.

It has been more than 30 years since the adoption of the legally binding CBD in 1992 (and with it the international ABS regime at Article 15) and despite being one of the most widely-adopted multilateral treaties, the bilateral ABS contractual mechanism has failed to meet expectations of generating reasonable monetary benefits.<sup>130</sup> Specialised multilateral ABS arrangements, like those developed under the UN Food and Agriculture Organisation's *International Treaty on Plant Genetic Resources for Food and Agriculture* (the 'Plant Treaty' or 'Seed Treaty'), have likewise failed to generate sufficient benefits to incentivise conservation and

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<sup>125</sup> E Hammond, 'Access and Benefit Sharing for Pathogens: An Overview of the Issues Facing the 2021 World Health Assembly and WHO Executive Board' (Third World Network Briefing Paper 2020) 4.

<sup>126</sup> Indeed, there is a non-zero chance that the Pandemic Treaty itself will not make it out of the negotiation process.

<sup>127</sup> H. Mayrand, 'From Classical Liberalism to Neoliberalism: Explaining the Contradictions in the International Environmental Law Project' (2020) 50 *Revue générale de droit* 57; C Corson and K. Iain MacDonald, 'Enclosing the Global Commons: The Convention on Biological Diversity and Green Grabbing' (2012) 39 *Journal of Peasant Studies* 263.

<sup>128</sup> K. Fuentes-George, 'Neoliberalism, Environmental Justice, and the Convention on Biological Diversity: How Problematizing the Commodification of Nature Affects Regime Effectiveness' (2013) 13 *Global Environmental Politics* 144.

<sup>129</sup> Convention on Biodiversity, Art 15(4); Nagoya Protocol, Art 10.

<sup>130</sup> S Laird and R Wynberg, 'Connecting the Dots: Biodiversity Conservation, Sustainable Use and Access and Benefit Sharing. BioInnovation Africa (Implemented by GIZ and Funded by BMZ)' <<https://bio-economy.org.za/wp-content/uploads/2021/08/Laird-and-Wynberg-2021-Connecting-the-Dots.pdf>>.

sustainable use.<sup>131</sup> This is particularly so once the costs of maintaining such a system are taken into account.<sup>132</sup> The ABS transaction as a concept, whether bilateral or multilateral, has failed to meet its intended objectives in international environmental law, and the rate of biodiversity loss continues to increase without any indication that ABS can meaningfully contribute to slowing it.<sup>133</sup>

The PIP Framework is regularly cited as an innovative and successful specialised ABS mechanism that can ensure access to samples of influenza virus with human pandemic potential and the reciprocal sharing of vaccines and other benefits during an influenza pandemic.<sup>134</sup> While it has increased funding for WHO through its innovative 'Partnership Contribution' funding system, an annual subscription payment from pharmaceutical companies,<sup>135</sup> this is simply a voluntary donation made by pharmaceutical companies to the WHO and is separate to the benefit-sharing that is supposed to occur in exchange for access to PIP biological materials. It is difficult to see why the non-binding PIP Framework is so routinely praised as an ABS instrument when its ability to deliver the promised vaccines and other benefits has not yet been tested during an actual influenza pandemic.<sup>136</sup> The PIP Framework employs private law contracts to bind non-state users of PIP biological materials to sharing associated benefits (e.g., life-saving vaccines and antiviral medication) with the WHO for distribution to WHO Member States on an 'as needs' basis in the event of an influenza pandemic.<sup>137</sup>

As mentioned, users of PIP biological materials include pharmaceutical companies that require up-to-date samples of influenza viruses to manufacture both seasonal and pandemic influenza vaccines. This may not be the case in the future, as synthetic biology techniques have progressed to the point that viral genetic sequence data is sufficient for some applications meaning that the Framework's benefit sharing obligations can be bypassed if companies can 'rematerialize' viruses (or parts thereof) using information,<sup>138</sup> and there are ongoing efforts to develop a universal

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<sup>131</sup> 'As yet, the [Plant Treaty's Multilateral] Fund has not received substantial payments through the mandatory "benefit-sharing" provisions of the [Plant] Treaty.' p.84 M Walløe Tvedt, 'A Contract-law Analyses of the SMTA of the Plant Treaty: Can It Work as a Binding Contract?' (2021) 24 *The Journal of World Intellectual Property* 83. See also E Tsioumani, *Fair and Equitable Benefit-Sharing in Agriculture: Reinventing Agrarian Justice* (Routledge, 2021) for a thorough and insightful discussion of the Plant Treaty in general, as well as monetary benefit-sharing in particular.

<sup>132</sup> S Laird and others, 'Rethink the Expansion of Access and Benefit Sharing' (2020) 367 *Science* 1200.

<sup>133</sup> *ibid.*

<sup>134</sup> L Gostin and D Sridhar, 'Global Health and the Law' (2014) 370 *New England Journal of Medicine* 1732; D Fidler and L Gostin, 'The WHO Pandemic Influenza Preparedness Framework: A Milestone in Global Governance for Health' (2011) 306 *JAMA* 200; N Jefferies, 'Levelling the Playing Field? Sharing of Influenza Viruses and Access to Vaccines and Other Benefits' (2012) 20 *Journal of Law and Medicine* 59; Vezzani, "Preliminary Remarks on the Envisaged WHO Pandemic Influenza Preparedness Framework for the Sharing of Viruses and Access to Vaccines and Other Benefits" (2010) 13 *The Journal of World Intellectual Property*; L Gostin and others, 'Virus Sharing, Genetic Sequencing, and Global Health Security' (2014) 345 *Science* 1295.; WHO, *Pandemic Influenza Preparedness Framework: Biennial Report 2018-2019*. Geneva: World Health Organisation; 2020 (WHO/WHE/GIH/PIP/2020.1).

<sup>135</sup> WHO, 'Pandemic Influenza Preparedness (PIP) Framework: Partnership Contribution (PC) Preparedness High-Level Implementation Plan II 2018–2023' Revised Version (WHO 2019) 3.

