Bugs Need Drugs: A Critical Analysis of the TRIPS Protocol's Effects on Drug Accessibility in the Global South

Amelia Duggan
Simon Fraser University

Introduction

In the wake of the intensifying focus on global justice in the international arena, one of the central debates among scholars of global political economy (GPE) concerns the ways in which international trade should be regulated. While liberal economic theorists promulgate the inherent economic benefits embedded within the regulatory framework of the World Trade Organization (WTO), critical theorists argue that these so-called benefits serve to replicate the asymmetrical power relations between OECD[1] countries and the Others. The struggle to achieve an acceptable balance is no more sharply pronounced than in the ongoing debate over universal affordable access to life-saving medicines versus the right to benefit from intellectual property.

The forum for this debate is centred around the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), wherein states are working to facilitate an equitable agreement that will enable the realization of goals on both sides. While the TRIPS agreement is promoted as a fair balance between the protections of intellectual property rights (IPRs) (overwhelmingly represented by states of the Global North) and the moral imperative to provide universal access to essential drugs for those unable to afford their high costs (as represented by states of the Global South), a closer examination reveals fatal contradictions within the economic logic espoused by adherents to the liberal economic tradition. Critical theorists, beginning from the premise that the practical requirements of a trade regime must be reconciled with the normative imperatives of universal human rights, emphasize the significant of these disparities and the power asymmetries propagated by international trade structures. I argue that, insofar

[1] OECD refers to the Organization for Economic Co-operation and Development. The OECD is an international economic cooperation consisting of 34 states located primarily within the global North. See http://www.oecd.org/

as the TRIPS protocol reflects the primacy of market values to the detriment of human rights imperatives, the global political economy continues to replicate and perpetuate colonial patterns of power and subjugation.

The TRIPS agreement was negotiated over the course of the Uruguay Round (1986-94) of the GATT. The foremost achievement of the Uruguay Round, however, was the creation of the WTO as an ostensibly unbiased regulatory institution to enforce GATT provisions. But as McMichael (2012, p. 136) notes, "the WTO is arguably less about trade rule consistency than about governing member states via liberalization." The WTO champions the pursuit of liberal economic principles through rigorous enforcement of a particular system of rules, including the dismantling of barriers to trade discrimination through economic nationalist (protectionist) policies. Proponents of WTO economics assert that the costs of government intervention in the market outweigh the costs of market failure. Therefore, as outgoing director-general of GATT, Peter Sutherland, declared in 1994, "Governments should interfere in the conduct of trade as little as possible." (McMichael, 2012, p. 137). The overarching goal of WTO policies is global regulatory harmonization, but, as critical theorists point out, it is unclear that free trade equates *fair* trade (Peng, 1990, p. 41).

Entering into force in 1994, the areas covered by the TRIPS protocol include copyrights, trademarks, geographical indications, industrial designs, patents, topographies of integrated circuits, and undisclosed information including trade secrets (WTO, 2001). The agreement standardizes global intellectual protections and includes a dispute settlement mechanism. Minimum standards for IP protection include "limits on states' abilities to *deny* patents to certain types of products; a period of 20 years for all patents

(many countries [had previously] granted patents for shorter periods); and limits on states' flexibility in the use of technologies or products patented in their territory" (Wade, 2003, p. 635). The special circumstances of developing countries were acknowledged by giving a deadline of 2000, or 2006 for LDCs for total compliance (Joseph, 2013, p. 430), and the deadline was further extended during the Doha round.

