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**South Africa's influence in multilateral organisations:
A case study of the proposal for a TRIPS waiver at the WTO**

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A mini dissertation submitted in partial fulfilment of the requirements of the degree
Master of Arts (Diplomatic Studies)

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DECLARATION OF ORIGINALITY

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SIGNATURE

A handwritten signature in black ink, appearing to read 'Mpe Nthabiseng Malefane', written in a cursive style.

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Firstly, I would like to express my heartfelt gratitude to my supervisor Mr Anthony Bizos, who pointed me in the right direction during the times I was lost, particularly, for stepping up and guiding me when I was in danger of not completing this study.

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ABSTRACT

The COVID-19 pandemic occurred at a time that multilateral cooperation was confronted with legitimacy, accountability, and representation deficits. It was in this environment that South Africa and India presented a proposal for a waiver at the World Trade Organisation (WTO), on the Trade Related Aspects of Intellectual Property Rights (TRIPS) provisions with regards to COVID-19 vaccines, diagnostics, and therapeutics. The reaction of the various global key players to the proposal was a further indication of the deficits in the system. This study explores the question of “is South Africa, as an emerging power, influential in the system of global governance?” The joint proposal that South Africa and India put forward at the WTO is used as a case study. The attributes of emerging powers and their role in multilateral organisations have been considered as indicative of South Africa’s status. A description of the key concepts was incorporated to provide the context for analysis of South Africa’s subsequent behaviour at the WTO. The reactions of the WTO member states and regional groups which opposed the waiver proposal, notably the European Union, indicates that the system of global governance is still largely influenced by developed countries. The final Decision was a compromise that carefully balanced the interests of all WTO member states. It was, however, significant that the WTO managed to reach consensus and adopt a Decision that binds all of its member states.

LIST OF ACRONYMS

ACP	African, Caribbean and Pacific States
ACT	Access to COVID-19 Tools
AFRO	World Health Organisation Regional Office for Africa
AIDS	Acquired Immunodeficiency Syndrome
APAs	Advance Purchase Agreements
APRM	African Peer Review Mechanism
AU	African Union
BRICS	Brazil, Russia, India, China, South Africa
CBDR	Common but differentiated responsibilities
CDC	Centre for Disease Control
CEPI	Coalition for Epidemic Preparedness Innovations
COVAX	COVID-19 Vaccines Global Access
DDA	Doha Development Agenda
DDR	Doha Development Round
DIRCO	Department of International Relations and Cooperation
EU	European Union
GATT	General Agreement on Tariffs and Trade
GAVI	Global Alliance for Vaccines and Immunisations
GDP	Gross Domestic Product
HIV	Human Immunodeficiency Virus
IBSA	India, Brazil, South Africa
IPR	Intellectual Property Rights
NEPAD	New Partnership for Africa's Development
OAU	Organisation of African Unity
PPE	Personal Protective Equipment
TRIPS	Trade Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Economic Social and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

US	United States
WEOG	Western, European, and Others Group
WHO	World Health Organisation
WTO	World Trade Organisation

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- A Interview questions
- B Transcript of interview with Mr Q
- C Transcript of interview with Mr X

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CHAPTER 1

INTRODUCTION

1.1 Background

The condemnation of apartheid was a global stance that unified governments in the multilateral arena. It was therefore incumbent on South Africa post-1994 to embrace multilateralism as one of the main pillars of its foreign policy. Upon re-joining the global community, multilateral institutions provided South Africa the opportunity to be active in the system of global governance and to embrace the potential of these institutions. South Africa quickly rose to prominence in multilateral meetings and was able to lobby for debt relief for heavily indebted countries, it played a crucial role in the process of halting the supply of conflict diamonds, and successfully petitioned the World Trade Organisation (WTO) to relax patent restrictions on HIV/AIDS treatments (Spies, 2010).

Over the course of the last decade, multilateral cooperation's legitimacy, accountability, and representation has become deficient. It has started facing an efficiency crisis due to the limited implementation of core agreements. For instance, the failure to make progress on the reform of the United Nations (UN) and the deadlock of the WTO Doha Development Round (DDR) have negatively impacted on the effectiveness of multilateral institutions (Telò, 2020). The COVID-19 pandemic therefore arrived at a time when the multilateral system was at its weakest. The health, economic, and trade crises that occurred because of the pandemic have acted as both a magnifier and catalyst of the challenges in the multilateral system. The decline of the current global order and the move towards new forms of cooperation seems inevitable (Rodrigues, 2020).

The evolving global environment, characterised by the retreat of the United States (US) in multilateral organisations and the rise of China, has presented opportunities for South Africa to be more assertive and to join new alliances. The diminishing legitimacy of multilateral organisations has also created challenges which have had an impact on South Africa's standing in the global arena. Its status is influenced by several factors. The first is geographical factors, which determines regional alliances and comparative advantage. In this regard, Southern Africa, Africa, and countries of

the South have become important in shaping South Africa's role in the system of global governance. The second is economic clout, in so far as it relates to the country's aspirations and status as a so-called developing, emerging, or middle-income country. This has allowed South Africa to become the only African country in the G20 and to form alliances with other emerging powers such as in the BRICS formation (Brazil, Russia, India, China, and South Africa). South Africa's influence in these groups has resulted in the admission of the African Union (AU) into the G20 and the expansion of the BRICS formation. The BRICS grouping has had a significant impact on the reimagining of the international financial system and the structural elements of global economics, creating alternatives to traditional Bretton Woods Institutions (the International Monetary Fund and World Bank) and their rules for commercial and financial relations (Tella, 2017).

The stated position of the South African Government, is that foreign policy and its approach to diplomacy is grounded in the founding values enshrined in its Constitution: "human dignity, the achievement of equality, and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution and the rule of law; and democracy" (South Africa, 1996). Furthermore, the centrality of multilateralism and the rules-based international order is fundamental to South Africa's foreign policy. As a result, South Africa has been in favour of the reform of the system of global governance, including the UN and its organisations, as well as the Bretton Woods Institutions, to make them more "effective, legitimate, and responsive to the needs of developing countries." South Africa's economic diplomacy prioritises the promotion of a fair and equitable rules-based international trade system that supports poor countries' development ambitions (South Africa, 2011).

South Africa's joint proposal with India at the WTO for a waiver on the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement, and its existing flexibilities with respect to intellectual property protections for COVID-19-related medical technologies, was therefore based on the country's fundamental foreign policy principles and the desire to influence the multilateral trade system as an emerging power.

1.2 South Africa in the WTO

After the first democratic elections in 1994, South Africa joined the “Uruguay Round of the General Agreement on Tariffs and Trade” and became an active contributor to the ongoing discussions that resulted in the establishment of the WTO. Prior to 1994, South Africa had adopted positions that were aligned with developed countries. It struggled to distance itself from these positions and was chosen as one of six "Friends of the Chair" at the DDR, which was the WTO's Fourth Ministerial Conference held in 2001, based on its progressive stance. Subsequently, South Africa's shift away from positions taken by developed countries became evident during the WTO's Fifth Ministerial Conference in Cancun in 2003. While it continued to try to broker deals and form alliances within the Organisation, it began to support views that were different to those of the "Quad" (Canada, the EU, Japan, and the US) (Jordaan, 2012).

The TRIPS provisions and public health were among the first issues on which South Africa took a lead at the WTO (Ismail, 2012). Prior to the DDR, South Africa had already advocated that structural impediments to development should be removed. According to Ismail (2012), South Africa recognised the importance of a rules-based system and pushed for this as a basic requirement and starting point for negotiations. It ensured that the “Doha Development Agenda” included pledges in support of developing country development goals, particularly on public health. South Africa was prominent in the push to include intellectual property rights and TRIPS flexibilities on the agenda of the DDR. This resulted in the “Doha Declaration on the TRIPS Agreement and Public Health.” The Declaration addressed some of the issues in the TRIPS agreement which has been contentious since its adoption at the conclusion of the Uruguay Round of trade negotiations. Policymakers in both developed and developing countries have debated on measures to strike a balance between protecting public health and guarding the interests of pharmaceutical companies.

1.3 TRIPS agreement

The first multilateral agreement that governed trade between countries was concluded in 1947 and is known as the General Agreement on Tariffs and Trade (GATT). It had 128 members by the time it was replaced by the WTO in 1994. The preamble of the

GATT stated that its goal was the "substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis" (World Trade Organisation). The GATT conducted eight rounds of negotiations to address diverse trade concerns and to settle international trade disputes, acting as a de facto international organisation. The growing consensus was that the GATT would serve member states better if it became a formal international organisation. To achieve this, the Uruguay Round of negotiations was initiated in 1986 and concluded on 15 December 1993, having lasted almost eight years with 124 countries agreeing to enforceable international trade regulations. As a result, the Marrakesh Agreement was signed on 15 April 1994 and came into force on 1 January 1995, formally establishing the WTO (World Trade Organisation).

In the course of the Uruguay Round of negotiations, developed countries, particularly the US, Japan, and the European Union (EU) member states, proposed an additional negotiating stream to focus on "trade-related aspects of intellectual property rights" which became the basis of the TRIPS agreement (Thrasher *et al.*, 2022). The final text of the TRIPS agreement was consequently adopted as annexure 1C of the Marrakesh Agreement (World Trade Organisation). The aim of the agreement was to protect against the potential loss of profits through duplication or violation of patents in countries considered to have inadequate legal protections. Initially, it seemed that incentives for developing countries to adhere to the agreement would exist and investors provided assurances that the protection of intellectual property rights would promote technology transfer and boost foreign direct investment (Maskus, 2000).

The demand for a strong and internationally 'harmonised' intellectual property rights (IPR) regime was thus the motivation behind the creation of the TRIPS agreement, which is considered the most ambitious IPR agreement and the first multilateral agreement to elaborate criteria for patenting pharmaceutical products. The goal of the TRIPS agreement was to facilitate international trade whilst ensuring adequate IPR protection. It granted patent holders rights to restrict third parties from manufacturing, promoting, using, selling, or importing any product without their permission. During the negotiations, developing countries had opposed some of the proposals because the restrictions disproportionately affected them.