<sup>136</sup> "Whether the WHO's multilateral approach under the PIP Framework will actually attain its goals or not remains to be demonstrated." Reichman, Uhlir and Dedeurwaerdere (n 107). p. 245.

<sup>137</sup> Art 6.9.2, PIP Framework. For a more general discussion of the use of private law contracts within the ABS sphere, see E Morgera and L Gillies, 'Realizing the Objectives of Public International Environmental Law through Private Contracts: The Need for a Dialogue with Private International Law Scholars', *Linkages and Boundaries in Private and Public International Law* (Hart Publishing 2018).175–198.

<sup>138</sup> G Koblentz, 'The *De Novo* Synthesis of Horsepox Virus: Implications for Biosecurity and Recommendations for Preventing the Reemergence of Smallpox' (2017) 15 *Health Security* 620 and A Hampton, 'Pathogen Dematerialization and the ABS Loophole' (2023) 10 *Journal of Law and the Biosciences* lsad002.

influenza vaccine that could make up-to-the-minute sample sharing unnecessary for pharmaceutical companies.<sup>139</sup> These scenarios could instantly render the PIP Framework obsolete. Other issues around the system stem from a lack of substantive operational oversight, with a number of private companies having received PIP Biological Material without having a SMTA2 in place with WHO.<sup>140</sup>

The adoption of the ABS mechanism outside of the environmental conservation field in which it was designed, connected what should be two separate public health resource allocation problems: (1) pathogen sharing and (2) pharmaceutical supply and distribution.<sup>141</sup> Both are vital activities for public health that could (and should) be addressed separately. Despite wanting to delink access to pathogens to the distribution of medicines, we are by no means advocating for a return to the *status quo ante*. Prior to the PIP Framework and Nagoya Protocol, LMICs did not have adequate access medicines even when those medicines were developed and/or manufactured using their own pathogen samples or associated data. This situation was clearly inequitable. Rather, this highlights that the introduction of ABS in the public health space (which created a transaction where access to pathogen samples and associated data are traded for the promise of receiving medicines later), has not been shown to deliver better access to medicines for LMICs, but has introduced a whole series of problems for public health.

While pathogens were said to be held in common and subject to free exchange prior to the introduction of ABS in this space, the logic of free exchange and moreover, allocative efficiency was *never* present in respect of the distribution of medical countermeasures. Indeed, as noted above, LMICs had long complained that while they were expected to provide pathogen samples, they were priced out of the market for medical countermeasures.<sup>142</sup> This inequity was undoubtedly exacerbated by the introduction of international enforceable standards of intellectual property via the WTO TRIPS Agreement.<sup>143</sup>

However, while acknowledging the problems inherent in the ways in which these two vital activities for public health were treated in the recent past, it is also the case that connecting them in a *quid pro quo* is not the solution to the inequities surrounding access to pathogen samples and information or access to medical countermeasures. Tying these two issues together introduces market dynamics into a situation where parties that would otherwise have similar interests (combating a pandemic) become adversaries in a buyer-seller paradigm, with each party trying to maximise their own gains.<sup>144</sup> That is, providers of pathogenic genetic resources (sovereign states)

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<sup>139</sup> Samples will still be required for many public health applications, like surveillance and risk assessments.

<sup>140</sup> For example, post the creation of the PIP Framework, a number of private pharmaceutical companies have received PIP Biological Material, despite them not having an SMTA2 in place: Janssen R&D, received 19 samples of PIP Biological material on: 4 Nov 2014 [IVTM Shipment ID: SHP1217]. Baxter AG has received six separate shipments between 2012 and 2013 [IVTM Shipment ID: 631, 632, 681, 679, 1024, 1025] containing 16 samples of PIP Biological Material. Adimmune Corp. also received 19 samples in 2012-2013 across seven different shipments. [IVTM ID: 622, 637, 653, 781, 826, 1026, 1030] These transfers occurred despite the fact that these private commercial entities did not have SMTA2 agreements in place, and still do not have to date.

<sup>141</sup> Eccleston-Turner and Rourke, 'Arguments against the Inequitable Distribution of Vaccines Using the Access and Benefit Sharing Transaction' (n 27).

<sup>142</sup> See Sedyaningsih and others (n 108); Rourke (n 108).

<sup>143</sup> See discussion above in III.A, *COVID-19, Vaccine Nationalism and the Empty TRIPS Waiver*.

<sup>144</sup> Eccleston-Turner and Rourke, 'Arguments against the Inequitable Distribution of Vaccines Using the Access and Benefit Sharing Transaction' (n 27). See also discussion in Vogel *et al.*, 'Human Pathogens as Capstone Application of the Economics of Information to Convention on Biological Diversity: The Receptivity of Research Scientists' (2013) 5 International Journal of Biology 121 regarding the problematic incentive structure under the PIP Framework.

will want to maximise the benefits that they may be entitled to while users of pathogenic genetic resources (e.g., pharmaceutical companies) will want to minimise the benefits shared.<sup>145</sup>

The trouble with introducing market dynamics can be seen already in the operation of the multilateral PIP Framework, where providers and users may be able to secure better terms outside of the non-binding provisions of the PIP Framework by engaging in bilateral ABS.<sup>146</sup> Thus, the multilateral mechanism is undermined by bilateralism *unless* the multilateral ABS mechanism is made legally binding. International agreements under the UN system are based on the sovereign equality of nation states; the UN system cannot create a multilateral ABS system that binds private entities. The PIP Framework gets around this by employing private contracts (the Standard Material Transfer Agreements) to bind user parties (private entities) to agreed terms, but these contracts only apply when user parties *choose* to obtain pandemic influenza virus samples through the WHO system. That is, a multilateral ABS instrument cannot be made compulsory; both user parties and provider states are still free to act outside of it.