Liberal economists cite an intrinsic moral right to profit from one's work, the functional necessity of profit to enable further pharmaceutical research and development (R&D), and the market–driven innovation incentives as merits of TRIPS. While the validity of these arguments do carry some weight, I argue that the extent of IPRs are excessive insofar as they actually stifle innovation, unfairly limit access to essential medicines in developing countries, and unjustly skew North-South economic 'partnerships' in favour of developed states. The result of the application of the TRIPS agreement is the perpetuation of exorbitant profits for Northern-based transnational pharmaceutical corporations (TNCs) (largely based in the United States and the European Union) that disproportionately constrain poorer countries in stimulating substantive development and producing meaningful human security for their people. In effect, TRIPS contributes to the maintenance of hegemonic status-quo power relations whereby poor states are subject to economic domination by wealthy ones. Thus, the liberal economic logic espoused by actors located in highly industrialized countries can actually be understood as an innovative form of economic nationalism, as the policies pursued in the

name of neoliberalism amount to protectionism in the form of the continuous construction of structural inequality.[2]

In order to elucidate the underlying theoretical positions embedded within the negotiation and application of TRIPS, I begin by deconstructing the central arguments of enhanced IPR proponents (i.e., liberal actors). Next, I analyze how structural features of international organization, including international jurisprudence and prevailing norms, serve the collective interests of power-wielding states. Three case studies (India, Brazil, and South Africa) are then examined to highlight the ways in which disadvantaged states maximise their limited bargaining positions in order to define the contours of TRIPS protocols in relation to existing international law and its underlying norms. The culmination of this critical analysis is a characterization of the TRIPS debate as a struggle between liberal economic theory and critical theory regarding the former's conceptualization of the market as central to GPE versus the latter's human rights-based approach. This assessment aligns with McMichael's characterization of liberal globalization as threatening "to replace the social contract between state and citizen with a private contract between corporation and consumer" (McMichael, 2012, p. 141). In moving forward, we, as a global society, must decide which set of values we want to take precedence and how our international structures will reflect them operationally.

Deconstructing IP Arguments: Ingenuity, Innovation, and Development

The patent system is predicated on the intrinsic moral right to benefit from the fruits of one's own labour. According to the WTO, IPRs are "the rights given to persons

[2] For the sake of clarity I will continue to refer to this group as 'liberal' owing to the market logic they postulate, despite the economic nationalist character of their policy outcomes.

over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a period of time" (WTO, 2013). The protections that patents offer guarantee that an external actor cannot undercut these benefits by replicating a product without having incurred the costs of invention. Market logic dictates that investors must be assured that they will profit from developing a new drug before allocating significant funds towards that aim, otherwise it would be irrational and financially ruinous to do so. Referred to as the R&D argument, it is the primary basis from which the arguments for tightened IPRs are launched. The Pharmaceutical Research and Manufacturers of America (PhARMA), which represents the trade interests of US pharmaceutical research and biotechnology companies, claims that in 2009 its members invested $45.8 billion in "discovering and developing new medicines" (Flint and Payne, 2013, p. 505). While the replication of such drugs is relatively cheap and easy with generic versions being brought to market for as little as two million dollars, it can cost up to $800 million and ten to fifteen years to do the same for a new medicine (Flint and Payne, 2013, p. 505).

A basic assumption of the patent system (as an expression of the liberal tradition) is that people are not inherently altruistic, thus IPRs are necessary to foster innovation and competitiveness within the industry (Joseph, 2003, p. 432). This functional aspect of the R&D argument asserts that without guarantees of remuneration, innovation would stagnate and no one would be able to benefit from scientific progress. Ensuring access to medicines for some outweighs the prospect of zero access as a product of nonexistence in this view (Joseph, 2013, p. 432). Similarly, the incentive to innovate drives competition,

which in turn results in more efficacious medicines serving a multitude of interests, including the specialized interests of the developing world.

The international patent regime under the WTO and TRIPS reflects these values and concerns and applies them to the context of global trade. I argue, however, that the mechanisms enacted by TRIPS produce results that are antithetical to the stated goals of liberal economists and instead serve the self-interest of the dominant actors involved i.e. Western states and transnational corporations.

