

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

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Abstract During the COVID-19 pandemic 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. However, equity is difficult to define, much less to operationalize. Presently, WHO Member States appear to have chosen ‘access and benefit-sharing’ (ABS) as the predominant mechanism for operationalizing equity in the Treaty. This article 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, pandemics, COVID-19, solidarity, pathogens, global health law, 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

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of the World Health Organization (WHO) has begun in earnest.¹ The proposed instrument, commonly called the ‘Pandemic Treaty’, is intended to address the global failures in outbreak prevention, preparedness and response witnessed during COVID-19.² 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.³ 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.⁴

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 (Section II), before exploring and contextualizing the frequent calls for equity throughout the COVID-19 pandemic (Section III). Section IV 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 will help evaluate whether current proposals to operationalize equity in the Treaty can achieve the intended outcome. Member States have declared in UN Doc A/INB/2/3 that ‘[e]quity is central to achieving and sustaining the objective(s)’ of the Treaty, however it is our contention 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).

Section V highlights how the current discussions on equity within the Pandemic Treaty erroneously conflate equity with ABS. It is argued that equity can never be transactional and that ABS as a legal mechanism is incapable of delivering equity, particularly for low- and middle-income

¹ World Health Assembly, ‘The World Together: Establishment of an Intergovernmental Negotiating Body to Strengthen Pandemic Prevention, Preparedness and Response’ (28 November 2021) UN Doc SSA2/CONF./1Rev.1.

² 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(3) *IntlAff*(London) 837.

³ Equity was raised by over 60 Member States at the World Health Assembly Special Session (WHASS), including Gabon, Dominican Republic, Namibia, Tanzania, Mauritania, the UK, Georgia and Tonga.

⁴ For the joint statement by heads of States and WHO, see WHO, ‘COVID-19 Shows Why United Action Is Needed for More Robust International Health Architecture’ (WHO, 30 March 2021) <<https://www.who.int/news-room/commentaries/detail/op-ed---covid-19-shows-why-united-action-is-needed-for-more-robust-international-health-architecture>>.

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.

Section VI 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. Section VII 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

Despite having a history which can be traced back to the works of Aristotle and to Roman law,⁵ 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.⁶ Instead, it is more feasible to describe rather than to define it,⁷ 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',⁸ 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

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

⁶ *ibid* 2.

⁷ SK Chattopadhyay, 'Equity in International Law: Its Growth and Development' (1975) 5 *GaJIntl&CompL* 381, 382.

⁸ W Fahmy, 'Equitable Principles from the Perspective of International Law of the Sea' (2018) 1(1) *EconLPoly* 46.

necessary to bridge the gap between international law and justice—particularly distributive justice⁹—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.¹⁰

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. Equity has been prominent in the jurisprudence of the the International Court of Justice (ICJ), and in the construction of claims heard before the Court, which has placed equity firmly in the ‘mainstream of international law’.¹¹ This is perhaps most apparent with regards to the ICJ’s jurisprudence on maritime boundary disputes which is seen as ‘equity’s traditional stronghold’.¹² Whilst the subject of much criticism, it was the seminal judgment of the ICJ in the *North Sea Continental Shelf Cases*¹³ 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.¹⁴ 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 of equity to all areas of international law.¹⁵ 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’¹⁶ 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 recognized 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 recognizing 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

⁹ M Janis, ‘The Ambiguity of Equity in International Law’ (1983) 9 *BrookJIntlL* 7; R Lapidot, ‘Equity in International Law’ (1987) 22(2) *IsLR* 161. ¹⁰ Titi (n 5). ¹¹ *ibid* 29, 135. ¹² *ibid* 28.

¹³ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3.

¹⁴ For more on this, see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 13; *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction of the Court, Judgment) [1973] ICJ Rep 3. ¹⁵ Titi (n 5) 11. ¹⁶ *ibid* 3.

can be found within the United Nations (UN) Convention on the Law of the Sea (UNCLOS),¹⁷ the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty),¹⁸ the non-binding Pandemic Influenza Preparedness (PIP) Framework under the auspices of the WHO¹⁹ and the UN General Assembly (UNGA) Declaration on the Establishment of a New International Economic Order,²⁰ to name but a few. The incorporation of equity or equitable considerations into treaty law and other international texts 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 recognized by civilized nations’ under the ICJ Statute.²¹ 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.²² Additionally, the ICJ has also made reference to customary international law and equitable considerations in both the *Gulf of Maine Case*²³ and the *Jan Mayen Case*,²⁴ with the requirements of customary law in relation to maritime 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, rising perhaps to the level of customary international law, if only in the context of maritime delimitation.

¹⁷ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS). References to equity are found throughout the UNCLOS, including the preamble and arts 74, 83.

¹⁸ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1979, entered into force 11 July 1984) 1363 UNTS 3, art 11(7).

¹⁹ WHO, ‘Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits’ (adopted 24 May 2011, 2nd edition 2021) UN Doc A64/VR/10 (PIP Framework).

²⁰ For the Declaration on the Establishment of a New International Economic Order, see UNGA Res 3201 (S-VI) (1 May 1974) UN Doc A/RES/3201(S-VI) 4.

²¹ *Diversion of Water from the Meuse (The Netherlands v Belgium)* (Dissenting Opinion of M Anzilotti) [1937] PCIJ Rep Ser A/B No 70; *Diversion of Water from the Meuse (The Netherlands v Belgium)* (Individual Opinion of Hudson) [1937] PCIJ Rep Ser A/B No 70.

²² Titi (n 5) 144.

²³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Judgment) [1984] ICJ Rep 246.

²⁴ *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Judgment) [1993] ICJ Rep 38.