It should be clarified that there are different types of benefits wrapped up with the PIP Framework. Some benefits were 'available before the adoption of the PIP Framework, but their provision has improved through the [Framework]'.<sup>147</sup> For instance, when using samples from another country, researchers should involve the scientists from originating laboratories.<sup>148</sup> Scientists from the originating laboratory should also be involved in the preparation of manuscripts for publication,<sup>149</sup> and researchers should appropriately acknowledge the contributions of scientists from the originating laboratories.<sup>150</sup> What was entirely new with the PIP Framework was '[b]enefits from non-[WHO] institutions in the form of pharmaceuticals ... vaccines, medical treatments, relevant licences [sic] and private capacity building'.<sup>151</sup> These are the tangible benefits supposed to be available through the PIP Framework but the PIP Framework makes little attempt to specify *how* these new benefits will be distributed, other than to say that it will occur 'according to public health risk and needs'.<sup>152</sup>

It is hard to imagine how the WHO – the international body responsible for helping all peoples attain 'the highest possible level of health'<sup>153</sup> – could possibly provide these sorts of tangible benefits on any other basis. Benefits cannot be preferentially shared with countries that comply with the access side of the transaction, giving over their pathogen samples and associated data. This would bias the distribution of benefits towards countries that have the technological capacity to share their samples and data in the first place; that is, it would privilege higher-income countries. Instead, the WHO *must* distribute any pooled benefits 'based on public health risk and

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<sup>145</sup> Eccleston-Turner and Rourke, 'Arguments against the Inequitable Distribution of Vaccines Using the Access and Benefit Sharing Transaction' (n 27). See also, J. Harrington, H Deacon & P Munyi 'Sovereignty and development: law and the politics of traditional knowledge in Kenya' (2021) 13 *Critical African Studies*, 1, 95-114,

<sup>146</sup> M Rourke and M Eccleston-Turner, 'The Pandemic Influenza Preparedness Framework as a "Specialised International Access and Benefit-Sharing Instrument" under the Nagoya Protocol' (2021) 72 *Northern Ireland Legal Quarterly* 411.

<sup>147</sup> M Wilke, 'The World Health Organisation's Pandemic Influenza Preparedness Framework as a Public Health Resource Pool' in Evanson Chege Kamau and Gerd Winter (eds), *Common Pools of Genetic Resources: Equity and Innovation in International Biodiversity Law* (1st edn, Routledge 2013). p. 323.

<sup>148</sup> PIP Framework, Annex 1 (SMTA1) art 5.2.

<sup>149</sup> PIP Framework, Annex 1 (SMTA1) art 5.2.

<sup>150</sup> PIP Framework, Annex 1 (SMTA1) art 5.3.

<sup>151</sup> Wilke (n 147).p. 323.

<sup>152</sup> PIP Framework, Article 6.0.2 (iii).

<sup>153</sup> World Health Organisation, Constitution of the World Health Organisation, Chapter I: Objective. art 1.

need'.<sup>154</sup> This means any international multilateral instrument that ties access to pathogen samples and associated data with benefits could 'not provide any benefits that a Member State would not already qualify for outside of the PIP Framework'<sup>155</sup> or other multilateral instrument. It also reaffirms that multilateralism in this context is highly susceptible to being undermined by bilateral ABS agreements conducted outside the purview of the WHO.

There are other, quite fundamental ABS issues that the PIP Framework does not adequately address that will need to be resolved if it is to be a model for other international pathogen ABS systems. The issue of scope, for instance, is ostensibly easy to define in the text of the PIP Framework ('H5N1 and other influenza viruses with human pandemic potential') but is not so simple in practice. For instance, some National Influenza Centres (NICs) may deem a strain of influenza as having human pandemic potential and share those samples under the terms of the PIP Framework's SMTAs, but other NICs may disagree and decide not to share virus samples of the same influenza subtype. In fact, 'the NICs of individual countries must sometimes forward clinical samples to the [WHO Collaborating Centres] without having ascertained whether the strains therein qualify as "PIP biological materials"'.<sup>156</sup> That is, NICs have to share their samples before they even know whether those samples *need* to be shared. This highlights yet another flaw in the system – that it is not clear whether the country of origin maintains sovereign rights over their materials once they have transferred them to the WHO.<sup>157</sup> Furthermore, the requirement for the WHO to trace the movement of influenza samples through the network of WHO-affiliated laboratories can be abandoned when the system is under pressure.<sup>158</sup>

There are also power imbalances that impact the operation of the PIP Framework. When negotiating the benefit-sharing contract between the WHO and the third-party user of PIP biological materials (SMTA2), the WHO's small team of lawyers are negotiating with the well-resourced legal teams of large pharmaceutical multinationals. This means that pharmaceutical companies are getting the best possible terms for any benefit-sharing commitments they make (including some clauses that will ensure they can readily get out of these commitments).<sup>159</sup> Another power imbalance issue is that of the dispute resolution mechanism in the contract between the NIC (on behalf of the provider state) and the WHO (SMTA1). In the event that a dispute cannot be settled through 'negotiation or any other amical means'<sup>160</sup> ... 'the Parties concerned may refer the dispute to the Director-General, who may seek advice of the Advisory Group with a view to settling it'.<sup>161</sup> The Director-General of the WHO can then make a recommendation for resolving the conflict.<sup>162</sup> This is to say that one of the Parties to the SMTA1 – the WHO – also acts as the mediator of disputes.

It should always be remembered that the PIP Framework specifically – and the ABS mechanism more generally – does not exist in a political vacuum. The promise of potentially being able to access medical countermeasures cannot be (and will never actually be) the major incentive

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<sup>154</sup> PIP Framework, art 6.1,

<sup>155</sup> Rourke (n 97) 105.

<sup>156</sup> *ibid*, 100

<sup>157</sup> *ibid*. p. 100. On the problematic nature of the country of origin when applied to pathogens, see also F Humphries and others, 'COVID-19 Tests the Limits of Biodiversity Laws in a Health Crisis: Rethinking "Country of Origin" for Virus Access and Benefit-sharing' 28 *Journal of Law and Medicine* 684.

<sup>158</sup> *ibid*, 103 - 104; PIP Framework, Art 5.3.3.