First, the view that product patents constitute a vital requirement for innovation has crystallized only within the past twenty years, with TRIPS as the institutional milestone (Löfgren and Williams, 2013, 56). The argument that profits from innovation will yield further innovations, which will in return diffuse to the South, is empirically unfounded (Wade, 2013, 633). Furthermore, the development strategy of liberalization combined with strong IP protection is contradictory to the development path of almost all advanced states today (Chang, 2003). Development through protectionism and imitation, Chang argues, is a prerequisite for advanced innovation and meaningful participation with the global economy. It is illogical that the historical economic development of OECD countries would differ so drastically in comparison to that of contemporary developing countries.

Second, the astronomical profits of pharmaceutical companies entail a much more substantive commitment to *genuine* R&D than what currently exists. The prevalence of 'evergreening,' whereby patent protection is extended for longer periods of time than what is normally legally permissible via incremental developments (Smith, Correa, and Oh, 2009, p. 24) is evidence of strategic (protectionist) patenting. These incremental

"innovations" usually add no therapeutic value to existing medicines and prevent them from entering the public domain, in turn preventing generic drug manufacturers from replicating them. According to market logic, competition is necessary to drive down costs yet pharmaceutical–producing countries have been given tacit consent through lack of appropriate regulation to undermine market competition. Low patentability standards that enable the practice of evergreening are exploited to strategically shut out generic competition and maintain monopolies (Correa, 2011). Furthermore, the fact that public funding, not IP protection, drives a significant level of R&D (Flint and Payne, 2013, p. 513) makes this line of reasoning problematic and belies an alternative underlying corporate agenda.

Third, in the face of expensive litigation financed by the deep pockets of a nine hundred billion dollar pharmaceutical industry (Smith, Correa, and Oh, 2009, p. 21), innovation and inventiveness is disincentivized for companies and governments of the Global South. Loose and expansive patentability thresholds serve to stifle innovation within poorer countries where the risk of litigation comes at too high a cost when the financial and legal expertise of Northern pharmaceutical companies far outweigh those of the South. The strategy of "patent clusters" is an example of this problem as companies file up to 1,300 patents in the EU in relation to a single drug, resulting in close to 700 cases of reported patent litigation (Correa, 2011). Lengthily litigation processes delay the development and release of generic drugs and places an undue economic burden on poor governments and their citizens.

The evidence presented leads to the conclusion that the liberal economic prescriptions codified in the TRIPS protocol do not contribute to their stated goals.

Pharmaceutical companies are not simply aiming to preserve essential means to maintain levels of R&D that will eventually ameliorate the lives of millions in the Global South. Conversely, their actions amount to the deliberate construction and maintenance of comparative advantage. The underlying political economy within which these companies operate paints a more accurate portrait of the motivations behind TRIPS and enhanced IPRs. The strategic environment that TNCs are facing is one that has drastically changed in the wake of ever-accelerating globalization and worldwide economic interdependence. As Smith (2011, p. 34) argues, TNCs are "in a period of rapid environmental change and intense competition, following a relatively long period of… stability in which the same business models… dominated for many decades." Countries like India and Brazil that previously employed protectionist measures in their pharmaceutical industries have succeeded in becoming major players in the global pharmaceuticals market. Similarly, their focus on the production of generic drugs has given them comparative advantage in providing affordable medicines to the emerging markets of the Global South. Combined with the fact that many lucrative "blockbuster" patents will expire in the near future, or have already expired (Löfgren and Williams, 2013, p. 89), it is clear that large pharmaceutical TNCs must adapt or suffer the deleterious effects of the changing global market, despite the structural protectionism afforded to them by TRIPS.

Exacerbating the existing problems over access to affordable pharmaceuticals is the trend among TNCs towards consolidation, including mergers and acquisitions between competing companies. In fact, the largest ten pharmaceutical companies in the world account for 50 percent of the total market (Smith et al., 2009, p. 21). The concentration of patent rights within a few very powerful corporations allows these actors

to charge monopoly rent on products that mean the difference between life and death. Joseph (2003) characterizes this as an intensifying "cartelization" problem, noting that the effects of this problem are uncompetitive and unconscionable. This process of consolidation bolsters the bargaining power of TNCs in relation to their home state (usually the US or EU), further limiting soft power of Southern states.