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 Section III 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’,²⁵ with timely and sufficient access to vaccines and other medical countermeasures being paramount to the realization of equity in a health emergency. The consistent inability of developing States to access medical countermeasures during a pandemic²⁶ therefore presents a problem not just for global public health but for the realization 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 industrialized nations of upstream resources and research tools (including genetic resources, technology and specialized 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 knowledge²⁷ from the Global South for use within their own territories without first seeking permission or providing adequate compensation to the originating State.²⁸ Genetic resources were frequently utilized in the development and production of medical technologies, which are afforded protection by an ever-expanding intellectual property rights regime.²⁹ Meanwhile, the genetic resources themselves were treated as

²⁵ WHO, ‘Health Equity’ <https://www.who.int/health-topics/health-equity#tab=tab_1>.

²⁶ See M Turner, ‘Vaccine Procurement during an Influenza Pandemic and the Role of Advance Purchase Agreements: Lessons from 2009-H1N1’ (2016) 11 *Glob Public Health* 322; M Eccleston-Turner, ‘Operationalizing the Right to Health through the Pandemic Influenza Preparedness Framework’ (2018) XII(1) *Glob Health Gov* 22.

²⁷ M Eccleston-Turner and M Rourke, ‘Arguments against the Inequitable Distribution of Vaccines Using the Access and Benefit Sharing Transaction’ (2021) 70 *ICLQ* 825.

²⁸ K Kariyawasam and M Tsai, ‘Access to Genetic Resources and Benefit Sharing: Implications of Nagoya Protocol on Providers and Users’ (2018) 21 *JWIP* 289.

²⁹ Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1869 UNTS 299, 33 *ILM* 1197 (1994), Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights.

'public goods' that could be appropriated from the Global South by 'the privatised property regime' of the Global North.³⁰ A number of barriers make it increasingly difficult—if not 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,³¹ limited manufacturing capacity that is bolstered by an overzealous intellectual property regime,³² and, as most recently evidenced by experiences during the COVID-19 pandemic, widespread nationalism exhibited by the wealthiest States.³³

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.³⁴ Vaccine financing and limited manufacturing capacity 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.³⁵

³⁰ Eccleston-Turner and Rourke (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 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, CUP 2005). This is discussed further in Section V.

³¹ 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 *MilbankQ* 426.

³² M Wibisono, 'Responsible Virus Sharing and Benefit Sharing: A Balance between Humankind and the Pandemic Threat' in M Caballero-Anthony (ed), *Pandemic Preparedness in Asia* (S. Rajaratnam School of International Studies 2009) 124.

³³ See L Gruszczynski and C Wu, 'Between the High Ideals and Reality: Managing COVID-19 Vaccine Nationalism' (2021) 12 *EJRR* 711. Indeed, as articulated in S Thambisetty et al, 'Addressing Vaccine Inequity during the COVID-19 Pandemic: The TRIPS Intellectual Property Waiver Proposal and Beyond' (2022) 81(2) *CLJ* 384, 386. 'The COVID-19 pandemic has shed light on an existing problem of inequality within the TRIPS system which has kept LMICs in an IP [intellectual property] 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 [high-income countries] to realize 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.'³⁴ See discussion in Thambisetty et al (n 33).³⁵ *ibid.*

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 two 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.³⁶ This assumed that high-income countries (HICs) would use COVAX for the purchase of vaccines, thereby ‘delegating authority over R&D and allocation decisions to a new global partnership’.³⁷

However, this turned out to be ‘overly ambitious and unrealistic’³⁸ and fewer than half a 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 per cent of the COVID-19 vaccine supply available that year, to cover approximately 16 per cent of the global population.³⁹ Canada alone ordered five times the quantity of vaccine required for vaccination of its entire population.⁴⁰ 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 mechanism⁴¹ 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 Organization’s (WTO’s) Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. The waiver, first proposed by India and South Africa in October 2020,⁴² was proposed to help facilitate greater production of COVID-19 vaccines and other medical countermeasures by and for developing States.⁴³ COVAX did not interfere with the status quo, treating intellectual property protections as ‘sacrosanct’,⁴⁴ and although a decision to

³⁶ Eccleston-Turner and Upton (n 31).

³⁷ WHO, ‘External Evaluation of the Access To COVID-19 Tools Accelerator (ACT-A)’ (10 October 2022) <<https://www.who.int/publications/m/item/external-evaluation-of-the-access-to-covid-19-tools-accelerator-act-a>>. ³⁸ *ibid.*

³⁹ See O Wouters et al, ‘Challenges in Ensuring Global Access to COVID-19 Vaccines: Production, Affordability, Allocation, and Deployment’ (2021) 397 *Lancet* 1023.

⁴⁰ Gruszczynski and Wu (n 33) 713.

⁴¹ Eccleston-Turner and Upton (n 31).

⁴² WTO, ‘Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19: Communication from India and South Africa’ (2 October 2020) IP/C/W/669. See also WTO, ‘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. ⁴³ Gruszczynski and Wu (n 33) 714.

⁴⁴ Thambisetty et al (n 33).

waive certain protections relating to COVID-19 vaccines was agreed to at the twelfth WTO Ministerial Conference in June 2022⁴⁵ (nearly two years after the initial proposal), the final, heavily modified agreement has been the subject of much criticism.⁴⁶ 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'.⁴⁷

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).⁴⁸ 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 consider genuine actions under international law that could enhance equitable access to medicines. With the experiences of LMICs during COVID-19 in mind, calls to realize equity in global health—particularly in accessing and distributing medical countermeasures during 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-19.⁴⁹

⁴⁵ WTO, 'Ministerial Decision on the TRIPS Agreement: Adopted on 17 June 2022' (22 June 2022) WT/MIN(22)/30, WT/L/1141.

⁴⁶ See, eg, The South Centre, 'TRIPS Waiver: An Insufficient Multilateral Response. TRIPS-Consistent National Actions Are Called For' (21 June 2022) <<https://www.southcentre.int/wp-content/uploads/2022/06/SC-Statement-TRIPS-waiver-FINAL-1.pdf>>.

⁴⁷ WTO (n 45) para 8.

⁴⁸ 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>>.

⁴⁹ Joint Statement by Heads of States and WHO (n 4).