Since then, a variety of measures have been adopted to mitigate against the agreement's negative impact on developing countries. These concessions are referred to as TRIPS flexibilities because they give allowance that the strict TRIPS obligations be marginally relaxed (Chimpango, 2021). Article 8 of the TRIPS agreement, for example, provides that state parties may institute measures in the interest of public health on condition that they comply with the agreement. The Doha Declaration also affirms the flexibilities of TRIPS for access to essential medicines. However, the implementation of these measures necessitates a complex balance between a country's international obligations and its domestic realities (Chaudhary & Chaudhary, 2021).

To date, the TRIPS agreement continues to be the most exhaustive multilateral agreement that regulates intellectual property. It has made intellectual property protection a crucial component of the global trading system and one of the three pillars of the WTO. The official recognition of the TRIPS agreement addressed the concern that the ineffective implementation of protection measures for intellectual property rights was unfairly disadvantaging those who held the rights in respect of the rewards of their innovation and also jeopardised their legitimate commercial interests (Otten & Wager, 1996). For the first time, the TRIPS agreement stipulated minimum requirements for the protection and enforcement of intellectual property rights. It mainly recognised the importance of the link between intellectual property and trade and acknowledged the need for a stable intellectual property system.

The TRIPS agreement remains one of the most controversial international agreements to have come into force. The negotiations were extremely contentious, and the opinions of developed and developing countries on the structure of intellectual property protection and enforcement are still incompatible to this day. Developing and least developed countries continue to express dissatisfaction with how the agreement has been interpreted and how it is being implemented. Furthermore, they are unhappy with developed countries' continuing requests for provisions that go beyond what was agreed upon during the negotiations (Haakonsson & Richey, 2007).

Furthermore, developing countries argue that the TRIPS agreement has guaranteed pharmaceutical firms' global monopolies on essential goods. They argue that this has

limited access to medicines for developing and least developed countries and has consequently raised the cost of prescription drugs. On the other hand, developed countries argue that, to address these concerns, the “general principles” of the agreement (Article 8) were meant to ensure that the agreement would not violate member states’ rights to protect public health (World Trade Organisation). Developed countries also argue that the agreement includes flexibility provisions which promote development, and which protect the public interest (Peter, 2017). However, despite the inclusion of flexibilities, the provisions of the TRIPS agreement have been a burden on developing countries since its inception as these flexibilities do not go far enough. Developing and least developed countries have battled to meet the extended deadlines given to enact these flexibilities into their domestic legislation and become compliant in terms of intellectual property legislation that complies with TRIPS (Haakonsson & Richey, 2007).

The global intellectual property protection framework, which is the core of the agreement, has also had a major impact on access to medicines for developing and least developed countries, and particularly on the commercialisation of pharmaceutical products. These challenges include the restriction of the local production of generic medicines through reverse engineering of existing patented drugs. This has resulted in high import prices of medical products due to restrictions on manufacturing cheaper therapeutic products using elapsed patent technologies or under licensing agreements which has further delayed the production of generic medicines (Motari *et al.*, 2021).

The 2001 Doha Declaration on the TRIPS Agreement and Public Health was aimed at framing health policy and the intellectual property regime. The subsequent Decision of 30 August 2003, on the application of paragraph six, made provision for a waiver on export limitations. Additionally, the TRIPS agreement amendment of 6 December 2005 formalised the provision for developing countries’ access to generic medications for HIV/AIDS, malaria, and tuberculosis. The revisions refined the regulation of the intellectual property system's framework for health policy. The Doha Declaration specified that compulsory regulatory guidelines on licenses need to exist to import goods from member states with production capability or to start production for the domestic market. The Africa Group in the WTO, led by South Africa, raised concerns with respect to the issue of importing under obligatory licenses. The WTO system has

continued to have difficulties in this area, despite the amendment. The TRIPS agreement should have been an instrument to bolster national and international efforts in addressing public health challenges in developing and least developed countries but the limited flexibility of its provisions has prevented this (Haakonsson & Richey, 2007).

The COVID-19 pandemic predictably re-ignited the deliberations on the flexibility of the TRIPS agreement and access to patents. When the pandemic struck in 2020, governments in developed countries exploited domestic legislation to acquire priority access to vaccines through Advance Purchase Agreements (APA) with vaccine manufacturers. These contracts served the best interests of developed countries but, given the rapid spread of the COVID-19 virus throughout the world, they also constituted a risk. The subsequent hoarding of vaccines undermined international cooperation. It demonstrated that the relationship between the intellectual property rights regime and the TRIPS agreement is based on protection and financial profits in favour of right holders. International law was therefore used as a tool to restrict universal and equitable access to COVID-19 vaccines, diagnostics, and therapeutics (Phelan *et al.*, 2020).

1.4 Conceptual framework

In the post-Cold War era, the issue of power as it relates to a state's influence in the global system of governance has been contentious (Fonseca *et al.*, 2016). Another characteristic of the post-Cold War era is the strengthening of existing multilateral organisations, as well as the reaffirming of alliances. The countries that were newly integrated into the world economy were labelled as emerging powers (Ikenberry, 2010). According to Fonseca *et al.* (2016), in the categorisation framework of the Bretton Woods Institutions, the words "developing" and "emerging" had similar connotations, despite their semantic differences. As a result, the concept of an emerging power in Wall Street language was initially used interchangeably with the term "developing country". The distinction between the two has since gained momentum in the context of political and economic change (Fonseca *et al.*, 2016).

Hart and Jones (2010) state that these emerging powers have increasingly used their status to question the validity of the post-World War II order, which they were never fully absorbed into, and to advocate for more pluralist positions in multilateral negotiations. In this sense, their strategic views are influenced by their awareness of having been on the outside of the post-World War II order. According to the authors, the categorisation of emerging powers assumes that these powers possess certain shared characteristics. For example, the increasing contribution of these countries to global Gross Domestic Product (GDP) growth is considered to have the potential to change the global economic and political landscape of the twenty-first century. These countries all have strong military capabilities and political influence, a reasonable degree of internal coherence, and the capacity to contribute to the formation of a new international order, whilst increasing their own economic strength. In addition, emerging powers wish to gain more status and play a more prominent role in global affairs. These emerging powers have also been more vocal and influential in international institutions such as the WTO and the International Monetary Fund (Hart & Jones, 2010).

A growing body of literature (Heine, 2010; Vercauteren, 2015; Stephen, 2017) has referred to the concept of emerging powers in terms of their behaviour in the global system of governance. The apparent trend for emerging powers has been the desire to conquer markets rather than territories, resulting in the growing importance of economic influence (Vercauteren, 2015). This study contends that South Africa is an emerging power and uses the concept of emerging power to explore South Africa's role and influence at the WTO as it relates to the joint proposal with India for a TRIPS waiver.

1.5 Research question and objectives

The COVID-19 pandemic arrived when the multilateral trade system was already being hampered by global dynamics. The withdrawal of the US from some multilateral agreements such as the United Nations Framework Convention on Climate Change (UNFCCC) and organisations such as the United Nations Economic Social and Cultural Organisation (UNESCO) had raised concerns about the effectiveness of the system of global governance. The pandemic therefore acted as a magnifier of the

apparent shift away from collective agreements by developed countries. The beginning of the pandemic saw a move to nationalism as illustrated by countries such as Japan which made money available for its production companies to move out of China and the EU and restricted the export of some medical equipment. The financing and ownership of intellectual property rights to the development and manufacture of COVID-19 vaccines and other related medical products was used as rationale by developed countries to secure excess amounts for their populations and to restrict production. The move to focus inward was a clear demonstration of the trend towards a nationalist approach by the developed world, notably the US and the EU. Emerging countries such as South Africa and India were therefore confronted with the reality that the multilateral trading system is not equitable. The South Africa and India joint proposal to the WTO for a waiver from the intellectual property protections for COVID-19 related medical technologies of the TRIPS agreement and its existing flexibilities was a contentious move which was seen as having been motivated by the necessity to manufacture these products in developing countries and to mitigate against their dependence on developed countries. Given the implementation challenges at the WTO, as well as the resistance of major global players, the level of support the proposal garnered can provide an indication of the influence and status of emerging powers in global governance institutions, notably the WTO.

1.5.1 Research objectives

The aim of this study is to explore the influence of South Africa in multilateral organisations, particularly the WTO. This will be achieved by analysing the role and characteristics of South Africa that led to the joint proposal with India for a TRIPS waiver and the significance of the challenges which the proposal encountered.

1.5.2 Research question

This study focuses on the proposal by South Africa and India for a TRIPS waiver at the WTO as a case study, with a view to explore South Africa's influence as an emerging power in multilateral organisations. The research problem can be summarised with the following research question:

“Is South Africa, as an emerging power, influential in multilateral organisations?”

To answer this question, the following subsidiary questions are posed:

- What attributes make South Africa an emerging power?
- Which perceived roles of an emerging power motivated South Africa's proposal for a TRIPS waiver?
- What does the outcome of the proposal for a TRIPS waiver indicate about South Africa's influence at the WTO?

1.5.3 Research methodology

This study is a qualitative analysis of South Africa's approach to multilateral diplomacy which was carried out by analysing the TRIPS waiver proposal as a case study. It focuses on South Africa's international status as an emerging power. This study integrates, inter alia, the researcher's perception as an official of the Department of International Relations and Cooperation (DIRCO), Branch: Global Governance and Continental Agenda. It also consists of a desktop analysis of documents in the public domain, using both primary and secondary sources.

This study comprises of an exploration of South Africa's position at the WTO. The researcher is aware that there are no recent published policy documents on the positions adopted by South Africa at the WTO. This study augmented the available material by interviewing senior government officials who have represented South Africa at the WTO. The two interviewees were selected because of their direct role in the South Africa and India proposal for a TRIPS waiver.