In their efforts to maintain economic hegemony in the Global North, pharmaceutical TNCs' levels of innovation has ground to a standstill and the pharmaceutical market is now experiencing a crisis in productivity. Despite citing innovation as a central argument to enhanced IP protection, the actions of TNCs indicate that substantive innovation is not high up on their agendas. In fact, "the number of new products has not increased whilst the overall level of resources being invested has risen dramatically" (Correa, 2011). The 'evergreening' of patents, as discussed above, reflects a shifted focus towards incremental innovations on existing medicines, regardless of the value that development may add, in efforts to extend patent protection. These developments are viewed as 'safe' R&D because the value of a product is already known, so the likelihood that a company will enjoy profits from their expenditures is much higher than it would be otherwise. Around 80 per cent of R&D spending is allocated towards these line extensions constituting a "wasteful concentration of research" (Joseph, 2003, p. 444). This reality reveals the artifice of Northern comparative advantage, as the reach of these companies would no doubt subside in the absence of TRIPS protection.

Liberal economic theory glosses over the obvious market failure in providing region-specific pharmaceutical products. Southern countries are enormously burdened by tropical diseases such as malaria and tuberculosis, and their remedies are simply not

profitable. Liberals argue that strong IP protection will encourage Indian and Brazilian pharmaceuticals to pursue the development of "Third World" diseases, and market forces in a vacuum would not produce this outcome. However, given the obvious lack of wealth within countries where these diseases are endemic, the absurdity of this argument is striking. If we truly aim to empower states to realize substantive economic development, the mechanisms informed by the theoretical framework of neoliberalism are clearly ill equipped to produce the desired results. What liberalization and privatization do for a developed economy they do not do for an underdeveloped one composed of fledgling industries, including pharmaceuticals. As Abrahamsen (2004) points out, wealthy countries include poorer ones in the global market under the auspices of empowerment and development while simultaneously excluding them from genuine development by constraining their abilities to address the specialized needs of their citizens.

The induction of TRIPS into international law can be seen as a major gain for Northern economies and especially for Western pharmaceutical companies. The promised stimulation of innovation, competitiveness, and technology transfer through market mechanisms are instead proven *not* to be functions of the TRIPS protocol. Conversely, "TRIPS and associated rights should be considered less an effective incentive structure for innovation than a strategic system of barriers to the entry of competitive alternative product brands" (Löfgren and Williams, 2013).

In the Balance: TRIPS and Human Rights Law

The application of TRIPS has generally been inconsistent with existing international conventions pertaining to universal human rights (HR). In this section I will examine the United Nations Universal Declaration of Human Rights (UDHR) and the

International Covenant on Economic, Social and Cultural Rights (ICESCR) in contrast with the TRIPS agreement and the acknowledgement of their discrepancies in the 2001 WTO Ministerial Conference in Doha, Qatar. Following this analysis I conclude that the current balance between HR and corporate interests disproportionately favours the latter at great cost to the former, however there exist means by which developing countries can utilize the system to their benefit if they are willing.

The pre-eminence of human rights in international law is codified in Articles 3 ("Everyone has the right to life, liberty and security of person") and 25(1) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including… medical care) of the UNDHR (1948). Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) firmly and unambiguously establishes these rights in two key articles: Article 12 requires states to "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health," while Article 12(2)(c) commits states to take steps towards the "prevention, treatment and control of epidemic, endemic, occupational and other diseases" (1966). Article 15(1)(c) recognizes the right to benefit from one's intellectual property, however the Treaty's governing body clarified the balance of priorities stating "it is important not to equate intellectual property rights with… human rights" (CESCR, 2006). IP rights are *not* human rights, and the two should not be conflated as such.