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 emphasized that a new instrument, grounded in equity, could provide authoritative structure and cohesion to the global governance of pandemic preparedness.⁵⁰ The WGPR argued that such an instrument could move ideas of equity from being a 'soft law' aspiration, to becoming an active, legally binding, operational aspect of pandemic preparedness and response.⁵¹ 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 socio-economic status) in global pandemic preparedness and response activities

as being key to 'operationalize' equity in a future instrument.⁵² 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'.⁵³ The WGPR acknowledged that '[w]hile each of these areas are complex, *equity is at the core of the breakdown in the current system*'⁵⁴ 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'.⁵⁵

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

⁵⁰ WHO, '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) UN Doc A/WGPR/3/6. ⁵¹ *ibid.* ⁵² *ibid.*

⁵³ WHO, '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) UN Doc A/WGPR/2/4, 2.

⁵⁴ WHO, '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) UN Doc A/WGPR/5/2 (emphasis added). ⁵⁵ *ibid.*

shared information and resources'.⁵⁶ 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 the WHO.⁵⁷ They further emphasized 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'.⁵⁸

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 the Constitution of the WHO. Member States emphasized their 'commitment ... to develop a new instrument for pandemic prevention, preparedness and response with a whole-of-government and whole-of-society approach, *prioritizing the need for equity*'.⁵⁹ Indeed, at this Special Session, equity was raised by more than 60 WHO Member States, demonstrating the emphasis that members were placing on the concept, right from the earliest days of the Pandemic Treaty's development.⁶⁰

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*'.⁶¹ The decision further emphasized the need for '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, *prioritizing the need for equity*'.⁶² The decision was adopted unanimously by Member States, without editing or watering down the language around equity within the text.⁶³

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-

⁵⁶ WHO (n 53) 3.

⁵⁷ WHO (n 54).

⁵⁸ 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) UN Doc SSA2/3.

⁵⁹ World Health Assembly (n 1) (emphasis added).

⁶⁰ Wenham, Eccleston-Turner and Voss (n 2).

⁶¹ World Health Assembly (n 1) (emphasis added).

⁶² *ibid* (emphasis added).

⁶³ World Health Assembly, 'The World Together: Establishment of an Intergovernmental Negotiating Body to Strengthen Pandemic Prevention, Preparedness and Response' (1 December 2021) UN Doc SSA2(5).

building, equitable and timely access to and distribution of medical countermeasures and addressing barriers to timely access to and distribution of medical countermeasures'.⁶⁴

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'.⁶⁵ As is evident from discussions preceding these remarks, the frequent reference to 'equitable sharing of benefits arising from shared information and resources'⁶⁶ belies a sense that access to pathogens should be associated with the sharing of benefits that those pathogens are used to develop. However, it is in these remarks that one can 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 UN's Convention on Biological Diversity (CBD) in 1992.⁶⁷ This widely adopted Convention recognizes that States have sovereign rights over their genetic resources⁶⁸ 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

⁶⁴ WHO, 'WGPR interim report to EB150' (10 January 2022) UN Doc A/WGPR/6/3.

⁶⁵ WHO, '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) UN Doc A/INB/1/4 Rev.1, 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.'

⁶⁶ WHO (n 53) 3.

⁶⁷ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD). The international ABS legal landscape is dominated by the 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 utilization of genetic resources are shared in a fair and equitable way. See 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 (Nagoya Protocol)

⁶⁸ CBD *ibid.*, 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 ...'

mutually agreed terms.⁶⁹ 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 utilization of genetic resources' with the country of origin.⁷⁰ 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 transactional mechanism, designed to generate fair and equitable benefits for channelling into the conservation of biological diversity, and the sustainable use of its components.⁷¹

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 operationalize 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.⁷² 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'.⁷³ Crucially, substantive elements to address these gaps and challenges were listed as: access to medical countermeasures; access to pathogen samples and data; transfer of technology and know-how; coordination, collaboration and cooperation.⁷⁴ 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).⁷⁵

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

⁶⁹ *ibid.*, art 15.

⁷⁰ *ibid.*, 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* (IUCN 1994) <<https://portals.iucn.org/library/efiles/documents/EPLP-no.030.pdf>>.

⁷¹ See CBD *ibid.*, 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 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'. 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.

⁷² WHO, 'Draft Annotated Outline of a WHO Convention, Agreement or Other International Instrument on Pandemic Prevention, Preparedness and Response' (14 June 2022) UN Doc A/INB/1/12.

⁷³ *ibid.* (emphasis added).

⁷⁴ *ibid.*

⁷⁵ *ibid.*

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'⁷⁶ and '[r]ecogniz[es] that equity should remain as a principle, an indicator and an outcome of pandemic prevention, preparedness and response'.⁷⁷ 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 Utilization to the Convention on Biological Diversity, and the Pandemic Influenza Preparedness Framework.⁷⁸

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 social or economic status'.⁷⁹ Equity is further listed as one of the objectives of the instrument, first 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'.⁸⁰ 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'.⁸¹

In November 2022, the WHO INB produced a conceptual zero draft of the Treaty,⁸² the first detailed indication of what elements would 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'.⁸³ 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'⁸⁴ and

⁷⁶ WHO, 'Working Draft, Presented on the Basis of Progress Achieved, for the Consideration of the Intergovernmental Negotiating Body at its Second Meeting' (13 July 2022) UN Doc A/INB/2/3.

⁷⁷ *ibid.* ⁷⁸ *ibid.* ⁷⁹ *ibid.* ⁸⁰ *ibid.* ⁸¹ *ibid.*

⁸² WHO, 'Conceptual Zero Draft for the Consideration of the Intergovernmental Negotiating Body at its Third Meeting' (25 November 2022) UN Doc A/INB/3/3.

⁸³ WHO, 'Zero Draft of the WHA CA+ for the Consideration of the Intergovernmental Negotiating Body at its Fourth Meeting' (1 February 2023) UN Doc A/INB/4/3.

⁸⁴ WHO, A/INB/3/3 (n 82) preamble; WHO, A/INB/4/3, *ibid.* preamble.