1.6 Ethical considerations

In conducting this study, the following ethical considerations were applied:

- a) The research made use of government documents that are in the public domain. As a government official, the researcher had access to classified documentation, however this was not used. The research fully complied with the Government's

Minimum Information and Security Standards regulations that guide the use and protection of classified information.

- b) The research was conducted whilst working fulltime at DIRCO. As a senior manager, the researcher attended meetings that discussed both the proposal for a TRIPS waiver and other foreign policy considerations. The information from these closed meetings was not used.
- c) Both interviewees participated willingly and were provided with the University of Pretoria, Faculty of Humanities Ethics Committee's consent forms entailing an introduction, background, and the objectives of the research as well as individual informed consent forms to sign. The participants were interviewed in their official capacity and on a voluntary basis. They will remain anonymous in this study. Pseudonyms have been used for direct quotations from the interviews and were included where they add value to the findings.

1.7 Limitations of the research

This study focuses on the joint proposal by South Africa and India to the WTO for a TRIPS waiver as a case study. It excludes other activities that South Africa is involved in at the WTO as well as its role in other multilateral organisations. This has confined the possible examination of South Africa's overall influence in the system of global governance.

This study is limited in focus and is concentrated on the period January 2020 to June 2022. The end of the pandemic may have had an influence on the relevance of the proposal. At the time of concluding this study, the Ministerial Conference, which is the highest decision-making body of the WTO, had adopted a Decision related to vaccines only. The debates on the TRIPS flexibilities and access to medicines are ongoing.

The cluster approach of national government denotes that the idea to submit the proposal would have been approved by the relevant clusters before being presented to Cabinet. The research has not considered the inputs of the Department of Health, which is the custodian of the Medicines and Related Substances Control Act and the Department of Science and Innovation, which is responsible for research and

development. These Departments would have had a role in the rationale to submit the proposal.

This study was conducted in a working environment that deals directly with some aspects of the topic. This could have influenced the researcher's perspective. Research done within a related working environment could result in limitations on objectivity (Costly *et al.*, 2010). The researcher limited the study to documents that are in the public domain and has not used any information or views expressed in the working environment.

1.8 Structure of the research

This mini dissertation consists of four chapters and is structured in a conventional format including this introductory chapter, an analytical framework, a case study narrative on the proposal for a TRIPS waiver, and a final chapter containing analysis and findings. Following this introductory chapter, which sets out the background, research problem, methodology, ethical considerations, and limitations, chapter two provides an analytical framework for policy analysis focusing on the role of South Africa as an emerging power. Chapter three is a narrative of the sequence of events as related to the South Africa and India proposal for a TRIPS waiver and includes the views of various stakeholders, as well as other international developments that occurred during the pandemic which had an impact on the distribution of vaccines. Chapter four explores South Africa's role and influence at the WTO as an emerging power, incorporating primary data obtained and makes a pronouncement on the findings, it includes a conclusion to the study.

CHAPTER 2

ANALYTICAL FRAMEWORK

2.1 Introduction

Chapter one provided a contextual overview and background for this study. This second chapter comprises the analytical framework that will be used to assess how South Africa's international status influences its foreign policy decision making. As such, this analytical framework provides descriptive details of key concepts used in this study to systematically examine the research question: "Is South Africa, as an emerging power, influential in multilateral organisations?"

This study considers South Africa's international status and its impact on foreign policy decision making and outcomes, particularly in multilateral organisations. This is assessed by analysing South Africa's behaviour at the WTO. The South Africa and India joint proposal at the WTO for a waiver of some obligations of the TRIPS agreement has been used as a case study. The joint proposal demonstrates South Africa's and India's desire to push for equitable access to COVID-19 treatments as global common goods. The dynamics that arose during the negotiations on the waiver proposal indicate the current state of global governance as characterised by competition and uncertainty. Furthermore, the outcome of the negotiation indicates the influence of both South Africa and India at the WTO.

This study contends that the positions taken by developed country member states of the WTO on the proposal for a waiver were not based on international trade and intellectual property law considerations but, rather, on their desire to use their status to preserve their privileged access to vaccines. Similarly, the support by some member states of the WTO for the proposal indicates the influence of both South Africa and India in the global system of governance. Foreign policy analysis is used to evaluate the impact of South Africa's status in challenging the rules of the game. This study argues that the categorisation of South Africa and India as "emerging powers" has shaped their stance on key issues in the system of global governance. It is further argued that South Africa and India have demonstrated assertiveness and a desire to change the rules in the system of global governance, in particular the WTO. The joint

proposal by South Africa and India for a TRIPS waiver was therefore made in the context of two emerging powers using their status to promote their national interest and to fight for the concerns of the developing world.

2.2 Foreign policy analysis

According to Kaarbo (2003), foreign policy analysis is characterised by research which aims to bridge the gap between domestic policy making and international relations. One of the notable aspects of recent studies is that if a researcher wishes to look into what influences foreign policy across time, geography, and issues, they should consider the architecture of the international system, inter-state relationships, and the influence of group dynamics in intergovernmental organisations (Kaarbo, 2003). Furthermore, Pijović (2020) says that the objectives of a state's foreign policy are based on ideological, strategic, and economic interests. A state's "core" foreign policy is premised on preserving and/or strengthening ties with other states with which it believes it shares cultural, historical, normative, and socio-political similarities. This denotes a common approach to the ideals and values considered to be the foundation of sovereignty and national interest. The pursuit of common priorities and the goal of influencing the international environment is also considered one of the "core" foreign policy considerations. These objectives are sustained because they are also supported by structural elements, such as strong bilateral and multilateral relationships which preserve the relationship beyond a specific issue (Pijović, 2020).

This is supported by Alden and Aran (2016) who have stated that the field of foreign policy analysis also highlights the constantly evolving conditions of how states interact with one another in an unpredictable international system. Foreign policymakers navigate the increasingly blurred boundaries between domestic policies and external factors using tools as diverse as negotiations, advocacy, and punitive actions to generate policies that advance their interests. Their decisions are also shaped by history and institutional practices (Alden & Aran, 2016). Foreign policy analysis can also be distinguished by its actor-specific perspective, which is founded on the assertion that everything that happens between and across nations is driven by individual or collective human decision makers (Hudson, 2005). Accordingly, foreign policy analysis, as a subfield of international relations, examines this by concentrating

on the decision-making processes of specific players, typically states, governments, and leaders (Foyle, 2003).

This study focuses on the concepts of role conception and status in the multilateral arena and how they impact foreign policy decisions. Karim (2018) argues that the idea of “role conception” can systematically link the status-seeking attributes of states with their foreign policy agenda. A country’s role conception can therefore be achieved by certain behaviours such as being a “regional leader, a voice for developing countries, a supporter of democracy and a bridge-builder” (Karim, 2018:344). The study of role conception consequently questions the conventional wisdom that states perform a single role in the global system of governance. Role conception also separates interests from power. According to Miliband (1983), states display two basic inclinations: self-interest on the one hand, and 'national interest' on the other. Self-interest is primarily about the desire to demonstrate power. Adigbuo (2007) also states that an analysis of states’ roles in foreign policy indicates that states demonstrate two sets of attributes: primary roles and secondary roles. Primary roles can include political and security considerations, whereas secondary roles can be as a “defender, developer, protector, liberation supporter, regional leader” (Adigbuo, 2007:91). This study concurs that states have multiple roles in the global system of governance.

2.3 Role theory

International Relations theorists have used the national roles of states to explain the foreign policy positions of these states. This has led to the emergence of role theory in foreign policy analysis. Holsti (1970:245) states that role theory is based on the notion that the foreign policy behaviour of governments is determined by their national roles which includes “attitudes, decisions, responses, functions and commitments towards other states” (Holsti, 1970). This is evident in multilateral organisations where states hold positions of status. The explicit privileges and responsibilities of states are established in codified forms such as the UN Charter, which specifies roles such as the veto power for the five permanent members of the Security Council. In addition, implicit behaviours and informal practices, as well as expectations, shape the behaviour of states according to their perceived status. In both scenarios, it is possible to apply role theory to the analysis of state behaviour. Whereas foreign policy actions

do not always occur in the framework associated with a state's position because states operate in a multifaceted environment influenced by diverse bilateral and multilateral dynamics, one can still draw on the concept of status (Holsti, 1970:241). In this context, the term is used in the assessment of the international categorisation of states, particularly the classification of emerging powers, which affords South Africa and India a certain status in the international arena.

Holsti (1970:242) further says that the international system has a layered approach that reflects differences in participation in global affairs, levels of foreign commitment, military capabilities, prestige, economic strength, and technological prowess. He asserts that traditional labels such as "great power" or "middle power" do not automatically indicate the diplomatic impact of states but they do suggest a distinction of status. It is therefore logical to assume that decision makers are aware of differences in international status and influence, and that their strategies are aligned to this distinction (Holsti, 1970).

Thies and Sari (2018) define roles as positions in an organised group of any socially recognised category of actors. In developing the concept, they use the three categories of internal, external, and an overlap of both sets of attributes. These can be assigned to a state, or they can be attained by that state. They further indicate that roles may reflect a state's placement in a hierarchy with other states and may imply functions that must be performed according to the expectations of other states. In their model, they use hierarchical, functional, behavioural, and identity approaches to define state attributes. The hierarchical approach uses a combination of economic, military, social, and development indicators to determine a country's rank in the international system. The use of these quantitative indicators has several advantages, including the ability to objectively measure the strength of states and to facilitate comparisons between countries. The internal characteristics of emerging power status can be demonstrated through auxiliary roles such as being a consensus builder and a supporter of multilateralism. However, researchers differ in the choice of indicators and the level accorded to emerging powers in the power hierarchy (Thies & Sari, 2018). This study focuses on the behavioural and identity approaches to defining a state's attributes and the role South Africa plays in the international system.

2.4 Emerging powers

According to Fonseca *et al.* (2016), the concept of an emerging power was adopted in the study of international relations and incorporated without a concrete definition. They define an emerging power as a nation with a certain political conduct, such as reformist or revisionist, a state with active engagement in the international system with a set of material and ideological characteristics, and a state that displays leadership characteristics. However, a leading role by itself is insufficient to define the category; one or more of the other characteristics that indicate its significance also has to be present. The distinctiveness of this category is also typically characterised by a rejection of the domination of specific states (Fonseca *et al.*, 2016).