Yet liberal economic institutional design clearly engenders socioeconomic inequality and undue suffering from preventable disease. Neoliberal tenets expressed through binding WTO agreements have constructed a system that cracks open nascent Southern markets to exploitation by monopolistic corporate regimes. In fact, accessibility

to medicines has largely worsened in these countries since the initiation of TRIPS. In Malaysia, for example, prices have risen by 28 per cent on average every year between 1996 and 2005 (Smith et al., 2009). The TRIPS protocol unduly limits access to critical medical treatments while simultaneously filling the already overflowing coffers of Western TNCs. The fact that 90 per cent of biological components used in the production of pharmaceuticals is located in the Global South and 97 per cent of all patents are held by Northern scientists and corporations reflects the extent of inequality between the two blocs (McMichael, 2012, p. 142).

Limiting access to drugs that curtail deadly epidemics has much more profound socioeconomic costs than the "possible short term costs to society" that the WTO (2013) claims. In addition to the immediate suffering and harm caused by diseases like HIV/AIDS and malaria, broader long-term harm is caused to the very fabric of the host society. The joint United Nations Program on HIV/AIDS (UNAIDS) estimates that 95 percent of people infected with HIV/AIDS live in developing countries, in the country worst affected, South Africa, less than 50 percent of people alive now will reach the age of 60 (Barnard, 2002, p. 163). TRIPS, as a component of the liberal development strategy, cannot hope to induce economic development in societies that are decimated by this disease. If the labour force cannot survive to and through adulthood, or is unable to live life beyond the immediate demands of severe illness, they will naturally be incapable of benefitting from scientific and technological transfer. It is imperative that international agreements reflect the extreme nature of pandemics and epidemics in order to achieve a baseline level of health upon which developing countries will be able to pursue development.

In 2001 the WTO held its ministerial meeting in Doha, Qatar with the aim to address the mounting criticisms concerning access to critical medicines. On 14 November 2001 the WTO issued a "Declaration on the TRIPS agreement and public health," officially acknowledging negative effects of stringent patent laws. Three main outcomes of these negotiations reoriented the TRIPS agreement in such a way that better served the interests of poor countries, specifically in affirming their rights to "promote access to medicines" (WTO, 2001). First, Members reserve the right to "grant compulsory licenses and [have] the freedom to determine the grounds upon which such licenses are granted" (WTO, 2001). Second, the Declaration explicitly states that public health crises such as "those relating to HIV/AIDS, tuberculosis, malaria and other epidemics" constitute national emergencies that generate legitimate access to TRIPS exceptions with regard to facilitating access to cheap medicines (WTO, 2001). Lastly, the obligation to comply with the TRIPS provisions with respect to pharmaceuticals was extended from 2006 to 2016 for LDCs (WTO, 2013).

Although the structures of the WTO and TRIPS reflect the asymmetrical power relations between countries of the Global North and South, the developments at Doha marked a critical normative shift in international public policy. Whereas TRIPS deeply constrained governments of developing countries and empowered TNCs, Doha provided key flexibilities in the TRIPS provisions, creating vital space for political manoeuvring. The cases of India, Brazil, and South Africa are now briefly examined to uncover the potentialities of these flexibilities.

India: Maximizing Flexibilities for Development

India holds a unique position within the debate because of their comparative advantage in manufacturing generic drugs at a much lower cost than their patent-protected counterparts. Before TRIPS, India did not offer patents for pharmaceutical products at all (Flint and Payne, 2013, p. 510). But despite the shift in framing pharmaceuticals as a public good to a marketable one in the post-TRIPS era, India has managed to secure a significant level of access to medicines via domestic law. In its amended patents act, Section 3(d) indicates that India is not obliged to provide protection to any secondary patents after 1995 involving new chemical entities developed before 1995 "unless they differ significantly in properties with regard to efficacy" (Löfgren and Williams, 2013, p. 101). This enhanced efficacy clause prevents strategic abuse of the patent system by TNCs through the practice of evergreening. In this way, Indian pharmaceutical policy better adheres to the liberal ideal of free market competition.