[r]eiterated 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.⁸⁵

Finally, the preambles of the conceptual zero draft and the CA+ draft recognize 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'.⁸⁶ 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',⁸⁷ although this language had been removed by the February 2023 CA+ draft, and 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 tackling the inequities in terms of technology, health workforce, infrastructure and financing, among other aspects.⁸⁸

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 operationalized 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 recognizing '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'.⁸⁹

⁸⁵ WHO, A/INB/3/3, *ibid*, preamble; WHO, A/INB/4/3, *ibid*, preamble.

⁸⁶ WHO, A/INB/3/3, *ibid*, preamble; WHO, A/INB/4/3, *ibid*, preamble.

⁸⁷ WHO, A/INB/3/3, *ibid*, art 4.

⁸⁸ WHO (n 83) art 4.

⁸⁹ *ibid*, art 10(1).

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 ABS instruments.⁹⁰ 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’.⁹¹ 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.⁹²

Benefit sharing is proposed to be addressed by way of WHO Standard Material Transfer Agreements (SMTAs) 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.⁹³ The WHO will then use this contractual agreement with the manufacturers to secure benefits in return for the above-mentioned access.⁹⁴ The CA+ draft 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’.⁹⁵

The PABS system is heavily inspired by the WHO’s non-binding PIP Framework, which is discussed 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 manufacturers’.⁹⁶ This appears to be an effort to prevent the ability of vaccine-producing States to acquire vaccine doses compulsorily before leaving their borders, an oversight that significantly undermines the

⁹⁰ *ibid.*, art 10(2).

⁹¹ *ibid.*, art 10(3)(a).

⁹² 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.*

⁹³ WHO (n 83) art 10(3)(f).

⁹⁴ *ibid.*, art 10(3)(g).

⁹⁵ *ibid.*, art 10(3)(h).

⁹⁶ *ibid.*, art 10(3)(h).

utility of the PIP Framework.⁹⁷ 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.⁹⁸ 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+ draft. These draft provisions propose, among other things, the creation of a WHO-led Global Pandemic Supply Chain and Logistics Network,⁹⁹ as well as the 'promotion of sustainable and equitably distributed production and transfer of technology and know-how'¹⁰⁰ 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'.¹⁰¹ Additional provisions under Chapter III aim at regulatory strengthening¹⁰² as well as increasing research and development.¹⁰³

The above provisions, while admittedly in draft form, have been criticized 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'.¹⁰⁴ The draft provisions on a Global Pandemic Supply Chain and Logistics Network, for example, lack 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].¹⁰⁵

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 realized 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',¹⁰⁶ together with the heavy (if partial) reliance on ABS to operationalize the concept of equity in the Pandemic Treaty is deeply concerning.

⁹⁷ 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 *MilbankQ* 91; Eccleston-Turner and Rourke (n 27).

⁹⁸ N Ramakrishnan and KM Gopakumar, 'WHO: Zero Draft of the Pandemic Instrument Creates an "Illusion" of Equity' (*Third World Network*, 27 February 2023) <<https://www.twn.my/title2/health.info/2023/h1230207.htm>>.

⁹⁹ WHO (n 83) art 6(2).

¹⁰⁰ *ibid.*, art 7.

¹⁰¹ *ibid.*, art 7(1).

¹⁰² *ibid.*, art 8.

¹⁰³ *ibid.*, art 9.

¹⁰⁴ Ramakrishnan and Gopakumar (n 98).

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

The next section focuses on a particular aspect of the operationalization of equity within the February 2023 CA+ draft: that of the proposed PABS mechanism. It is argued that attempts to operationalize 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 70 years, the international scientific community treated pathogen samples as resources in common, informally sharing samples in order to carry out the above vital activities.¹⁰⁷ 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.¹⁰⁸ This leads to vast inequities in access to medicines for infectious disease threats.¹⁰⁹

¹⁰⁷ M Eccleston-Turner and M Rourke, ‘Common Heritage or Sovereign Resource? The World Health Organization’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, CUP 2020); and JH Reichman, PF Uhler and T Dedeurwaerdere, ‘Uncertain Legal Status of Microbial Genetic Resources in a Conflicted Geopolitical Environment’ in JH Reichman, PF Uhler and T Dedeurwaerdere, *Governing Digitally Integrated Genetic Resources, Data, and Literature: Global Intellectual Property Strategies for a Redesigned Microbial Research Commons* (CUP 2016).

¹⁰⁸ See E Sedyaningsih et al, ‘Towards Mutual Trust, Transparency and Equity in Virus Sharing Mechanism: The Avian Influenza Case of Indonesia’ (2008) 37 *Ann Acad Med Singap* 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).

¹⁰⁹ 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).

A significant international shift in how pathogens were managed came about via the CBD and its Nagoya Protocol (2010).¹¹⁰ 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.¹¹¹ To comply with these international instruments, users of genetic resources must now obtain the prior informed consent of the country of origin,¹¹² and come to mutually agreed terms about how the genetic resources will be used¹¹³ as well as what associated benefits will be shared with the country of origin.¹¹⁴ 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,¹¹⁵ and two pressing global health issues—prompt access to pathogen samples and access to essential pharmaceuticals—became linked through the ABS transaction.¹¹⁶ 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 PIP Framework in 2011¹¹⁷ which 'recognize[s] the sovereign right of States over their biological resources'.¹¹⁸ 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'.¹¹⁹

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;¹²⁰ 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.¹²¹

¹¹⁰ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization, 'Decision X/1. Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization' (29 October 2010) UN Doc UNEP/CBD/COP/DEC/X/1, Annex I. ¹¹¹ CBD (n 67) art 15(1). ¹¹² *ibid* art 15(5).

¹¹³ *ibid* art 15(4).

¹¹⁴ *ibid* art 15(7).

¹¹⁵ 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 et al (n 108); Rourke (n 108). ¹¹⁶ Eccleston-Turner and Rourke (n 27).

¹¹⁷ Sedyaningsih et al (n 108); Rourke (n 108).

¹¹⁸ PIP Framework (n 19) preamble.

¹¹⁹ *ibid*, art 2.