Scholars of International Relations and political scientists have attempted to classify states based on their type of power and have debated the definition of an emerging power. The criteria usually considered are based on military power and economic power. As a result, multiple characterisations of an emerging power exist. These states typically dominate their neighbours in terms of influence over resources and express a desire to change the power dynamics in the international system and to attain leadership positions in global governance institutions (Schirm, 2012; Schoeman, 2015; Stephen, 2017). According to Vercauteren (2015), being an emerging power permits a more influential role in international relations. The consensus is that the following criteria can be used to determine an emerging power (Vercauteren, 2015:101): “rapid GDP growth, growing per capita income, increasing debt and equity, market liquidity, and an established financial system infrastructure.” Furthermore, MacFarlane (2006) says that the concept of emerging powers assumes several attributes held by the states involved. These include challenging US hegemony, regional dominance, and aspirations for a global role. These criteria can be helpful in analysis and policy development, as they indicate specific behaviour by emerging powers. Emerging powers are usually discontented with how international politics has traditionally been organised (MacFarlane, 2006) and cooperation between emerging powers and more established countries which appear to share the same discontent with the seemingly unipolar configuration of world affairs may lay the groundwork for alliances.

Milani (2011) also asserts that a nation that questions its position within the existing order and exhibits political ambition is considered to be an emerging power. These nations have several traits in common. In addition to economic, political, and military resources, their relative capacity for regional and international influence, some degree of domestic cohesion, and the ability to carry out effective state action are considered essential. As a result, emerging powers have a relative capacity for impact, especially in the fields of culture, public development strategies, and social cohesion. These attributes may serve as models for other nations (Milani, 2011). Additionally, the category of emerging power signifies a state's acknowledgment of its capabilities and constraints. The contribution of emerging powers to global governance tends to depend on their ability to recognise their limitations and thus avoid raising expectations by taking on issues that they may not be able to address. These states face the conundrum of being both opposed to the liberal world order, promoted by developed Western countries, and having ambitions to be a part of the system (Öniş & Kutlay, 2017). Whilst having attributes of both developing and developed countries, the global governance behaviour that distinguishes them from both categories is that emerging powers also display distinct characteristics such as advocating for the reform of the international trade system (Mahrenbach, 2015).

Within the changing global landscape, which is characterised by emerging powers assuming a greater role in the system of global governance, scholars generally agree that a global power shift will result in a multipolar world order. This will allow emerging powers to assume leadership positions in global governance institutions. These emerging powers are primarily from the global South and have a variety of objectives, the most important of which is to create an equal international order. Emerging powers have the desire to establish new “norms and standards” and, by so doing, change the rules of the game. They are also expected to demonstrate their power by assuming some of the responsibilities of providing global public goods (Schoeman, 2015). On the other hand, Heine (2010:6) questions the expectation of “the responsibility of emerging powers” by asking who these emerging powers are responsible to, especially since they have been largely excluded from the system of global governance.

The debate around the level of responsibility emerging powers should carry has led to the concept of 'common but differentiated responsibilities' (CBDR) which is sometimes expanded to 'common but differentiated responsibilities and respective capabilities'. The CBDR principle originates from the basis of responsibility in international law concerning the safeguarding of the 'common heritage of mankind'. It emphasises all nations' shared responsibilities in addressing environmental, developmental, and climate challenges, while recognising that the current crises are due to historical activities undertaken by developed countries and therefore there should be a differentiation on the obligations imposed. The imposition of responsibilities should also consider differences in economic and technological capabilities (Ye, 2016). The concept was formalised in climate change negotiations but has since gained popularity in other multilateral forums, including being used by developing country representatives at the WTO.

Emerging powers have also moved from the periphery to the core of global economic activity. They have demonstrated a willingness to collaborate in international structures to advance their positions. Notably, the excellent economic performance of countries classified as emerging powers has been phenomenal. However, economic growth is not the only indicator of an emerging power's progress; their diplomatic profile also plays a role in how these states are perceived. Emerging powers are still in the early stages of development and even though domestic challenges such as high levels of poverty still overshadow solidarity in their networks, they still play an active role in the international arena (Cooper & Flermes, 2013).

Emerging powers also outdo their neighbours in terms of resources. Quantitative indicators such as population, territory, military power, and GDP are all attributes used to describe emerging powers. Furthermore, emerging powers want to alter the sharing of power in the global system of governance and want to assume leadership roles in international institutions. However, as previously indicated, the performance of emerging powers demonstrates a significant disparity between their aspirations and their capacity to achieve their objectives. In many cases, these emerging powers have been unable to achieve their objectives due to a lack of recognition of their leadership by their immediate neighbours. To succeed, their leadership must be acknowledged

by their regions because increases in power have a direct impact on their respective region (Schirm, 2012).

Emerging powers are also considered to be emerging out of the group of developing countries (Woll, 2009; Schöfer & Weinhardt, 2022) which makes them a subset of developing countries. These countries are considered to be emerging in more ways than one. They are not just evolving from being developing countries, they are also progressing in terms of their influence over international decision making. In the past, the coveted club of developed countries operated largely by disregarding the opinions and concerns of developing countries and by imposing their own interests through better coordinated positions. This meant that developing countries, including those that are now emerging powers, had power only when they could mobilise and represent the interests of other developing countries by speaking with one voice, usually using a single coordinator in negotiations. This has led to the model of negotiating in groups or coalitions. The WTO, for example, has several such groups that are primarily issue-based (Hou, 2013). The power of these states is not based on material capability but rather on their behaviour and foreign policy positions in the international system (Karim, 2018).

2.5 South Africa and India as emerging powers

States can obtain international status by joining a group that bestows a specific level of status on its members. Several such groups exist and offer “status alliances” where membership is based on common interests, thus affording the state additional clout in the community of nations. The most auspicious of these groupings are the G7, G20, United Nations Security Council (UNSC) permanent members (P5), and BRICS. Membership of these groups is not incompatible. Some countries are simultaneously members of more than one of these alliances (Volgy & Gordel, 2019). South Africa’s and India’s membership of the G20, IBSA (India, Brazil, and South Africa), and BRICS has afforded them international recognition and status.

India's voice in global affairs bears significant weight. Its development since independence as a robust democracy of more than a billion citizens, its attainment of a strong economy, its ability to be a pioneer in various fields of science and technology,

its leadership role in issues relating to global governance, its military capability, its role in UN peacekeeping operations, and many other achievements are indicative of its status as an emerging power despite demographic challenges and national socio-economic issues (Mahapatra, 2018).

South Africa's status as an emerging power is sometimes questioned when compared to its BRICS counterparts such as India, China, or Russia. However, this study reasons that its superior capabilities within Africa, both economically and militarily, as well as the esteem it achieved through its notable transition from apartheid, are grounds for its elevation to the "eminent" group of emerging powers. Whilst, other factors must be considered in the South African case, especially the country's triple challenges of poverty, inequality, and unemployment (Schoeman, 2015). South Africa's foreign policy has, nonetheless, had one common denominator since the days of apartheid, in that the country seeks global recognition, which is also central to positioning itself as a regional leader (Alden & Schoeman, 2013). South Africa's deficiencies in economic power such as low GDP growth are supplemented by diplomatic expertise and soft power which has given the country the ability to interact effectively in the global governance system (Heine, 2010).

Geldenuys (2011) says that South Africa's status as an emerging power supposes that it has the "hard and soft power" capabilities to join the club in reforming the Western-designed, global rules of the game and to ensure that developed states are more receptive to the needs and preferences of the majority of developing states. Its membership of BRICS, IBSA, as well as the G20 indicates South Africa's position as such (Geldenuys, 2011).

According to Schoeman (2015:432), to be considered an emerging power requires more than having conventional hard power resources and capabilities. South Africa has acquired this status because of its "moral authority, political stability, democratic nature, and dedication to human rights." Schoeman (2000:353) additionally asserts that the responsibility of an emerging power, which implies that it is also a regional power, is to maintain regional security. To fulfil this role, several conditions must be met:

- The internal dynamics of such a state should allow it to play a stabilising and leading role in its region.
- The emerging power should indicate and demonstrate its willingness, and of course also its capacity or ability, to assume the role of regional leader, stabiliser and, if not peacekeeper, at least peacemaker.
- The emerging power should be acceptable to its neighbours – the members of the security complex in which it operates – as a leader responsible for regional security. A broader, or extra-regional acceptance is perhaps a necessary condition, but not sufficient, even if supported and promoted by big powers.

Schoeman (2000) further asserts that emerging powers such as India and South Africa appear to play a dual function. The first is as a regional leader, whether because of their economic size, military force, or geopolitical importance. The second is demonstrating an ambition for larger involvement in the international system using moral standing as a distinguishing aspect of their status (Schoeman, 2000). Following its integration into the global system, South Africa has been considered to be a country that punches above its weight in global affairs which is not afraid to participate actively in regional and global politics. One of the most critical issues for South Africa has been to establish itself as a responsible international participant and champion of multilateralism. The country has assumed the image of regional leader in Africa and is one of the leading countries on the African continent, both politically and economically (Qobo, 2013).

2.6 Global governance and multilateralism

The 1990s heralded a new era for the system of global governance. The fall of the Soviet Union eliminated the single international counterbalance to Western power and signified the end of a bipolar world. The transition from GATT to the WTO was evidence of this (Stephen, 2017). The global focus shifted and cooperation through international organisations, human rights, advancing democracy, and economic liberalisation became the main priorities of the multilateral system. This model started to take precedence and the perspective on world politics and methods of conducting international affairs changed. The focus on the new issue areas resulted in a transition marked by states governing the globe through cooperatively "solving problems". The

challenge, however, was that the major political issues had been “settled” in the West’s favour, as evidenced in the TRIPS agreement, which was part of the package of the agreement that established the WTO (Stephen, 2017:483). This caused discontent among emerging powers, including South Africa and India. Both countries have challenged the legitimacy of its rules and the fairness of leadership roles in multilateral institutions which have resulted in the rise of power politics. Consequently, encouraged by their rapid economic development, emerging powers became bold and began to challenge the dominance of the West in the corridors of the WTO, the halls of the Palais des Nations in Geneva, as well as the basement rooms of the UN in New York (Stephen, 2017).