<sup>159</sup> *Ibid*, 102

<sup>160</sup> PIP Framework, Annex 1 (SMTA1) Art 7.1.

<sup>161</sup> PIP Framework, Annex 1 (SMTA1) Art 7.2.

<sup>162</sup> PIP Framework, Annex 1 (SMTA1) Art 7.2.

or disincentive that will impact the choice of sovereign nations to share pathogen samples and genetic sequence data with the international community. For starters, there are plenty of countries that are relatively self-sufficient and could decide not to share infectious disease information with the WHO or other international parties at all, because not doing so would not impact their chances of receiving benefits. HICs will realise that if benefits are distributed based on need, then they are too well off to ever be one of the country's most in need, or they will be relatively self-sufficient when it comes to generating medical technologies. In these situations, the incentive for sharing samples and associated data is not sufficient. But there may still be a disincentive for sharing pathogen samples and associated data: many countries that readily shared COVID-19 data during the pandemic found that their actions were met with trade and travel sanctions rather than solidarity.<sup>163</sup>

It is important to remember that pre-2011 when the PIP Framework was adopted, many countries were already freely sharing influenza samples with the WHO and the rest of the international community. Post-2011, many scientists from around the world continued to share their countries' non-influenza pathogen samples and associated data on a largely informal basis, without requiring benefit sharing commitments from user parties. It may still be the case that countries are *more* likely to share pathogen samples and associated data when they are seen as good international citizens for doing so – not because they go into a lottery to win a small pool of prizes. But the WHO treating pathogen samples and associated data as commodities means that many countries may have no other choice but to participate in the marketplace for their chance to qualify for medical products for their populations. The fact that the ABS mechanism is always associated with the terms, 'fairness' and 'equity', despite thirty years of evidence that the overall outcomes are rarely fair or equitable, means many Member States may be putting false hope in the ability of the Pandemic Treaty's ABS mechanism to deliver much needed medical countermeasures.

## VI. WHAT COULD BE DONE INSTEAD?

Accompanying the frequent references to equity in the negotiation documents for the Pandemic Treaty were references to another fundamental principle: that of solidarity. The decision by WHO Member States at the WHASS to establish the INB stressed that Member States should be guided by the principle of solidarity. Solidarity was raised by several government representatives at the WHASS in December 2021 including (but not limited to) Chile, Fiji, Ecuador, Egypt, Algeria, Norway, Mozambique, El Salvador, Nigeria, and Albania.<sup>164</sup> Moreover, appeals to solidarity have been a notable feature of the COVID-19 pandemic response.<sup>165</sup>

Solidarity has been described as a 'multifunctional, constituent element ... of the concept of justice in public international law'<sup>166</sup> capable of facilitating the 'transformation of international law into a value based international legal order'.<sup>167</sup> Legal scholar, Dinah Shelton, has defined solidarity as 'a sentiment, a feeling or intellectual recognition of affinity that may lend support to decisions *based on equity*; it is the foundation for expanding the "we" to include the "others"'

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<sup>163</sup> E.g., South Africa who promptly reported Omicron as a variant of concern. See B Mason Meier and others, 'Travel Restrictions and Variants of Concern: Global Health Laws Need to Reflect Evidence' (2022) 100 Bulletin of the World Health Organisation 178.

<sup>164</sup> Wenham, Eccleston-Turner and Voss (n 2).

<sup>165</sup> B Prainsack, 'Solidarity in Times of Pandemics' (2020) 7 Democratic Theory 124.

<sup>166</sup> R Wolfrum and C Kojima, *Solidarity: A Structural Principle of International Law* (Springer 2010). 7

<sup>167</sup> R Wolfrum, 'Solidarity amongst States: An Emerging Structural Principle of International Law' (2009) 49 Indian Journal of International Law 8., 8.

[emphasis added].<sup>168</sup> The links between solidarity and equity have been recognised in international legal texts with a 2020 UN General Assembly resolution on the 'Promotion of a democratic and equitable international order' affirming 'that a democratic and equitable international order requires, *inter alia*, '[i]nternational solidarity, as a right of peoples and individuals'.<sup>169</sup>

All of this is to say that equity cannot be bought. A transactional approach, which in essence compensates states for the sharing of pathogens, is at odds with equity. Rather, to achieve equity, one should emphasise the principle of solidarity,<sup>170</sup> focusing on the 'we' rather than the compensatory 'me' that a transactional mechanism inevitably encourages.<sup>171</sup> In this regard, it has been recognised in the literature that "solidarity could create tension with the compensatory approach to benefit sharing"<sup>172</sup> with the ABS transactional mechanism linked with the notion of justice as a form of exchange or commutative justice,<sup>173</sup> but not with other forms of justice such as *distributive* forms of justice that solidarity in global health calls for.<sup>174</sup> In this vein, the de-linkage (or decoupling) of access from benefit-sharing appears not only sensible but also necessary to achieve equity.

The discussion so far has demonstrated that the transactional ABS model is incapable of delivering equity. Simply put, linking access to pathogen samples and associated data to the receipt

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<sup>168</sup> Wolfrum and Kojima (n 166), 30

<sup>169</sup> United Nations General Assembly, Promotion of a democratic and equitable international order: resolution / adopted by the General Assembly (28 December 2020) A/RES/75/178, para 6 (f). See also A/RES/56/151 of 19 December 2001 and A/RES/57/213 of 18 December 2002.

<sup>170</sup> For a highly useful overview of the principle of solidarity more generally, see B Prainsack, *Solidarity in Biomedicine and Beyond* (A Buyx ed, First paperback edition, Cambridge University Press 2018). For discussion on the links between solidarity and equity, see for example G Tomson and others, 'Solidarity and universal preparedness for health after covid-19' (2021) *British Medical Journal* 372; S Gill and S Benatar, 'Global Health Governance and Global Power: A Critical Commentary on the Lancet-University of Oslo Commission Report' (2016) 46 (2) *International Journal of Health Services* 346; E Friedman and others, 'Global Health in the Age of COVID-19: Responsive Health Systems Through a Right to Health Fund' (2020) 22 (1) *Health and Human Rights* 199; L Gostin, S Moon, and B Mason Meier, 'Reimagining Global Health Governance in the Age of COVID-19' (2020) 110 *American Journal of Public Health* 1615; J B Bump, P Friberg and D R Harper, 'International collaboration and covid-19: what are we doing and where are we going' (2021) *British Medical Journal* 372.