¹²⁰ *ibid* art 5.1.

¹²¹ *ibid* art 6.11.

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’.¹²² In the event of an influenza pandemic, the stockpile of donated vaccines will be distributed to States ‘according to public health risk and need’.¹²³ 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’¹²⁴ and others have suggested that it offers a good starting point for the developing an ABS system for other pathogens.¹²⁵ 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 operationalizing 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.¹²⁶ 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.

¹²² PIP Framework (n 19) Annex 2: SMTA 2, art 4.1.1. 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 per cent 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, it is not yet known which strain of influenza will cause the next pandemic.

¹²³ PIP Framework (n 19) art 6.9.2.
¹²⁴ WHO, Executive Board, ‘Review of the Pandemic Influenza Preparedness Framework: Report by the Director-General’ (29 December 2016) UN Doc EB140/16, 13, Annex 1.

¹²⁵ 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.

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

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.¹²⁷ 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.¹²⁸ 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.¹²⁹ The expectation was that these bilateral contracts would generate sufficient benefits to incentivize 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 in 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.¹³⁰ Specialized multilateral ABS arrangements, like those developed under the UN Food and Agriculture Organization'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 incentivize conservation and sustainable use.¹³¹ This is particularly so once the costs of maintaining such a system are taken into account.¹³² 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.¹³³

¹²⁷ H Mayrand, 'From Classical Liberalism to Neoliberalism: Explaining the Contradictions in the International Environmental Law Project' (2020) 50 RGDIP 57; C Corson and KI MacDonald, 'Enclosing the Global Commons: The Convention on Biological Diversity and Green Grabbing' (2012) 39(2) JPeasantStud 263.

¹²⁸ K Fuentes-George, 'Neoliberalism, Environmental Justice, and the Convention on Biological Diversity: How Problematizing the Commodification of Nature Affects Regime Effectiveness' (2013) 13 GlobEnvironPolit 144.

¹²⁹ CBD (n 67) art 15(4); Nagoya Protocol (n 67) art 10.

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

¹³¹ M Walløe Tvedt, 'A Contract-law Analyses of the SMTA of the Plant Treaty: Can It Work as a Binding Contract?' (2021) 24 JWIP 83, 84: 'As yet, the [Plant Treaty's Multilateral] Fund has not received substantial payments through the mandatory "benefit-sharing" provisions of the [Plant] Treaty.' 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.

¹³² S Laird et al, 'Rethink the Expansion of Access and Benefit Sharing' (2020) 367(6483) Science 1200.

¹³³ *ibid.*

The PIP Framework is regularly cited as an innovative and successful specialized 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.¹³⁴ While it has increased funding for the WHO through its innovative ‘Partnership Contribution’ funding system, an annual subscription payment from pharmaceutical companies,¹³⁵ 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.¹³⁶ The PIP Framework employs private law contracts to bind non-State users of PIP biological materials to sharing associated benefits (eg 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.¹³⁷

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,¹³⁸ and there are ongoing efforts to develop a universal influenza vaccine that

¹³⁴ L Gostin and D Sridhar, ‘Global Health and the Law’ (2014) 370 *N Engl J Med* 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 *JLM* 59; S Vezzani, ‘Preliminary Remarks on the Envisaged World Health Organization Pandemic Influenza Preparedness Framework for the Sharing of Viruses and Access to Vaccines and Other Benefits’ (2010) 13(6) *JWIP* 675; L Gostin et al, ‘Virus Sharing, Genetic Sequencing, and Global Health Security’ (2014) 345 *Science* 1295; WHO, ‘Pandemic Influenza Preparedness Framework: Biennial Report: 1 January 2018–31 December 2019’ (2020) UN Doc WHO/WHE/GIH/PIP/2020.1.

¹³⁵ WHO, ‘Pandemic Influenza Preparedness (PIP) Framework: Partnership Contribution (PC) Preparedness High-Level Implementation Plan II 2018–2023’ (revised version, 2019) UN Doc WHO/WHE/IHM/PIP/2018.1 Rev.1, 3.

¹³⁶ ‘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) 245.

¹³⁷ PIP Framework (n 19) art 6.9.2. 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’ in V Ruiz Abou-Nigm, K McCall-Smith and D French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart Publishing 2018) 175–98.

¹³⁸ G Koblenz, ‘The *De Novo* Synthesis of Horsepox Virus: Implications for Biosecurity and Recommendations for Preventing the Reemergence of Smallpox’ (2017) 15 *Health Secur* 620; A Hampton, ‘Pathogen Dematerialization and the ABS Loophole’ (2023) 10 *JLB* lsad002.

could make up-to-the-minute sample sharing unnecessary for pharmaceutical companies.¹³⁹ 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 benefit-sharing contract in place between themselves and the WHO (Standard Material Transfer Agreement (SMTA2)).¹⁴⁰

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.¹⁴¹ 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, by no means should one advocate for a return to the *status quo ante*. Prior to the PIP Framework and Nagoya Protocol, LMICs did not have adequate access to 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.¹⁴² This inequity was undoubtedly exacerbated by the introduction of international enforceable standards of intellectual property via the WTO TRIPS Agreement.¹⁴³

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

¹⁴⁰ 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 November 2014 (Influenza Virus Tracking Mechanism (IVTM) Shipment ID: SHP1217). Baxter AG 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.

¹⁴¹ Eccleston-Turner and Rourke (n 27).

¹⁴² See Sedyaningsih et al (n 108); Rourke (n 108).

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

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 maximize their own gains.¹⁴⁴ That is, providers of pathogenic genetic resources (sovereign States) will want to maximize the benefits that they may be entitled to while users of pathogenic genetic resources (eg pharmaceutical companies) will want to minimize the benefits shared.¹⁴⁵

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.¹⁴⁶ 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]’.¹⁴⁷ For instance, when using samples from another country, researchers should involve the scientists from originating laboratories.¹⁴⁸ Scientists from the originating laboratory should also be involved in the

¹⁴⁴ Eccleston-Turner and Rourke (n 27). See also the discussion in JH 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(2) *IntJBiol* 121 regarding the problematic incentive structure under the PIP Framework.