The start of the 21st century saw gradual, rising criticism of multilateralism. This scepticism was supported by failures such as the WTO's DDR, as well as the challenge presented by emerging powers. Jokela (2011) explains that the increase in the number of influential states has made achieving shared interests more complicated. The growing participation of emerging powers in global governance has challenged multilateral organisations and reflects a shift towards a multipolar world order. Consequently, multipolarity has cast doubt on the future of multilateralism. Furthermore, multipolarity is frequently associated with a growing emphasis on national interest (Jokela, 2011). As a result, during the period from 2016 to 2019, just before the COVID-19 pandemic, the agendas of think tanks and security strategists were primarily concerned with the threats and dangers related to tensions arising from the ‘hypothetical’ multipolarity caused by China's rise, the questioning of US hegemony by emerging powers, as well as the 'America first' policy agenda of the Trump administration (Caballero & Arbiol, 2022).

2.6.1 Global governance

According to Higgott and Erman (2010), “global governance” is a prominent but contentious political term. According to realist scholars, the primary characteristic of the international system has been, and continues to be, anarchy, which rejects any description of governance that goes beyond the level of the state. Liberal scholars, however, contend that even if society is anarchic, established conventions and guidelines for conduct exist which guide the behaviour of states. In addition, modern

democratic theorists assert that the foundations of a global society are being realised at the level of the state (Higgott & Erman, 2010). It is therefore clear that scholars of International Relations have little consensus on the concept of global governance.

However, Finkelstein (1995:369) provides the following definition of global governance: “Global governance is governing, without sovereign authority, relationships that transcend national frontiers. Global governance is doing internationally what governments do at home.” Similarly, Dingwerth and Pattberg (2006) state that the term considers the world of politics as a tiered system that includes local, national, regional, and global political activities which are linked. This system, for example, suggests taking into account how the WTO rules affect communities at the local level, but also how the actions of communities impact on WTO rules. Jokela (2011) indicates that global governance denotes a break from the notion of international politics being primarily focused on nations pursuing their own interests and acknowledges the growing importance of global and regional governance structures, as well as transnational players. It refers to governance that extends beyond state lines and exists at several levels, i.e. transnational and/or multilayer governance.

Eilstrup-Sangiovanni and Hofmann (2020:1078) focus on the origin of the present system of global governance as well as continuing threats. They contend that the current global order, which originated post-World War II, is founded on three principles: “national sovereignty, economic liberalism, and inclusive, rule-based multilateralism.” These principles provide fundamental standards of behaviour while allowing debate and review of some norms and standards. Thus, the global order is a fluid system in which contestations can occur while the system remains intact.

Higgott and Erman (2010: 452-453) furthermore argue that two forms of global governance exist: one is primarily guided by economic theory and the other by normative theory and the two forms are mutually dependent. Their two definitions state:

Global Governance Type 1: An economic theory of governance emphasising the enhancement of effectiveness and efficiency in the delivery of global public goods via collective action problem solving. GGI is underwritten by the

emergence of a technocratic/managerial elite for which international institutions are instruments of transaction cost reduction, policy coordination and compliance for the mitigation of the risks attendant on an open and global economy.

Global Governance Type 2: A political theory of governance emphasising the struggle for systems of representation and accountability that will enhance legitimation and democratisation of policy-making in global contexts. GGII reflects an assumption that as the nation state becomes more problematic as a vehicle for democratic engagement, the clamour for democratic engagement at the global level becomes stronger.

They suggest that, while the WTO is a mechanism for trade liberalisation, it is also a conduit for better global governance (Higgott & Erman, 2010). Lamy (2006) states that global governance serves as an example of the framework that enables society to attain its goals with fairness and justice. He argues that, for collective sustainable development to be ensured, the interdependence of states necessitates that laws, social norms, and other mechanisms that shape human behaviour should be examined and managed cooperatively. He also specifically mentions that the WTO is central to global governance and he contends that everyone would benefit from a trading system that recognises global public goods.

Stephen (2017:490) argues that the direction that global governance is taking is a result of divergent approaches by existing and new role players. He has identified six challenges that have emerged and are likely to persist. These are: “(1) global governance is here to stay, but is increasingly contested; (2) a struggle is ensuing for leadership and privilege within global governance; (3) the liberal social purpose of global governance is taking a back seat; (4) existing multilateral institutions are facing increased deadlock; (5) informalization is likely to increase; and (6) global governance is becoming more fragmented.”

In elaborating on the above factors, Stephen (2017) argues that emerging powers realise the benefits of existing global governance institutions and have opted to use them rather than destroy them. However, their resistance to accepting existing rules

complicates processes in these institutions. This has also resulted in a struggle for leadership with a view to influencing how these organisations are run. As a result of the distribution of power, the increase in the number of active players, and the resultant diversity of interests, global agreements have been much harder to achieve, resulting in deadlocks and rendering the process of revolutionising them ineffective. The stalled negotiations on the DDR are a classic example of the lack of progress (Stephen, 2017).

2.6.2 Multilateralism

One of the most common definitions of multilateralism is that of Keohane (1990:731) who defines it as “the practice of coordinating national policies in groups of three or more states.” He also focuses on multilateral institutions, and contends that international institutions that are successful, have a clear set of rules and standards and therefore create clear expectations (Keohane, 1990). According to Van Langenhove (2010), multilateralism is both a normative term and an ideal. At the normative level, its practice refers to states engaging through a collection of existing institutions. It is also ideal as it assumes equal benefit. As a result, it is subject to differences at both levels. According to Caporaso (1992), three characteristics indicate multilateralism. These are indivisibility, agreed standards of behaviour, and reciprocity. Indivisibility is defined as the extent to which costs and benefits are shared. Standards of behaviour are reflected in the rules of interacting with other states and reciprocity emphasises that states anticipate benefitting equally in the long run.

It is important to note that multilateralism is not synonymous with global governance. Ruggie (1993) says that multilateralism should be interpreted as a specific organising concept for global governance. He refers to the definition of multilateralism which is based on the notion that it is the management of global issues by three or more states acting in accordance with commonly agreed standards of conduct. He asserts that this definition’s important feature is that agreed standards should prevail above the state’s national interests (Ruggie, 1993) and argues that the term "multilateral" is an adjective that regulates the noun "institution" by changing the nature of the institution. The organising principles entail indivisibility among collective members in terms of generalised norms of conduct (Ruggie, 1992).

According to Qobo and Dube (2015), multilateralism implies consistency of recognition, but this does not translate to equal respect or uniformity of the interests of all states. They state that multilateralism first evolved as an organising model in the years following World War II, which widened the possibility for cooperation among core economies whilst maintaining fundamental power relations. Therefore, a multilateralist viewpoint never advocated for equity or levelling the playing field in the sense of a global egalitarian goal. The interests of the developing countries, whether they were colonial subjects or not, and even after they had achieved independence, were not given as much consideration as the interests of developed countries (Qobo & Dube, 2015).

2.7 Emerging powers and the architecture of global governance

Emerging powers are said to be “emerging” because they previously played a limited or no role at all in the system of global governance and were mostly stifled by developed countries. There has been no acknowledgment by developed countries that the design of the architecture of the multilateral system is composed of structures in which developing countries were not included in their conceptualisation (Heine, 2010).

According to Nel (2010), India and South Africa have taken on the responsibility as representatives of developing countries in the current push for global transformation. They are specifically advocating for the revision of trade rules in the DDR of negotiations among WTO members. They are also seeking an appreciation for developing countries’ unique developmental needs. As regional powers of the South, they persist in bearing the responsibility, not only for reorganisation, but also for recognition. Their quest is for a more inclusive and equal system of multilateralism and their contention is that the South's developmental needs should be addressed on terms determined by developing countries themselves (Nel, 2010).

The negotiating bloc model of decision making is the norm in multilateral organisations. However, the traditional blocs are now being challenged by new groupings, especially those led by emerging powers. Developed countries traditionally employed the practice of making decisions on significant global economic matters

through informal meetings. These decisions would later be formalised in plenary meetings where all member states participated as a “fait accompli”. Established groups such as the Western European and Others Group (WEOG) have faced increasing challenges, resulting in an increased necessity for collaboration. It is not that the West has become irrelevant during this transition. Rather, emerging powers, given their quest to be heard and their increasing diplomatic assertiveness, have become increasingly confident in their ability to reject any matter presented by the West without consultation (Hou, 2013).

Emerging powers increasingly play a leading role in most global decision-making processes and have quickly learned what it means to lead. For these countries, participating in the stabilisation of the global financial and economic system and realising the plurality of voices in institutions of global governance are the important goals of global redistribution (Qobo, 2013). Emerging powers want to be more recognised and included in global decision-making processes and, by so doing, change the current global governance model. Their approach to global reorganisation is focused on issues of representation and making their voices heard. This is driven by a desire to enhance their international stature and to utilise the global arena to further their domestic economic aspirations (Qobo, 2013).

The WTO has faced various challenges. Emerging powers, while criticising its inflexible character, have nevertheless adhered to the rules. The primary flaw of considering the world in binary terms (such as developed and developing countries) is being challenged by the rising clout of emerging powers in the global system. This has been amplified by the assertiveness of emerging powers, and the US’s retreat from multilateral institutions during the Trump era. Emerging powers have become the new voices supporting the ‘rule-based order’ and ‘reformed multilateralism’. According to Sinha (2021), however, emerging powers lack the authority to re-order the existing WTO system. As a result, global trade governance has become a battle between the traditional WEOG states and the emerging powers. Developed countries such as the US and the United Kingdom (UK) have focused inward of late and are prioritising their domestic interests. These new power shifts highlight the intrinsic tension at the WTO in the fight between representativeness and effectiveness (Sinha, 2021).