<sup>171</sup> For an interesting pre-Covid-19 discussion of the principle of solidarity in response to global pandemics, see B Prainsack and A Buyx, *Solidarity: reflections on an emerging concept in bioethics* (London, Nuffield Council on Bioethics, 2011) available here; <https://www.nuffieldbioethics.org/assets/pdfs/Solidarity-report.pdf> (see chapter seven)

<sup>172</sup> K Simm 'Benefit Sharing Frameworks - Justifications for and against benefit sharing in human genetic research. A Report for GenBenefit' (2007), available at [https://www.researchgate.net/profile/Kadri-Simm/publication/242205581\\_Benefit\\_Sharing\\_Frameworks\\_Justifications\\_for\\_and\\_against\\_benefit\\_sharing\\_in\\_human\\_genetic\\_research\\_A\\_Report\\_for\\_GenBenefit\\_2007/links/5a7d76bea6fdccc013f5a936/Benefit-Sharing-Frameworks-Justifications-for-and-against-benefit-sharing-in-h-human-genetic-research-A-Report-for-GenBenefit-2007.pdf](https://www.researchgate.net/profile/Kadri-Simm/publication/242205581_Benefit_Sharing_Frameworks_Justifications_for_and_against_benefit_sharing_in_human_genetic_research_A_Report_for_GenBenefit_2007/links/5a7d76bea6fdccc013f5a936/Benefit-Sharing-Frameworks-Justifications-for-and-against-benefit-sharing-in-h-human-genetic-research-A-Report-for-GenBenefit-2007.pdf), 13. See also K Simm, 'Benefit-Sharing: An Inquiry Regarding the Meaning and Limits of the Concept in Human Genetic Research' (2005) 1 *Genomics, Society and Policy* 29.

<sup>173</sup> B Dauda and K Dierickx, 'Benefit Sharing: An Exploration on the Contextual Discourse of a Changing Concept' (2013) 14 *BMC Medical Ethics* 36., 36. See also P Andanda and others, 'Legal Frameworks for Benefit Sharing: From Biodiversity to Human Genomics' in D Schroeder and J Cook Lucas (eds), *Benefit Sharing* (Springer Netherlands 2013).

<sup>174</sup> A useful formulation in respect of these different types of justice can be found in the work of Gerd Winter who posits that "Commutative justice means an equivalent quid pro quo between two equal parties: the countries holding GR are conceived as owners of a commodity that can be sold in exchange for non-monetary and monetary benefits. In contrast, distributive justice starts with the observation that the two parties are unequal because staying at different stages of development, and engages in assisting the weaker side". G Winter, 'Problems and Solutions of Access to Genetic Resources and Benefit Sharing: A Theoretical Perspective - Part II' (2021) 17 *Law, Environment and Development Journal* 100.103

of benefits such as vaccines and medical countermeasures just 'creates another space in which providers and users are antagonists, buyers and sellers, both of whom want to maximise their own gains'.<sup>175</sup> This is the case even when ABS is structured in a multilateral manner, as exemplified in the PIP Framework where there is no one-to-one transaction of samples directly in return for medicines. The PIP multilateral arrangement is, however, still fundamentally transactional. As noted above, such a market-based mechanism, 'guarantees that neither access to pathogens nor the sharing of benefits associated with their use will occur in a fair and equitable manner'.<sup>176</sup> If equity in a pandemic requires 'timely and equitable distribution of countermeasures including vaccines, therapeutics, diagnostics',<sup>177</sup> this simply will not occur using the ABS concept as it is currently constructed.

There are alternative measures that could operationalise equity within the context of the Pandemic Treaty that do not depend on ABS, or at least do not depend upon ABS as currently configured within the PIP and the draft PABS system. Indeed, the negotiations for a Pandemic Treaty offer an opportunity to open alternative paths for the future. As noted by Stephen Krasner '[t]he range of options available to policymakers at any given point in time is a function of institutional capabilities that were put in place at some earlier period'.<sup>178</sup> Arguably, the construction of equity in the negotiations on the Pandemic Treaty as being essentially equivalent to ABS owes much to the institutional and normative structures established by the CBD, Nagoya Protocol and latterly the PIP Framework. Their establishment mark a critical juncture whereby it has become 'progressively more difficult to return to the initial point when multiple alternatives were still available'<sup>179</sup> from that of the ABS mechanism. Current debates have hence become blinkered by path dependency with the embrace of equity *as* ABS meaning that alternative understandings of equity have been 'foreclosed or inhibited by directions taken in past development'.<sup>180</sup>

The Pandemic Treaty negotiations are an important opportunity to open new ways of thinking about equity, particularly in respect of the relationship between access to samples and access to medical countermeasures. Moving away from the redundant transaction-based model would, at a minimum, require the just distribution of medical countermeasures in a WHO system that is *independent* of whether Member States do or do not share pathogen samples or associated data. This system should be designed and operationalised first with a view to building the trust much lacking in responses to COVID-19. At the same time, the WHO must encourage timely access to the raw materials and knowledge to produce such countermeasures (i.e., pathogen samples and related data). But that does not mean that these two issues should be linked; one cannot act as incentive for the other. Access should be delinked from benefit-sharing.<sup>181</sup>

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<sup>175</sup> M Eccleston-Turner and M Rourke, '2021 Detlev F. Vagts Roundtable on Transnational Law Pandemic Vaccines: Market Products or Global Public Goods?' (2021) 115 Proceedings of the ASIL Annual Meeting 109.; 114

<sup>176</sup> *ibid.*, 114.

<sup>177</sup> A/WGPR/2/4 P 2 (at n 56).