¹⁴⁵ Eccleston-Turner and Rourke *ibid*. See also J Harrington, H Deacon and P Munyi, ‘Sovereignty and Development: Law and the Politics of Traditional Knowledge in Kenya’ (2021) 13(1) *CritAfrStud* 95.

¹⁴⁶ M Rourke and M Eccleston-Turner, ‘The Pandemic Influenza Preparedness Framework as a “Specialized International Access and Benefit-Sharing Instrument” under the Nagoya Protocol’ (2021) 72(3) *NILQ* 411.

¹⁴⁷ M Wilke, ‘The World Health Organization’s Pandemic Influenza Preparedness Framework as a Public Health Resources Pool’ in EC Kamau and G Winter (eds), *Common Pools of Genetic Resources: Equity and Innovation in International Biodiversity Law* (1st edn, Routledge 2013) 323.

¹⁴⁸ PIP Framework (n 19) Annex 1: SMTA 1, art 5.2.

preparation of manuscripts for publication,¹⁴⁹ and researchers should appropriately acknowledge the contributions of scientists from the originating laboratories.¹⁵⁰ 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 and private capacity building'.¹⁵¹ 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'.¹⁵²

It is hard to imagine how the WHO—the international body responsible for helping all peoples attain 'the highest possible level of health'¹⁵³—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 need'.¹⁵⁴ This means that 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'¹⁵⁵ 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"'.¹⁵⁶ 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

¹⁴⁹ *ibid* art 5.2.

¹⁵⁰ *ibid* art 5.3.

¹⁵¹ Wilke (n 147) 323.

¹⁵² PIP Framework (n 19) art 6.0.2(iii).

¹⁵³ WHO, Constitution of the World Health Organization, ch I—Objective, art 1 <<https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf>>.

¹⁵⁴ PIP Framework (n 19) art 6.1.

¹⁵⁵ Rourke (n 97) 105.

¹⁵⁶ *ibid* 100.

maintains sovereign rights over their materials once they have transferred them to the WHO.¹⁵⁷ 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.¹⁵⁸

There are also power imbalances that have an impact on the operation of the PIP Framework. When negotiating the SMTA2 benefit-sharing contract between the WHO and the third-party user of PIP biological materials, the WHO's small team of lawyers is 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).¹⁵⁹ 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'¹⁶⁰ ... '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'.¹⁶¹ The Director-General of the WHO can then make a recommendation for resolving the conflict.¹⁶² 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 or disincentive that will make an impact on 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 realize that if benefits are distributed based on need, then they are too well off to ever be one of the countries 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. However, 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.¹⁶³

¹⁵⁷ *ibid* 100. On the problematic nature of the country of origin when applied to pathogens, see also F Humphries et al, 'COVID-19 Tests the Limits of Biodiversity Laws in a Health Crisis: Rethinking "Country of Origin" for Virus Access and Benefit-sharing' (2021) 28 *JLM* 684.

¹⁵⁸ Rourke (n 97) 103–4; PIP Framework (n 19) art 5.3.3.

¹⁶⁰ PIP Framework (n 19) Annex 1: SMTA 1, art 7.1.

¹⁶² *ibid*, art 7.2.

¹⁶³ eg South Africa who promptly reported Omicron as a variant of concern. See BM Meier et al, 'Travel Restrictions and Variants of Concern: Global Health Laws Need to Reflect Evidence' (2022) 100(3) *Bull World Health Organ* 178.

¹⁵⁹ Rourke *ibid* 102.

¹⁶¹ *ibid*, art 7.2.

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 30 years of evidence that the overall outcomes are rarely fair or equitable, means that 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.¹⁶⁴ Moreover, appeals to solidarity have been a notable feature of the COVID-19 pandemic response.¹⁶⁵

Solidarity has been described as a 'multifunctional, constituent element ... of the concept of justice in public international law'¹⁶⁶ capable of facilitating the 'transformation of international law into a value based international legal order'.¹⁶⁷ The 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"'.¹⁶⁸ The links between solidarity and equity have been recognized in international legal texts with a 2020 UN General Assembly resolution on the 'Promotion of a democratic and equitable

¹⁶⁴ Wenham, Eccleston-Turner and Voss (n 2).

¹⁶⁵ B Prainsack, 'Solidarity in Times of Pandemics' (2020) 7(2) *Democr Theory* 124.

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

¹⁶⁷ R Wolfrum, 'Solidarity amongst States: An Emerging Structural Principle of International Law' (2009) 49 *IJIL* 8, 8.

¹⁶⁸ Wolfrum and Kojima (n 166) 30 (emphasis added).

international order' affirming 'that a democratic and equitable international order' requires, inter alia, '[i]nternational solidarity, as a right of peoples and individuals'.¹⁶⁹

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 emphasize the principle of solidarity,¹⁷⁰ focusing on the 'we' rather than the compensatory 'me' that a transactional mechanism inevitably encourages.¹⁷¹ In this regard, it has been recognized in the literature that 'solidarity could create tension with the compensatory approach to benefit sharing',¹⁷² with the ABS transactional mechanism linked with the notion of justice as a form of exchange or commutative justice,¹⁷³ but not with other forms of justice such as distributive forms of justice that solidarity in global health calls for.¹⁷⁴ In this

¹⁶⁹ UNGA Res 75/178 (28 December 2020) UN Doc A/RES/75/178, para 6(f). See also UNGA Res 56/151 (8 February 2002) UN Doc A/RES/56/151; and UNGA Res 57/213 (25 February 2003) UN Doc A/RES/57/213.