According to Patrick (2010), the goal of emerging countries is to change the rules. One common characteristic is that they want to be more influential in multilateral institutions, but they do not want to risk harming their own domestic progress. These conflicting priorities are a problem for emerging powers. They want to have a stronger voice in world affairs, but they are still committed to fighting poverty at home, since they consider themselves to be developing. They therefore oppose international measures that might slow down domestic progress. Although emerging powers may occasionally be able to reconcile this duality, it can also leave them torn between having global aspirations and being supportive of other developing countries (Patrick, 2010).

2.8 Conclusion

This chapter has illustrated the key concepts used in this study, particularly the role conception of states and the use of the concept in foreign policy analysis. The chapter has also elaborated on the characteristics of emerging powers, while considering South Africa and India as emerging powers. A description of the global system of governance and multilateralism was incorporated to provide the context for an analysis of South Africa's subsequent behaviour at the WTO. The challenges faced by the global system of governance and the role of emerging powers were also elaborated.

CHAPTER 3
**CASE STUDY: THE SOUTH AFRICA AND INDIA PROPOSAL
FOR A TRIPS WAIVER AT THE WTO**

3.1 Introduction

This chapter narrates the events related to the South Africa and India proposal for a TRIPS waiver at the WTO. It gives an account of the circumstances that led to the proposal, and to the dynamics that arose as a result. The positions of the main stakeholders and the impact of these positions on the final decision that was adopted by the Ministerial Conference are elaborated. The chapter also includes a synopsis of the global developments, which illustrated that at the time that South Africa and India presented the proposal at the WTO a vaccine had not been developed. Both countries correctly predicted that there would be challenges in the availability of vaccines. The views of non-state actors with regards to the proposal have also been incorporated. These are noteworthy since they played a role in influencing public opinion which had an impact on the official positions of WTO member states.

3.2 International developments

On 11 March 2020, the World Health Organisation (WHO) declared the COVID-19 outbreak a pandemic. Dr. Tedros Adhanom Ghebreyesus, Director-General of the WHO, stated during a press conference, that the number of cases had risen thirteen-fold. The number of countries with cases had multiplied by three, and that more cases were anticipated. He said that the WHO was "deeply concerned both by the alarming levels of spread and severity as well as by the alarming levels of inaction," and urged states to act swiftly to contain the spread. At the time, 114 countries had recorded cases (World Health Organisation, 2020).

In April 2020, the United Nations General Assembly (UNGA) adopted two resolutions: resolution 74/274 titled International cooperation to ensure global access to medicines, vaccines and medical equipment to face COVID-19 and resolution 74/270 titled Global solidarity to fight the coronavirus disease 2019 (COVID-19) pandemic. With these resolutions, the UNGA called for the strengthening of international cooperation to

contain, mitigate, and defeat the pandemic. Furthermore, the UNGA emphasised the importance of upholding all human rights and indicated that any type of prejudice had no place in the fight against the pandemic (un.org/en/ga/74).¹ In May 2020, the WHO adopted resolution WHA73.1. This resolution called for the “intensification of cooperation and collaboration at all levels” to contain the pandemic and to mitigate its impact (World Health Organisation, 2020).

The tendency of developed countries to focus inward had already become apparent in the early stages of the pandemic. On 4 May 2020, international leaders, philanthropists, and celebrities pledged €7.4 billion to the Coronavirus Global Response Initiative at an event hosted by the EU. The project was presented as a united effort, “joining forces to accelerate the development, production and equitable access to COVID-19 vaccines, diagnostics and therapeutics.” The initiative was meant to assure dependable production, with the objective of first developing the vaccines, then building the manufacturing infrastructure (Kampmark & Kurečić, 2022:9).

Yet, following the development of vaccines, the initial limited supply led to a hoarding of stocks, giving rise to what was later referred to as vaccine nationalism. Initially, approximately 1.5 billion vaccine doses were manufactured globally. However, only 10 countries received 75% of the supply. Less than 25 million of the shots were provided to the African continent. Many of the developing countries were unable to obtain enough vaccines to protect even their health professionals, whilst developed countries had enough vaccines to vaccinate their total populations and to provide booster shots (Torreele & Amon, 2021). However, the capability to produce vaccines was available in the developing world. If provided with financial resources, intellectual property rights, and expertise, companies such as Biovac and Aspen in South Africa, Institute Pasteur in Senegal, and VACSERA in Egypt had the capacity to start producing COVID-19 vaccines. What became clear was that access to intellectual property rights was proving to be particularly difficult, as holders of these rights were unwilling to negotiate, ignoring the fact that pandemics demand immediate attention. This led to the growing call that pandemic-related medical products should be designated as global public goods (Karim, 2021).

¹ Resolution number as per UN numbering system

3.3 Normative framework/Motivation

When the COVID-19 pandemic struck, it seemed that the world had adopted a unified approach to combating the virus. Scientists collaborated and sharing of best practice ensured that countries had the latest available information. However, when vaccines, diagnostics, and therapeutics became available, the cracks in cooperation began to show. Better resourced countries began hoarding vaccines while low and middle-income countries found themselves pushed to the end of the vaccines queue. The lack of access to COVID-19 vaccines and therapeutics contributed to severe illness, hospitalisations, and deaths in these countries. The motivation behind South Africa's and India's proposal for a waiver was intended to ensure equity, accessibility, and affordability of COVID-19-related vaccines, diagnostics, and therapeutics for all countries and to recognise them as global public goods (WTO: IP/C/W/669)².

The provisions of Article IX of the Marrakesh Agreement which established the WTO stipulates that, in extraordinary circumstances, as the highest decision-making body of the WTO the Ministerial Conference may decide to waive an obligation imposed on a member. The article also states that "any such decision must be made by three-fourths of the Members, unless otherwise provided for" (United Nations, 1995). However, in practice waivers are generally decided by consensus, and they have been notorious for requiring rigorous interpretation. The consensus with respect to the granting of waivers and obligations would also specify conditions for the concession. The extraordinary nature of waivers therefore subjects them to specific conditions, although the TRIPS agreement does not specify guidelines on their interpretation (World Trade Organisation).

The COVID-19 pandemic presented a scenario for WTO member states where protection of intellectual property rights had to be considered against global socio-economic wellbeing. As a result, the South Africa and India proposal for a TRIPS waiver raised a lot of controversy. The deliberations in subsequent negotiations, notably the positions of the EU and the US, highlighted the developed countries'

² WTO document number of initial proposal

priority to safeguard manufacturer's rights with respect to COVID-19 vaccine patents over public health considerations. This revived the debate on the need to have more flexibility in the TRIPS agreement and it is this necessity for greater flexibility that underscored South Africa's and India's proposal to pursue a waiver on the intellectual property rights that pertained to COVID-19-related vaccines, diagnostics, and therapeutics. The reluctance by the EU and the US to support the proposal for a waiver was consequently perceived as disregarding global socio-economic wellbeing, whilst practicing vaccine nationalism (Thambisetty *et al.*, 2022).

3.4 The South Africa and India proposal for a TRIPS waiver

Under the circumstances outlined in the previous sections, South Africa and India presented a joint proposal for a waiver to the TRIPS Council of the WTO on 2 October 2020. The proposal sought a waiver from the "implementation, application, and enforcement" of intellectual property rights for products and their underlying technologies for the "prevention, containment, and treatment" of COVID-19 for a period of "[X]³" years. It was proposed that the waiver would be used by all WTO member states, irrespective of their development status, and would cover vaccines, diagnostics, and therapeutics (WTO:IP/C/W/669). The proposal reasoned that intellectual property rights should not become obstacles for quick access to low-cost medical products under circumstances of global health threats such as the COVID-19 pandemic. Furthermore, it argued that an increase in global manufacturing would address the challenges with regards to the availability and affordability of medical products that related to COVID-19. The insistence by developed countries to maintain strict intellectual property rules which disregarded the need to save lives was highlighted as problematic. South Africa and India argued that the COVID-19 pandemic presented unusual conditions that required rapid response and flexibility from all WTO member states (Agejoh, 2022).

The South Africa and India proposal contained pertinent facts related to pressing medical issues such as the barriers created by intellectual property rights, price affordability, and the moral need for global solidarity (Sucker & Kugler, 2022). The

³ The initial proposal did not specify the number of years

proposed text was mainly technical, focussed on statistical information, and it did not include aspects pertaining to economic and political implications. In this context, the countries that rejected the proposal for a waiver were those which continue to host some of the largest pharmaceutical manufacturers in the world which would not profit from a waiver. Another challenge which would prove to be difficult to achieve was the WTO practice of adopting decisions by consensus which requires the backing of all 164 WTO members (Amnesty International, 2021a).

The text of the proposed Decision in the initial proposal called for member states to implement a waiver for sections one, four, five, and seven of Part II of the TRIPS agreement, or to enforce these under Part III, as was applicable to vaccines, diagnostics, and therapeutics for an unspecified period. Following concerns raised by other WTO member states, particularly the EU, about the broad scope of the proposed Decision, on 21 May 2021 South Africa and India, supported by 64 co-sponsors, submitted a revised text for the proposal of a waiver. The revision limited the scope to health products and technologies and indicated that the waiver would be applied for a period of three years. The amended text also clarified that the proposed waiver would be “in relation to health products and technologies including diagnostics, therapeutics, vaccines, medical devices, personal protective equipment, their materials or components, and their methods and means of manufacture for the prevention, treatment or containment of COVID-19” (WTO: IP/C/W/669/Rev 1).