India's approach provides an optimistic glimpse into the potential gains that can be achieved by maximizing flexibilities of the TRIPS provisions and the Doha Declaration. Its remarkable success in capacity-building can be attributed to the abolition of patent protection for pharmaceuticals in 1972 (Löfgren and Williams, 2013, p. 101). Between then and the introduction of TRIPS, India has become the largest producer of generic medicines in the world (Flint and Payne, 2013, p. 510) and a leader among the developing countries in promoting affordable access to medicines. However, issues associated with global market mechanisms persist as increased competition within the country has not spurred companies to develop drugs for diseases prevalent in the developing world; instead, companies continue to focus on 'global diseases' such as obesity and diabetes (Löfgren and Williams, 2013, 102). Further, while Indian companies

are able to continue production and marketing of first line antiretroviral (ARV) therapies, second-, third-, and subsequent-line therapies cannot be replicated in this way in compliance with TRIPS (Flint and Payne, 2013, p. 511). By enforcing the TRIPS protocol universally, the WTO is effectively sealing the fate of millions of infected poor people around the globe.

Brazil: Flexibilities as Bargaining Leverage

Brazil, too, has effectively utilized the flexibilities under TRIPS, albeit in a less direct way. Brazil leads the world in domestic ARV therapy production capacity and is able to supply the drugs at significantly lower cost. Similarly, this robust production capacity has translated into a market valued at US$27 billion, or one third of the Latin American market (Löfgren and Williams, 2013, p. 95). Pre-TRIPS, pharmaceuticals were not considered patentable as they are a public good, but in the wake of TRIPS, Brazil has successfully modified its strategic approach to global standardization of IPRs.

In 1997 Brazil added two key provisions to its industrial property law to facilitate fairer access to medicines produced in the Global North. First, Article 71 authorizes the use of compulsory licences in the case of national health emergencies, enabling local producers to manufacture generic drugs or to import from a third country (e.g. from Indian generics producer Cipla), despite patent protection (Wade, 2013, p. 639). This article is generally understood to be TRIPS compliant under Article 31, which provides governments with the power to suspend the rights of patent holders when companies fail to adequately produce, distribute, or make drugs available at reasonably affordable prices (WTO, 2013). The article significantly enhances the bargaining power of developing countries because despite only having issued one compulsory licence (for ARV drug

Efavirenz in 2007), Brazil has used the prospect of employing compulsory licences as a tool to negotiate deep price adjustments and fairer terms of licensing for Brazilian companies to distribute US medicines.

Brazil has been extremely successful in terms of both public and economic health. Since 1997 Brazil has supplied ARV therapies for free to its affected citizens resulting in a decrease in the infection rate by 50 percent (Joseph, 2003, p. 446). Between 1997 and 2002, prices of ARV therapies decreased by 83 per cent (Löfgren and Williams, 2013, p. 95). Its use of TRIPS flexibilities in negotiating fairer access to expensive patented medicines has curtailed a pandemic than continues to cripple many developing countries. The use of flexibilities is critical to evening out the international playing field when hegemonic states of the Global North are better equipped to protect their trade interests through international agreements. Brazil's actions have distinguished it as a state willing to capitalize on TRIPS provisions to strengthen their bargaining position relative to more powerful governments and corporations.

South Africa: Civil Society *v* Corporate and Political Pressure

South Africa (SA) is by far the most severely affected by the HIV/AIDS pandemic with more than four million adults and children living with the disease (Barnard, 2002, p.163). In an effort to confront the disease and issues surrounding access to affordable medicines, SA introduced a law in 1997 that enabled its government to utilize parallel importation measures, compels pharmacists to dispense affordable generic versions of drugs, and mandates increased transparency in drug pricing, forcing pharmaceutical companies to justify their cost (Joseph 2003, p. 447). Predictably, the

Pharmaceutical Manufacturers Association of South Africa (PMA), along with 39 transnational pharmaceutical corporations filed a suit in the High Court of South Africa.