¹⁷⁰ For a highly useful overview of the principle of solidarity more generally, see B Prainsack and A Buyx, *Solidarity in Biomedicine and Beyond* (CUP 2018). For discussion on the links between solidarity and equity, see, eg, G Tomson et al, 'Solidarity and Universal Preparedness for Health after COVID-19' (2021) 372 *BMJ* n59; 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) *Int J Health Serv* 346; E Friedman et al, 'Global Health in the Age of COVID-19: Responsive Health Systems Through a Right to Health Fund' (2020) 22(1) *HealthHumRts* 199; L Gostin, S Moon and BM Meier, 'Reimagining Global Health Governance in the Age of COVID-19' (2020) 110 *Am J Public Health* 1615; JB Bump, P Friberg and DR Harper, 'International Collaboration and COVID-19: What Are We Doing and Where Are We Going?' (2021) 372 *BMJ* n180.

¹⁷¹ 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* (Nuffield Council on Bioethics, 2011) chapter 7 <<https://www.nuffieldbioethics.org/assets/pdfs/Solidarity-report.pdf>>.

¹⁷² K Simm, 'Benefit Sharing Frameworks – Justifications for and against Benefit Sharing in Human Genetic Research. A Report for GenBenefit' (2007) 13, available at <https://www.researchgate.net/profile/Kadri-Simm/publication/242205581_Benefit_Sharing_Frameworks_Justifications_for_and_against_benefit_sharing_in_h uman_genetic_research_A_Report_for_GenBenefit_2007/links/5a7d76bea6fdccc013f5a936/Benefit-Sharing-Frameworks-Justifications-for-and-against-benefit-sharing-in-h-uman-genetic-research-A-Report-for-GenBenefit-2007.pdf>. See also K Simm, 'Benefit-Sharing: An Inquiry Regarding the Meaning and Limits of the Concept in Human Genetic Research' (2005) 1 *Genomics Soc Policy* 29.

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

¹⁷⁴ 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 [genetic resources] 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 (2) *LEAD* 100, 103.

vein, the delinkage (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 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 maximize their own gains'.¹⁷⁵ 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'.¹⁷⁶ If equity in a pandemic requires 'timely and equitable distribution of countermeasures including vaccines, therapeutics, diagnostics',¹⁷⁷ this simply will not occur using the ABS concept as it is currently constructed.

There are alternative measures that could operationalize 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'.¹⁷⁸ 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 marks a critical juncture whereby it has become 'progressively more difficult to return to the initial point when multiple alternatives were still available'¹⁷⁹ 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'.¹⁸⁰

¹⁷⁵ M Eccleston-Turner and M Rourke, '2021 Detlev F. Vagts Roundtable on Transnational Law Pandemic Vaccines: Market Products or Global Public Goods?' (2021) 115 ASILPROC 109, 114

¹⁷⁶ *ibid* 114. ¹⁷⁷ WHO (n 53) 2.

¹⁷⁸ S Krasner, 'Sovereignty: An Institutional Perspective' (1988) 21 CompPolStud 66.

¹⁷⁹ J Mahoney, 'Path Dependence in Historical Sociology' (2000) 29 TheorySoc'y 507, writing on the impact of critical junctures.

¹⁸⁰ 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, eg, 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

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 operationalized 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 (ie pathogen samples and related data). However, 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.¹⁸¹

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 delinkage 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 delinkage 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 realizing such benefit sharing.¹⁸² Accordingly, while access has become deeply (inter)connected to benefit sharing such that ABS is now conceptualized as a principle in itself, the third objective of the CBD is in fact premised upon fair and equitable benefit

JNatResourcesPolRes 305; M Ruiz Muller, *Genetic Resources as Natural Information: Implications for the Convention on Biological Diversity and Nagoya Protocol* (1st edn, Routledge 2015). For a related perspective, see also Laird et al (n 132).

¹⁸¹ There is a vast literature on so-called delinkage, also referred to as decoupling; see n 185 below.

¹⁸² Our thanks to an anonymous reviewer for raising this point. See, also, E Morgera, E Tsioumani and M Buck, ‘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>>.

sharing on its own.¹⁸³ Delinkage—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.¹⁸⁴

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 delinkage.¹⁸⁵ The origins of these discussions can be traced to the fact that the ABS system was conceived when genetic resources were (primarily) physical samples.¹⁸⁶ 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.¹⁸⁷

This issue was discussed at the recent Fifteenth Meeting of the Conference of the Parties to the CBD (COP15) held in December 2022¹⁸⁸ 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'.¹⁸⁹ 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',¹⁹⁰ it

¹⁸³ CBD (n 67) art 1: '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'.

¹⁸⁴ On this, see, eg, 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 *MarSafetySecLJ* 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 (n 27).

¹⁸⁵ See, eg, S Aubry et al, 'Bringing Access and Benefit Sharing into the Digital Age' (2022) 4(1) *Plants People Planet* 5; Winter (n 174); I Klünker and H Richter, 'Digital Sequence Information between Benefit-Sharing and Open Data' (2022) 9(2) *JLB Isac* 035; A Hartman Scholz et al, 'Multilateral Benefit-sharing from Digital Sequence Information will Support both Science and Biodiversity Conservation' (2022) *NatCommun* 1086; C Lawson, F Humphries and M Rourke, 'The Future of Information under the CBD, Nagoya Protocol, Plant Treaty, and PIP Framework' (2019) 22 *JWIP* 103; M Bagley, "'Just" Sharing: The Virtues of Digital Sequence Information Benefit-Sharing for the Common Good' (2022) 63(1) *HarvIntnlLJ* 1; Hampton (n 138).

¹⁸⁶ eg, see C Lawson and M Rourke, 'Digital Sequence Information as a Marine Genetic Resource under the Proposed UNCLOS Legally Binding Instrument' (2020) 122 *MarPoly* 103878; M Rourke, M Eccleston-Turner and S Switzer, 'Sovereignty, Sanctions, and Data Sharing under International Law' (2022) 375(6582) *Science* 724.