3.5 Multilateral initiatives to ensure access to vaccines

South Africa’s and India’s proposal for a waiver at the WTO was made in an environment where, in addition to the Coronavirus Global Response Initiative, other multilateral initiatives were aimed at securing the supply of vaccines. The Coalition for Epidemic Preparedness Innovations (CEPI), the Global Alliance for Vaccines and Immunisations (GAVI), the Vaccine Alliance, and the WHO had established the COVID-19 Vaccines Global Access (COVAX) facility in early 2020 to ensure more equitable access to vaccines for COVID-19. The WHO also developed the Access to COVID-19 Tools (ACT) Accelerator, a global programme intended to foster international cooperation and understanding regarding the pandemic. The aim was to fast-track the availability of vaccines and other tools to fight COVID-19. The ACT-

Accelerator focused on research and development in four areas: vaccines, diagnostics, medicines, and the strengthening of health systems. The COVAX facility was created to mitigate the problems faced by developing countries by securing access to vaccines through substantial Advance Purchase Agreements (APAs). Additionally, it promoted global cooperation to improve vaccine access across all member states. The challenge, however, was that developed countries such as Canada and the UK did not participate in the initiative. They instead, directly competed with COVAX for doses through bilateral APAs with vaccine producers. The EU initially did not participate but later changed its position and joined COVAX in September 2020. Nonetheless, the dichotomy was still that EU member states could also use APAs signed by the European Commission (Eccleston-Turner & Upton, 2021).

The GAVI alliance's COVAX global allocation plan was created as an international cooperative effort to provide vaccines to member states at a reasonable cost. It included 70% of the world's population in 170 countries and represented the best hope for the world to quickly end the pandemic since it had a diverse portfolio of COVID-19 vaccines. The initiative was meant to reduce inequalities in vaccine availability and distribution. Although the COVAX facility presented a fair method of addressing the issues around equitable supply of vaccines on paper, it did not accomplish much in practice (Kampmark & Kurečić, 2022).

3.6 Positions of the main stakeholders

When conducting multilateral negotiations, member states traditionally form alliances or negotiating blocs. Currently, the WTO has more than 25 negotiating blocs which are mostly based on a common position with regards to a particular issue, whilst some groups also are regional in nature. The negotiating blocks traditionally agree on a common language and speak through a single coordinator.

The proposal, as put forward by South Africa and India, saw specific blocks being more active and vocal in the discussions, most notably the Africa Group and the EU. The US also played a prominent role given the fact that it was a major producer of COVID-19 vaccines.

3.6.1 The African Union

South Africa assumed the chair-ship of the AU in February 2020, a month before COVID-19 was declared a global pandemic. Under South Africa's leadership, the AU responded to COVID-19 quickly. In collaboration with African governments and other stakeholders, the AU Commission, the Africa Centre for Disease Control and Prevention (Africa CDC), and the World Health Organisation Regional Office for Africa (AFRO) speedily established the Africa Taskforce for Coronavirus Preparedness and Response following an urgent meeting of African health ministers held on 22 February 2020 to discuss the pandemic. Six work streams were formed, which diligently activated and executed their mandate under the Africa Taskforce for Coronavirus Preparedness and Response. They focused on the following: "a) laboratory diagnosis and subtyping; b) surveillance, which involved screening at border crossing points and other cross-border activities; c) infection prevention and control in healthcare facilities; d) clinical management of severe COVID-19; e) risk communication; and f) supply chain management and stockpiles" (Rosenthal *et al.*, 2020).

Undoubtedly, Africa demonstrated one of the few instances of successful cooperation in respect of COVID-19. A continental plan, an emergency ministerial conference, and readiness evaluations were just a few of the early steps that the AU took to enhance its reaction (Kavanagh *et al.*, 2020).

Like other low and middle-income countries around the world, AU members tried to prevent the pandemic's potentially disastrous effects. Regrettably, they were unable to get the diagnostic and therapeutic equipment they required because economically strong countries used their economic power to secure supplies for own their populations.

The AU also sought cooperation with other partners. South Africa's President Ramaphosa addressed the leaders of the G20, at the G20 Extraordinary Leaders' Summit on COVID-19 which was held on 26 March 2020. In his remarks he said that the world was looking at G20 countries to provide leadership in dealing with the pandemic. He proceeded to point out: "As Africa we are concerned about the possible shortages of medicines, protective products and vaccines as factories close or

countries retain supplies for their own consumption” (Ramaphosa, 2020). He indicated that it was important to cooperate on efforts to expand the global manufacture to improve the accessibility of medical products and equipment. He said, that since Africa has poor health infrastructure and that the majority of medications and medical supplies available on the continent are imported, the G20 members should promote and facilitate trade, particularly for pharmaceuticals and medical equipment (Ramaphosa, 2020).

A virtual conference was held from 24 to 25 June 2020 by the AU Commission and Africa CDC, during which the need for COVID-19 vaccination, and a continental strategy, was debated by more than 3,000 political and technical specialists. The multisectoral approach proposed by Africa CDC was adopted in August 2020 by the AU Heads of State and Government. The historical experience with global health challenges such as the HIV/AIDS pandemic had necessitated that Africa act decisively, effectively, and collaboratively to secure access to vaccines and life-saving therapies (Nkengasong *et al.*, 2020). It was within this context that South Africa partnered with India to propose a waiver at the WTO.

South Africa included the proposal for a waiver on the agenda of the AU Summit of February 2021. The Decision of the AU read (Assembly/AU/5(XXXIV)⁴:

“NOTING that, in the light of the foregoing, exceptional circumstances exist justifying a waiver from the obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) specifically for the prevention, containment and treatment of COVID-19;

DECIDES to support the proposed WTO Waiver from certain provisions of the TRIPS Agreement for the Prevention, Containment, and Treatment of COVID-19 as contained in WTO Document IP/C/W/669;”

Following endorsement by the AU summit, the Africa Group at the WTO formally supported the proposal by South Africa and India which strengthened the support for

⁴ AU Summit Decisions document number

the proposal. With Africa united on the issue, the AU engaged the EU on their stance during the sixth EU-AU summit that was held in Brussels on 18 February 2022.

3.6.2 The European Union and the United States

COVID-19 vaccines were rapidly developed due to the pandemic's emergency. The vaccines were created by several pharmaceutical companies including Pfizer, Moderna, and AstraZeneca, all of which were based in developed countries. The popular view by scientists, supported by the WHO, was that the most effective solution to the health and economic crises brought by COVID-19 would be the rapid distribution and administration of vaccines to as many people as possible. However, the expectation that developed countries would help ensure fair access for all was not met, leading to what was called vaccine nationalism (Amnesty international, 2021b). The position of the developed countries on the proposed waiver was therefore informed by their need to protect the interests of their own manufacturing companies.

The US had initially expressed reservations on the first version of the proposal. Nevertheless, on 5 May 2021, twenty days before the revised text was issued, the US announced that it would support text-based negotiations of the waiver proposal but for COVID-19 vaccines only, not for diagnostics and therapeutics. Subsequently, the Governments of Australia, France, and New Zealand concurred with the US position. On the other hand, Germany, Norway, and Switzerland, three economically significant European nations, continued to aggressively oppose the proposal in its entirety. They argued that the current TRIPS Agreement provisions already offered sufficient flexibility and that removing intellectual property rights would endanger future developments in vaccine technology (World Trade Organisation).

On 4 June 2021, the EU submitted an alternative text which proposed, among other things, to reduce export restrictions and to enhance vaccine manufacturing, whilst it reiterated the TRIPS agreement's current flexibilities (WTO: IP/C/W/680)⁵. The EU proposal was broader than the US vaccine-focused negotiating position. It proposed amending articles 31 and 31bis of the TRIPS Agreement to support a more flexible

⁵ EU counter proposal document number

remuneration arrangement and to permit the use of a single notification to cover multiple countries. This proposal specifically mentioned the supply to "international joint initiatives that aim to ensure equitable access to the vaccines or medicines covered by the compulsory licence" such as the COVAX facility (Yu, 2023:5). A significant development was that the TRIPS Council agreed to start text-based discussions on 9 June 2021. The negotiations would consider both the revised text, as put forward by South Africa and India, and the alternative text presented by the EU (Sucker & Kugler, 2022).

During the negotiations, the EU questioned whether intellectual property rights were actually the problem in respect of access to COVID-19-related medical products. Member states argued that the problem was rather due to, inter alia, an increase in demand and the lack of manufacturing capacity (Oke, 2022). The delegations remained divided in their views and the Chair agreed to facilitate the discussions wherein the debate would be continued in an intensive process that entailed a series of informal negotiations between South Africa, India, the EU, and the US. As a result of these consultations, South Africa, India, the EU, and the US reached a compromise in March 2022, which limited the scope to vaccines and would allow for flexibility on the use of licensing agreements (World Trade Organisation).

3.6.3 Civil society views

The current system of global governance includes non-state actors who have become increasingly active. Consequently, international civil society organisations, notably Amnesty International, voiced their support for the waiver proposal and held several campaigns, including a petition to the world's five biggest pharmaceutical companies (Amnesty international, 2021b). In South Africa, the voices of civil society role players were also prominent. Journal (2021) interviewed Fatima Hassan, a South African human rights lawyer and activist, who indicated that African countries were inundated with initiatives which were presented as some form of answer to facilitate access to vaccines and promote fairness for the continent. The many different initiatives made it difficult to discuss the continent's response. The only body that could consolidate these initiatives was the AU whose response was a result of proposals presented by the South African Government. It took some time for the AU to officially endorse the TRIPS

waiver proposal, which was initially proposed by South Africa and India, and eventually supported by more than a 100 WTO member states. Hassan further indicated that the biggest impediment had been the perpetual resistance to attempts to solve the issue of intellectual property rights in a pandemic, especially in cases of a global health emergency. She recalled that Brazil, South Africa, and Thailand had previously attempted to challenge the system in respect of HIV/AIDS medications, and that there had been a similar response from business and developed countries. She lamented that no one had anticipated that a straightforward, limited, and time-bound proposal would receive so much resistance. She further said that the obstacles were presented by the pharmaceutical companies who lobbied using their economic power to prioritise profit. Their biggest concern was that sharing technology during the COVID-19 pandemic would set a precedent for other health issues and future pandemics. Another challenge was that the WTO had become ineffective. She indicated that the strategy of working with other stakeholders, including civil society organisations, in countries that were reluctant to support the waiver, is what helped garner support for the proposal (Journal, 2021).