The complainants charged that parallel importation and compulsory measures employed by SA were in violation of TRIPs (Barnard, 2002, p. 163). However, the protocol explicitly condones these tools in Article 6 and Article 31, stating that normal procedures may be waved "in the case of a national emergency or other circumstances of extreme urgency" (WTO, 2013). Moreover, the government has a constitutional responsibility to protect public health of South Africans. Clearly the position of the pharmaceutical companies is not supported by jurisprudence (national or international) and they were summarily subject to a dressing down in the court of world opinion. A global negative publicity campaign was launched against the PMA and its partners spearheaded by Medicines Sans Frontières and the TNCs quickly responded by introducing discounts for their products and donating medicines to public health agencies (Barnard, 2002, p. 163). The PMA eventually dropped the case in 2001 amidst ballooning backlash and the prospect of being compelled to reveal R&D as well as advertising and marketing expenditures (Joseph, 2003, p. 447).

It was in the context of the fallout from this case that the Doha Declaration was achieved, marking a "resounding and unambiguous legal victory" for the government of SA (Barnard, 2002, p. 164), the Global South as a whole, and proponents of critical approaches to GPE. Yet, the government failed to take advantage of this victory by enacting further provisions to ensure access to medicines for its citizens. Conversely, SA has since refrained from exercising the flexibilities achieved at Doha and actually engaged in negotiations on a free trade agreement that could include 'TRIPS-plus'

provisions[3] that would further constrain the government's efforts in assuring adequate health care for its citizens (Löfgren and Williams, 2013 p. 98).

Just as civil society and international pressure by NGOs have proven to play a powerful role in determining what is and is not acceptable, political pressure can determine how actors conduct themselves. South Africa was placed on the 301 Watch List (a precursor to trade sanctions) by the US Trade Representative for its lawful legislation (Löfgren and Williams, 2013, p. 98) and has now shied away from its obligations to its people. And South Africa is not alone, at the 5th High-Level Symposium on Global Health Diplomacy held in 2007 at the WTO in Geneva legal experts agreed that developing countries "have found that if they attempt to issue government use of compulsory licences, even on AIDS medicines, they come under intense political pressure, from the home country of the originator pharmaceutical company, and this has had a substantial dampening effect on the use of TRIPS flexibilities" (Herman, 2011).

Conclusion

The tension between market-oriented liberal economic theory and human rights-based critical theory is vividly played out in the discourses surrounding the WTO's TRIPS protocol. As highly advanced economies consolidate their economic and political power through the construction of the free trade regime, nascent Southern economies struggle to resist the entrenchment of global status-quo power relations. This debate has become central to the study of global political economy in the 21st century and will

[3] 'TRIPS-plus provisions refer to bilateral trade agreements that impose more stringent conditions in patent laws than are required by TRIPS. Developing countries are pressured by Western states to alter domestic patent law in favour of foreign companies in exchange for trade concessions and the promise or hope of foreign investment (Smith, Correa, and Oh, 2009).

invariably continue to be a source of contention in political and economic discourses in the years to come. Profit-motivated narrow self-interest continues to influence development strategy policy despite its glaring theoretical shortcomings, resulting in the construction of formidable institutional barriers to achieving substantive human security in the Global South. Insofar as the TRIPS protocol reflects the primacy of market values to the detriment of human rights imperatives, the GPE continues to replicate and perpetuate colonial patterns of power and subjugation. Neoliberalism may be deeply embedded within development discourses, but critical analysis reveals its conceptual incoherence when applied to specific contexts of development.

Industrializing countries are not, however, passive actors in this struggle. Brazil, India, and SA have strategically exploited hard-won TRIPS flexibilities enabling them to strengthen their relative bargaining positions and strike a fairer agreement. The future balance between IPRs and the human rights of those affected by critical illness seems to lie in the hands of governments of the South. As I have demonstrated, the dominant liberal economic paradigm reflected in the structure of TRIPS, while claiming to generate innovation, transfer of technology, and economic development, in fact overwhelmingly supports the trade interests of the Global North. Furthermore, advanced governments are increasingly seeking to pursue their interests through economic coercion within bilateral trade agreements (e.g. TRIPS-plus provisions).