<sup>178</sup> S Krasner, 'Sovereignty: An Institutional Perspective' (1988) 21 Comparative Political Studies 66.

<sup>179</sup> J Mahoney, 'Path Dependence in Historical Sociology' (2000) 29 Theory and Society 507. writing on the impact of critical junctures.

<sup>180</sup> B Nooteboom, 'Path Dependence of Knowledge: Implications for the Theory of the Firm' in L Magnusson and J Ottosson (eds), *Evolutionary Economics and Path Dependence* (Edward Elgar Publishing). 57, writing of path dependency and its impacts. On path dependency more generally within ABS, see, for example, S Winands-Kalkuhl and K Holm-Müller, 'Bilateral vs. Multilateral? On the Economics and Politics of a Global Mechanism for Genetic Resource Use' (2015) 7 Journal of Natural Resources Policy Research 305; Manuel Ruiz Muller, *Genetic Resources as Natural Information* (0 edn, Routledge 2015). For a related perspective, see also Laird and others (n 132).

<sup>181</sup> There is a vast literature on so-called delinkage, also referred to as decoupling; see (n 185), below.

There are two ways in which the term 'delink' has been used in the ABS policy space. First, there is the notion that a multilateral system delinks the act of providing access to a particular genetic resource in exchange for a particular benefit. That is, there is no 1:1 relationship between access to genetic resources and benefit sharing. However, there is still a transactional relationship where the act of providing access to a genetic resource in some way *qualifies* the provider to access a pool of benefits (if it does not, then there is no point in providing the genetic resources at all). There is still a buyer-seller paradigm at play, only the provision of benefits acts more like a lottery than a 1:1 transaction, with such a partial system for de-linkage bringing its own set of problems.

Alternatively, the term 'delink' can also be used to refer to separating access from benefit-sharing on a more fundamental level. Using the example of pathogens, this more fundamental form of de-linkage would see access to pathogens fully decoupled from the provision of medical countermeasures. While this proposal may at first sight seem radical, it should be noted that under the CBD, the relevant objective is 'fair and equitable sharing of the benefits'" with access merely a modality for realising such benefit sharing.<sup>182</sup> Accordingly, while access has become deeply (inter)connected to benefit sharing such that ABS is now conceptualised as a principle in itself, the third objective of the CBD is in fact premised upon fair and equitable benefit sharing on its own.<sup>183</sup> De-linkage – while seemingly marking a new juncture in governance in this area – is therefore not necessarily at odds with the third objective of the CBD. Indeed, a delinked system could be underpinned by the principle of sharing benefits understood in this more nuanced sense, with connections made to the fair and equitable sharing of the benefits of scientific research and the human right to science.<sup>184</sup>

Ongoing discussions in a variety of international fora, including the CBD, the Food and Agriculture Organization of the UN and the WHO on how to deal with digital sequence information (DSI)/genetic sequence data (GSD) associated with physical genetic resources provide additional context to proposals for de-linkage.<sup>185</sup> The origins of these discussions can be traced to the fact that the ABS system was conceived when genetic resources were (primarily) physical

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<sup>182</sup> Our thanks to an anonymous reviewer for raising this point. See also, Introduction, in E Morgera, E Tsioumani and M Buck, *Unraveling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity* (Brill, Nijhoff 2014) <<https://brill.com/view/title/20824>> accessed 17 May 2023.

<sup>183</sup> Art 1, CBD; 'fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.'

<sup>184</sup> On this, see for example, E Morgera, 'Fair and Equitable Benefit-Sharing at the Cross-Roads of the Human Right to Science and International Biodiversity Law' (2015) 4 *Laws* 803; E Morgera, 'Fair and Equitable Benefit-Sharing in a New International Instrument on Marine Biodiversity: A Principled Approach towards Partnership Building?' (2018) 5 *Maritime Safety and Security Law Journal* 48. For more detailed analysis of the human rights case against the ABS transaction for pathogens, and the potential relevance of the right to science here, see Eccleston-Turner and Rourke, 'Arguments against the Inequitable Distribution of Vaccines Using the Access and Benefit Sharing Transaction' (n 27).

<sup>185</sup> See Eg. S Aubry and others, 'Bringing Access and Benefit Sharing into the Digital Age' (2022) 4 *Plants, People, Planet* 5. G Winter, *Problems and Solutions of Access to Genetic Resources and Benefit Sharing: A Theoretical Perspective - Part II*, 17 *LEAD*, art. no. 1706 (2021); I Klünker, H Richter, Digital Sequence Information between Benefit-Sharing and Open Data (2022) 9 (2) *Journal of Law and the Biosciences*, Volume 9, Issue 2, July-December 2022, Isac035, <https://doi.org/10.1093/jlb/lsac035>; A Hartman Scholz, et al., 'Multilateral Benefit-sharing from Digital Sequence Information will Support both Science and Biodiversity Conservation' (2022) *Nat Commun* 1086; C Lawson, F Humphries and M Rourke, 'The future of information under the CBD, Nagoya Protocol, Plant Treaty, and PIP Framework' (2019) 22 *Journal of World Intellectual Property* 103; M Bagley, 'Just' Sharing: The Virtues of Digital Sequence Information Benefit-Sharing for the Common Good' (2022) 63 (1) *Harvard International Law Journal* 1; Hampton (n 138).

samples.<sup>186</sup> How the system works when these resources are in intangible form clearly requires a rethinking of the international ABS regime, particularly given that advances in gene synthesis will reduce and in some cases obviate the need to access physical samples.<sup>187</sup>

This issue was discussed at the recent 15th Meeting of the Conference of the Parties to the CBD (COP15) held in December 2022<sup>188</sup> at which it was agreed that the 'distribution of digital sequence information on genetic resources and distinctive practices in its use require a *distinctive solution* for benefit-sharing'<sup>189</sup> [emphasis added]. While encouraging the 'depositing of more digital sequence information on genetic resources, with appropriate information on geographical origin and other relevant metadata, in public databases'<sup>190</sup> it was also recognised that 'tracking and tracing of all digital sequence information on genetic resources is not practical'.<sup>191</sup> The COP15 therefore agreed to the establishment of 'a multilateral mechanism for benefit-sharing from the use of digital sequence information on genetic resources', with such a mechanism to include a global fund.<sup>192</sup> Details of the mechanism and the fund are to be developed by the next meeting of the COP but it was recognised that a multilateral approach (albeit one with potential exceptions)<sup>193</sup> is capable of meeting key goals such as effectiveness, efficiency, feasibility, and practicality; could generate more benefits than costs; not act as a hindrance upon research and innovation; be consistent with open data; be compatible with other international legal obligations; and take account the rights of Indigenous peoples and local communities, including with respect to the traditional knowledge associated with genetic resources that they hold.<sup>194</sup> It remains to be seen, however, what degree of de-linkage will be opted for by the Parties to the CBD.