¹⁸⁷ Hampton (n 138).
¹⁸⁸ UN Convention on Biological Diversity, 'Digital Sequence Information on Genetic Resources' (18 December 2022) UN Doc CBD/COP/15/L.30. This decision is reflected in a decision of the Nagoya Protocol's Meeting of the Parties (19 December) UN Doc CBD/NP/MOP/4/L.13.
¹⁸⁹ CBD/COP/15/L.30, *ibid*, para 3 (emphasis added).
¹⁹⁰ *ibid*, para 4.

was also recognized that ‘tracking and tracing of all digital sequence information on genetic resources is not practical’.¹⁹¹ 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.¹⁹² Details of the mechanism and the fund are to be developed by the next meeting of the COP but it was recognized that a multilateral approach (albeit one with potential exceptions)¹⁹³ 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 of the rights of Indigenous peoples and local communities, including with respect to the traditional knowledge associated with genetic resources that they hold.¹⁹⁴ It remains to be seen, however, what degree of delinkage will be opted for by the Parties to the CBD.

Drawing on the lessons of the PIP Framework, and analysis of the problems inherent in the application of the transactional ABS mechanism to public health, the more fundamental form of delinkage discussed above is called for. 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 obtain 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, there should be awareness of the power dynamics inherent in such a decoupled solution. Use of the term ‘access’ in this sense might result in being beholden to a paradigm in which the Global North dominates research and development. Accordingly, in designing any such system, there should be awareness of the power dynamics at play, and focus, ‘on the actual realisation of equity and fairness ... rather than on tokenistic “compliance”’.¹⁹⁵

It is essential to get a system for the equitable distribution of medical countermeasures right first. This is so that LMICs are assured that their pandemic needs will be met and that 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’, recognizing that the agency of beneficiaries is a key but often

¹⁹¹ *ibid.*, para 5.

¹⁹² *ibid.*, para 16.

¹⁹³ *ibid.*, para 6.

¹⁹⁴ *ibid.*, para 9.

¹⁹⁵ See discussion in S Switzer et al., ‘What Does the 2022 UN Biodiversity Summit Outcome on Digital Sequence Information Mean for the Ocean and Ocean Research? (Part 2)’ (One Ocean Hub, 26 April 2023) <<https://oneoceanhub.org/what-does-the-2022-un-biodiversity-summit-outcome-on-digital-sequence-information-mean-for-the-ocean-and-ocean-research-part-2/>>.

absent aspect of the principle of benefit-sharing.¹⁹⁶ The needs of the most vulnerable must be met in a spirit of partnership (and solidarity),¹⁹⁷ recognizing 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'.¹⁹⁸

Funding for such a system could come from a range of sources, including via 'taxes, levies, or tiered approaches that feed a multilateral fund'.¹⁹⁹ 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 emphasized is that the pharmaceutical industry would not get a free ride from such a system. Instead, what is proposed here is something akin to a permanent COVAX,²⁰⁰ but in a significant change to the COVAX

¹⁹⁶ See Morgera, 'Fair and Equitable Benefit-Sharing in a New International Instrument on Marine Biodiversity: A Principled Approach towards Partnership Building?' (n 184). 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 EJIL 353. Drawing on M Mancisidor, 'Is There Such a Thing as a Human Right to Science in International Law?' (2015) 4(1) ESIL Reflections 1, 2, 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'.

¹⁹⁷ On the links between benefit-sharing and interstate 'financial and technological solidarity obligations', see Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' *ibid.*, 374.

¹⁹⁸ E Tsioumani, 'Beyond Access and Benefit-Sharing: Lessons from the Law and Governance of Agricultural Biodiversity' (2018) 21 JWIP 106.

¹⁹⁹ Laird et al (n 132). See also the UN 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) <<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/>>. While heavily bracketed, the text of Annex III 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 utilization 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 188), they nonetheless exemplify the support among some Parties for such the introduction of fees such as a levy resulting from the utilization of DSI.

²⁰⁰ On the need for a permanent COVAX, see discussion in M Eccleston-Turner, 'Policy Brief: Assessing the Viability of Access and Benefit-Sharing Models of Equitable Distribution of Vaccines in International Law' (The Pandemic and Beyond, 2022) <https://pandemicandbeyond.exeter.ac.uk/wp-content/uploads/2022/01/VaccineDistribution_E-Turner_PolicyBrief_Jan22.pdf>.

mechanism, it would not treat ‘IP [intellectual property] exclusivity as sacrosanct’²⁰¹ nor be based on charity,²⁰² as is the case with COVAX.²⁰³

One element of the PIP Framework worth replicating in some form or other is the subscription payment (‘Partnership Contribution’) made by pharmaceutical companies that subsidizes 50 per cent of the ongoing running costs of the global network of WHO-affiliated influenza laboratories.²⁰⁴ 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 transfer²⁰⁵ 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 manufacturers²⁰⁶ 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 neocolonial) 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’.²⁰⁷ 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. Intellectual property 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.²⁰⁸ However, the Treaty is the place to start the conversation on delinkage and, moreover, introduce new

²⁰¹ Thambisetty et al (n 33).

²⁰² For a discussion on the problems inherent in a charitable orientation of the disbursement of medical countermeasures and its potential to undermine equity, see NA Evaborhene et al, ‘The WHO Pandemic Treaty: Where Are We on Our Scepticism?’ (2023) 8(6) *BMJ Glob Health* e012636.

²⁰³ A de Bengy Puyvallée and K Tagmatarchi Storeng, ‘COVAX, Vaccine Donations and the Politics of Global Vaccine Inequity’ (2022) 18 *Glob Health* 26.

²⁰⁴ PIP Framework (n 19) art 6.14.3.

²⁰⁵ Eccleston-Turner (n 200).

²⁰⁶ *ibid*.

²⁰⁷ Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’ (n 196).

²⁰⁸ 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 *Int Environ Agreem: Politics Law Econ* 557.

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 movement away from its conceptualization as a form of commutative justice (where one must give to receive) to one premised upon other forms of justice such as distributive justice, procedural justice and, by extension, solidarity.²⁰⁹ 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 are used to achieve equity support, as opposed to undermine solidarity.

²⁰⁹ C Wenham, R Reisdorf and S Asthana, 'Pandemic Treaty: A Chance to Level up on Equity' (2022) *BMJ* o1279.