The infamous 2013 Wikileaks publication of high-level diplomatic documents revealed that the US is pressing for even more stringent IPRs and robust corporate political powers through the Trans-Pacific Partnership negotiations document. These measures would exacerbate the already severely limited access to medicines that exists in

the developing world. On the other hand, the mass mobilization of global resources to halt the progression of the recent Ebola epidemic shows that the political will to deliver life-saving pharmaceuticals to Third World countries exists and can therefore be harnessed to realize a wider development agenda than crisis-management. It is imperative, now more than ever, that developing countries foster South–South partnerships in order to advance their interests in the global arena. In this way the GPE will reflect a more equitable and just balance and produce the substantive economic development that it seeks to stimulate.

Works Cited

Abrahamsen, Rita. (2004). The Power of Partnerships in Global Governance. *Third World Quarterly*, 25, 1453 – 1467.

Barnard, David. (2002). In the High Court of South Africa, Case No. 4138/98: The Global Politics of Access to Low-Cost AIDS Drugs in Poor Countries. *Kennedy Institute of Ethics Journal*, 12, 159 – 174.

Chang, Ha-Joon. (2003). Kicking Away the Ladder: Neoliberals Rewrite History. *Monthly Review*, 54, 10 – 16.

Correa, Carlos. (2011). Pharmaceutical Innovation, Incremental Patenting and Compulsory Licensing, Research Paper 41. *South Centre*.

Flint, Adrian and Jill Payne. (2013). Intellectual Property Rights and the Potential for Universal Access to Treatment: TRIPS, ACTA and HIV/AIDS medicine. *Third World Quarterly*, 34, 500 – 515.

Herman, Rachel Marusak. (2011). Developing countries are not making the most of TRIPS flexibilities because of political pressure. *British Medical Journal*. Retrieved from http://www.bmj.com.proxy.lib.sfu.ca/content/343/bmj.d7706

Joseph, Sarah. (2003). Pharmaceutical Corporations and Access to Drugs: The "Fourth Wave" of Corporate Human Rights Scrutiny. *Human Rights Quarterly*, 25, 425 – 452.

Löfgren, Hans and Owain David Williams ed. (2013). *The New Political Economy of Pharmaceuticals: Production, Innovation, and TRIPS in the Global South*. New York: Palgrave-Macmillan.

McMichael, Philip. (2012). *Development and Social Change: A Global Perspective*. SAGE: Thousand Oaks.

Peng, Martin Khor Kok. (1990). The Uruguay Round as Battleground: National Sovereignty versus TNC World Power. In *The Uruguay Round and Third World Sovereignty* (pp. 36-43). Penang: Malaysia.

Smith, B. D. (2011). *The Future of Pharma: Evolutionary Threats and Opportunities*. Farnham: Ashgate.

Smith, Richard D., Carlos Correa, and Cecilia Oh. (2009). Trade, TRIPS, and Pharmaceuticals. *The Lancet*, 373, 684 – 691.

UN Committee on Economic, Social and Cultural Rights (CESCR). (2006).General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1(c) of the Covenant). Retrieved from http://www.refworld.org/docid/441543594.html

United Nations. (1948). *The Universal Declaration of Human Rights*. Retrieved from http://www.un.org/en/documents/udhr/index.shtml

United Nations. (1966). *International Covenant on Economic, Social and Cultural Rights*. Retrieved from http://www.un-documents.net/icescr.htm

Wade, Robert Hunter. (2003). What Strategies Are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of 'Development Space'. *Review of International Political Economy*, 10, 621 – 644.

Wikileaks. (2013). *Secret Trans-Pacific Partnership Agreement*. Retrieved from http://wikileaks.org/tpp/

World Trade Organization. (2001). *Doha WTO Ministerial 2001: Ministerial Declaration*. Retrieved from http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

World Trade Organization. (2013). *TRIPS [Trade-Related Aspects of Intellectual Property Rights]*. Retrieved from http://www.wto.org/english/tratop_e/trips_e/trips_e.htm