Drawing on the lessons of the PIP Framework, and our analysis of the problems inherent in the application of the transactional ABS mechanism to public health, we call for the more fundamental form of de-linkage discussed above. This would see access to pathogens fully decoupled from the provision of medical countermeasures. Such a move would require the development of concurrent but separate models to ensure that scientists have access to pathogen samples and data, and that LMICs get the fair and equitable access to medical countermeasures that they deserve. The receipt of medical countermeasures would not be framed as a transactional reward for participating in pathogen sharing but would be based on the principle of global *solidarity* – the emphasis being on 'we' as opposed to 'me' – in the face of a common threat. However, we should be aware of the power dynamics inherent in such a decoupled solution. Use of the term 'access' in this sense might leave us, for example, beholden to a paradigm in which the Global North dominates research and development. Accordingly, in designing any such system,

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<sup>186</sup> E.g., see: C Lawson and M Rourke, 'Digital Sequence Information as a Marine Genetic Resource under the Proposed UNCLOS Legally Binding Instrument' (2020) 122 *Marine Policy* 103878; M Rourke, M Eccleston-Turner and S Switzer, 'Sovereignty, Sanctions, and Data Sharing under International Law' (2022) 375 *Science* 724.

<sup>187</sup> Hampton (n 138).

<sup>188</sup> United Nations Convention on Biological Diversity, 'Digital sequence information on genetic resources' (18 December 2022) CBD/COP/15/L.30. This decision is reflected in a decision of the Nagoya Protocol's Meeting of the Parties, CBD/NP/MOP/4/L.13

<sup>189</sup> CBD/COP/15/L.30, *ibid*, para 3.

<sup>190</sup> *ibid*, para 4

<sup>191</sup> *ibid*, para 5.

<sup>192</sup> *ibid*, para 16.

<sup>193</sup> *ibid*, para 6.

<sup>194</sup> *ibid*, para 9.

we need to be aware of the power dynamics at play, and focus, 'on the actual realisation of equity and fairness... rather than on tokenistic "compliance"'.<sup>195</sup>

It is essential to get a system for the equitable distribution of medical countermeasures right first. This is so LMICs are assured that their pandemic needs will be met and will they therefore do not need to limit access to their sovereign pathogen samples and associated data as their one and only bargaining chip in the face of a global emergency. Such a system must be designed on the basis of 'deep ... and cosmopolitan international cooperation', recognising that the agency of beneficiaries is a key but often absent aspect of the principle of benefit sharing.<sup>196</sup> The needs of the most vulnerable must be met in a spirit of partnership (and solidarity)<sup>197</sup>, recognising that '[s]cientific and technological progress does not [automatically] mean that benefits are shared fairly, or that they will reach the most vulnerable groups of society; nor does it mean that all technologies are well-suited for all societal contexts'.<sup>198</sup>

Funding for such a system could come from a range of sources, including via 'taxes, levies, or tiered approaches that feed a multilateral fund'.<sup>199</sup> The pharmaceutical sector would be an obvious choice on which to levy a charge or tax, collected by their home HICs and directed to a multilateral fund. Such charges would need to conform to the principles of procedural and distributive justice and should not have an adverse impact upon the most vulnerable. What should, however, be emphasised is that the pharmaceutical industry would not get a free ride from such a

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<sup>195</sup> See discussion in, S Switzer, E Morgera, J Lavelle, J, & R Wynberg, 'What does the 2022 UN Biodiversity Summit Outcome on digital sequence information mean for the ocean and ocean research? (Part 2)' 26 April 2023, available at <https://oneoceanhub.org/what-does-the-2022-un-biodiversity-summit-outcome-on-digital-sequence-information-mean-for-the-ocean-and-ocean-research-part-2/>

<sup>196</sup> See E Morgera, 'Fair and Equitable Benefit-Sharing in a New International Instrument on Marine Biodiversity: A Principled Approach towards Partnership Building?' (n 206). For a general discussion on fair and equitable benefit-sharing, see also E Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 *European Journal of International Law* 353. Drawing on M Mancisidor, 'Is There Such a Thing as a Human Right to Science in International Law?', *ESIL Reflections* (7 April 2015); Morgera argues that, "'to share' and 'to participate' in the benefits convey the same idea of agency, rather than of the passive enjoyment of benefits."

<sup>197</sup> On the links between benefit sharing and benefit sharing, and interstate "financial and technological solidarity obligations" see E Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (n 196), 374.

<sup>198</sup> E Tsioumani, 'Beyond Access and Benefit-Sharing: Lessons from the Law and Governance of Agricultural Biodiversity' (2018) 21 *The Journal of World Intellectual Property* 106.

<sup>199</sup> Laird and others (n 132). See also United Nations Convention on Biological Diversity, High Level Segment, 17 December 2022, Annex III, reproduced in B Van Vooren, 'Outcome from COP 15: a New Global Biodiversity Fund Paid For by Life Sciences Companies that "Use Digital Sequence Information on Genetic Resources"' (23 December 2022), Covington, available at <https://www.insideeulifesciences.com/2022/12/23/outcome-from-cop-15-a-new-global-fund-paid-for-by-life-sciences-companies-that-use-digital-sequence-information-on-genetic-resources/> accessed 11 January 2023. While heavily bracketed, the text of Annex 3 of the High Level Segment (17 December 2022) noted that in respect of contributions to a DSI fund, "(i) Each [developed-country] Party will take measures to ensure that 1% of the [retail price of all commercial income][net revenue from products] resulting from all utilisation of [genetic resources, traditional knowledge associated with genetic resources and] digital sequence information on genetic resources is contributed to the multilateral fund, subject to the exceptions set out below.

(i) alt. Funds should be deposited into the fund by users of digital sequence information on genetic resources at the point at which they commercialise a product derived from the use of digital sequence information on genetic resources  
(ii) The multilateral fund will also be open for voluntary contributions from all sources."

While these provisions were not ultimately adopted in the final COP decision on DSI (n 165), they nonetheless exemplify the support among some Parties for such the introduction of fees such as a levy resulting from the utilisation of DSI.

system. Instead, what is proposed here is something akin to a permanent COVAX<sup>200</sup>, but in a significant change to the COVAX mechanism, it would not treat 'IP exclusivity as sacrosanct'<sup>201</sup> nor be based on charity<sup>202</sup>, as is the case with COVAX.<sup>203</sup>

One element of the PIP Framework worth replicating in some form or other is the subscription payment ('Partnership Contribution') made by pharmaceutical companies that subsidises 50% of the ongoing running costs of the global network of WHO-affiliated influenza laboratories.<sup>204</sup> Critically, these contributions are not framed as benefits that are available to LMICs in the event of a pandemic. They are ongoing contributions from pharmaceutical companies to the WHO. In a related vein, ongoing technical assistance, capacity building and technology transfer<sup>205</sup> are central to this vision of a permanent, albeit significantly amended, COVAX. A securely and sustainably funded permanent COVAX, which makes aggressive use of Advance Purchase Agreements with vaccine manufacturers<sup>206</sup> to secure priority access on behalf of LMICs, with disbursement according to criteria agreed in advance with beneficiaries. As noted above, the agency of beneficiaries is a core, albeit overlooked aspect, of benefit-sharing, meaning that far from requiring a top down (and likely neo-colonial) approach, it mandates an 'iterative process, rather than a one-off exercise, of good-faith engagement among different actors that lays the foundation for a partnership among them'.<sup>207</sup> Disbursement according to need, not ability to pay, is also clearly essential for futureproofing pandemic response.

The challenges inherent in such a complex offering should not be underestimated. Not only would pathogens need to be separated from the purview of the biodiversity regime, but the construction of a mechanism akin to a permanent COVAX would require significant financial and regulatory innovations to ensure the equitable supply of vaccines, therapeutics, and diagnostics. IP issues would need to be resolved and attention given to the system of procurement under such a model. The Pandemic Treaty may not ultimately be the place to institute such a proposal because it will require a multisectoral approach.<sup>208</sup> However, the Treaty *is* the place to start the conversation on delinkage, and moreover, introduce new ways of imagining equity – and rethinking its relationship with solidarity – beyond the untenable transactional ABS model.

## VII. CONCLUSION

The Pandemic Treaty provides an ideal opportunity to reimagine equity within global health, allowing us to move away from its conceptualisation as a form of commutative justice

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<sup>200</sup> On the need for a permanent Covax, see discussion in M Eccleston-Turner, 'Assessing the viability of access and benefit-sharing models of equitable distribution of vaccines in international law' (2022) *The Pandemic and Beyond Policy Brief*, available at [https://pandemicandbeyond.exeter.ac.uk/wp-content/uploads/2022/01/VaccineDistribution\\_E-Turner\\_PolicyBrief\\_Jan22.pdf](https://pandemicandbeyond.exeter.ac.uk/wp-content/uploads/2022/01/VaccineDistribution_E-Turner_PolicyBrief_Jan22.pdf)

<sup>201</sup> Thambisetty and others (n 33).

<sup>202</sup> For a discussion on the problems inherent in a charitable orientation of the disbursement of medical countermeasures and its potential to undermine equity, see N A Evaborhene NA, J O Oga and S Mburu, 'The WHO pandemic treaty: where are we on our scepticism?' (2023) 8 (6) *BMJ Global Health*.

<sup>203</sup> A de Bengy Puyvallée and K Tagmatarchi Storeng, 'COVAX, Vaccine Donations and the Politics of Global Vaccine Inequity' (2022) 18 *Globalization and Health* 26.

<sup>204</sup> Art 6.14.3, PIP Framework.

<sup>205</sup> Eccleston-Turner (n 200).

<sup>206</sup> Eccleston-Turner (n 200).

<sup>207</sup> Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (n 196).

<sup>208</sup> Such multisectoral engagement could extend to the Treaty having a multipartite secretariat, such as those seen in the Basel, Rotterdam and Stockholm Conventions (BRSMEAS), for more see: J Allan, D Downie and J Templeton, 'Experimenting with TripleCOPs: Productive Innovation or Counterproductive Complexity?' (2018) 18 *International Environmental Agreements: Politics, Law and Economics* 557.

(where one must give to receive) to one premised upon other forms of justice such as distributive justice, procedural justice and by extension, solidarity.<sup>209</sup> This clearly requires a response beyond the outdated and morally flawed transactional model of ABS that is based on states having sovereign rights over pathogen samples and that treats ABS (no matter how poorly executed) as a synonym for equity. To continue down this path is to offer nothing but false hope to those countries that were most hard done by during the COVID-19 pandemic. There are different ways to structure a solution (or solutions) to these problems. Negotiators to the Pandemic Treaty must embrace this opportunity to rethink how international systems and outcomes can be made more equitable during a pandemic. It is time to retire the ABS mechanism from the health sphere, and more fundamentally, to reimagine this conception of equity within global health law and governance, so that the mechanisms used to achieve equity support, as opposed to undermine solidarity.

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<sup>209</sup> C Wenham, R Reisdorf and S Asthana, 'Pandemic Treaty: A Chance to Level up on Equity' [2022] *BMJ* o1279.