Kohler *et al.* (2022) conducted a study that polled most WTO member states and civil society organisations on their views of the proposal for a COVID-19 TRIPS waiver. They polled more than 350 civil society organisations, including medicines groups, HIV/AIDS organisations, global health and global justice alliances, and human rights groups. Their study included soliciting views on both the original October 2020 text and the revised version of March 2022. All of the civil society organisations indicated that they supported the proposal for a TRIPS waiver. Many of them also argued that governments should consider the proposal as a first step towards securing global access to addressing the need for COVID-19 vaccines, therapeutics, and medical devices. In the same study, virtually all the pharmaceutical sector stakeholders who made public declarations opposed both versions of the TRIPS waiver proposal. While these views were aligned with these stakeholders' interests, an assessment of the reasons given by each provided insight of the key areas of dispute during the COVID-19 TRIPS waiver negotiations. Whereas supporters considered the TRIPS waiver as an essential first step towards removing intellectual property-based obstacles to accessing vaccines during the pandemic, opponents considered it a pointless and

impractical political tactic for rapidly increasing the supply of COVID-19 health technologies.

According to Kohler *et al.* (2022), the debates over the TRIPS waiver proposal indicated that the global community was making similar intellectual property and public health arguments to those made during the HIV/AIDS epidemic. This highlighted the ongoing lack of trust that developing countries have for the international trading system and reinforced doubts on the capability and willingness of the system to promote global public goods and to expand access to crucial medical products. This additionally indicated the necessity for profound transformation and showed how lessons learnt are frequently lost (Kohler *et al.*, 2022).

The civil society organisations frequently issued statements directed to the leaders of WTO member states, urging that countries consider the waiver proposal as an urgent priority. These organisations articulated four primary reasons for this (Kohler *et al.*, 2022:165): “(1) the TRIPS waiver enables countries to overcome IP-based supply barriers that cannot be adequately addressed through voluntary or compulsory licensing; (2) the TRIPS waiver enables countries to uphold their human rights obligations; (3) the TRIPS waiver is a necessary but insufficient step toward achieving equitable access to health technologies during COVID-19; and (4) corporate profit should not be prioritized over equitable access.”

3.7 Vaccine diplomacy

Given the unequal distribution of vaccines as outlined in the previous sections, countries who produced vaccines used them as a diplomatic tool. As the pandemic progressed, countries which had adopted a “me first” strategy began “donating” some of their home-grown vaccines. According to the Toronto Star, the aim of these countries was to advance their own interests to consolidate traditional relationships and to secure their influence (Toronto Star, 2021).

China, Russia, India, and the US sought to consolidate their influence through contributions and donations of the vaccines which they produced to countries that had limited access to vaccines. This was subsequently termed “vaccine diplomacy”. China

had a considerable lead in the vaccine diplomacy contest and had delivered numerous free doses to 69 countries as of March 2021 (Lee, 2021). According to Suzuki and Yang (2023), China had created several vaccines with decent effectiveness, and its production capacity had risen at an exponential rate. Its main advantage was its established promotion and export networks. China, being the world's largest exporter, already had strong economic relations with developing countries and Chinese vaccines excelled in terms of accessibility and affordability.

India also entered the vaccine diplomacy race. Before the COVID-19 pandemic, India was considered as the 'pharmacy of the world' and had been manufacturing over 60% of the world's vaccines by volume. It therefore had the capacity to produce vaccines. However, its role was distinguished because it produced western-developed vaccines. It entered into large-scale bilateral sale purchase agreements and participated in the multilateral COVAX programme. Suzuki and Yang (2023) indicate that, whilst challenges existed in terms of government-industry partnership which had hampered vaccine research, India used its edge in vaccine production to undertake vaccine diplomacy.

Russia, on the other hand, positioned itself as a revived scientific superpower. Its biggest advantage was its research and development capabilities. Russia, whilst not a large manufacturer like India or a trader like China, had created Sputnik-V, a very efficient COVID-19 vaccine. In addition to donating vaccines, Russia wanted to export the production of its vaccine through technology transfer to compensate for manufacturing and distribution constraints (Suzuki & Yang, 2023).

As a model for developed countries, in response to appeals for international help, the US increased the number of vaccines it distributed to other countries. According to Eichensehr (2021), after a sluggish start, the US announced that it had donated and transported more than 110 million doses, which was more than the total donations of all other countries combined. It should be noted, however, that the US had initially promised to contribute 500 million doses by the end of 2022. Whilst celebrating its achievement as a leader in vaccine diplomacy, the US admitted that the amount it donated was only a small percentage of the total number of vaccines required to bring the virus under control internationally. Most of the vaccines it donated were not sent

directly to recipient countries. Instead, the US donated through the COVAX initiative (Eichensehr, 2021).

3.8 Vaccine inequity/apartheid

Concepts such as "vaccine nationalism" and "vaccine apartheid" arose during the pandemic because of the unwillingness by developed countries to share vaccines. The limiting of supply prevented an adequate quantity of vaccines from being distributed internationally. Many developed countries had sought their own COVID-19 vaccine deals with pharmaceutical companies. As a result, wealthier countries got as many vaccine doses as possible, limiting vaccine access elsewhere. Several developed countries acquired enough doses to vaccinate their populations multiple times. For example, Canada had a quantity of vaccines that could fully vaccinate its population five times (Forman *et al.*, 2021).

The uneven distribution of vaccines raised concern among various stakeholders. On 17 May 2021, a dismayed WHO Director-General, Tedros Ghebreyesus, lamented the limited supply of vaccines that had been made available to the COVAX facility whilst developed countries were already able to vaccinate their entire populations more than once. He indicated that developed countries made up 15% of the world's population but were hoarding 45% of vaccines. He said: "the world is in vaccine apartheid" (World Health Organisation, 2021). He said this to illustrate the moral failure of the distribution of vaccines. The term quickly became popular, mainly among activists, who regarded the inequity as a violation of human rights as well as a health issue.

Global vaccine inequity resulted in a two-track pandemic. Developed countries increased the availability of booster doses, whilst the first doses had not reached everyone in developing countries yet. The COVAX facility had been created to offer an equal supply of vaccines for all countries. COVAX, however, struggled due to a lack of money and donations. Consequently, it failed to fulfil even half of its 2021 target of providing two billion doses. In an open letter by a coalition of civil society organisations, to G20 leaders in October 2021, it was stated that, at the time, 133 doses of vaccines had been administered per 100 people in developed countries

whilst, in contrast, there had been four doses per 100 people made available in developing countries (Bajaj *et al.*, 2022).

From a human rights perspective, the disparity over the access to vaccines was considered just as problematic, and as a violation of fundamental human rights. Many writers (Joseph & Dore, 2021; Sekalala *et al.*, 2021; Kyobutungi *et al.*, 2023) have employed a human rights-based analysis to assess for the unequal distribution of vaccines. The inequity violated all of the main international human rights conventions such as the Universal Declaration of Human Rights (Article 27) and the International Covenant on Economic, Social, and Cultural Rights, whose articles two and fifteen explicitly state that everyone has the right to benefit from scientific progress (Altindis, 2022). The 1946 WHO Constitution (1995) has also declared "...the highest attainable standard of health as a fundamental right of every human being." Arguably, although most countries have ratified at least one international human rights convention that includes specific reference and obligations on the realisation of the right to health, the obligations under these conventions were not considered. Sekalala *et al.* (2021) argue that the injustice that has resulted from the unequal access to vaccines could have been addressed through a decolonised approach to human rights and global health.

3.9 Ministerial Decision on the proposal

The Ministerial Decision on the TRIPS Agreement was adopted by trade ministers at the 12th Ministerial Council Conference (MC12) held from 12 to 15 June 2022. The Decision authorised member states to take immediate action to diversify COVID-19 vaccine production and to circumvent the exclusionary impact of patents through a targeted waiver over the course of the next five years. It addressed some of the concerns that were raised during the pandemic, and supported diversifying vaccine production capability. It further stated that members should make a decision about potential extension to include the development and distribution of COVID-19 diagnostics and therapeutics no later than six months from the date that the Decision was finalised (WT/MIN(22)/30 WT/L/1141)⁶⁶.

⁶⁶ Ministerial Decision document number

The Ministerial Decision was notably different from the waiver proposed by South Africa and India and supporters of the waiver expressed disappointment with the outcome. However, it is important to note that the progression of COVID-19 from a pandemic to an endemic virus had weakened the negotiating position of those who supported the waiver, since the need for vaccines had declined. Those who feared that the impasse between developed and developing countries would continue beyond MC12 welcomed the Decision for offering a constructive compromise that helped advance the debate from negotiation to implementation. Ultimately, however, the Decision raised concerns about the ability of the TRIPS Council and the WTO to respond to pandemics and other international or regional crises in the future.

3.10 Summary of views on the outcome

The final text of the TRIPS waiver that was adopted garnered mixed reactions. Amin and Kesselheim (2022) were of the opinion that the Decision would not improve vaccine production capacity and lamented the fact that it excludes medicines and other COVID-19 health-related technologies. They further said that, based on the history of TRIPS, developed countries intended to give the impression of delivering something whilst knowing that it would not work in practice and developing countries should expect the same treatment they received in the 27 years that the TRIPS agreement has been in force. They voiced their disappointment, saying there would be other pandemics, or devastation caused by climate change, in which countless lives would be lost due to the lack of flexibility by developed countries (Amin & Kesselheim, 2022).

Ali *et al.* (2023:81) were of the view that the text adopted on 17 June 2022 presented several problems: “(a) it does not include sharing of trade secrets, copyright, industrial design, and technical knowhow, without which a waiver may be useless; (b) the waiver has added new and prohibitively onerous requirements for producers to identify and report all patents covered by the waiver proposal, including overlapping patents (‘patent thickets’) that can be extremely burdensome to establish for a complex network of vaccine IPs; and (c) the waiver does not include therapeutics and diagnostics, which have been a major line of defence during the pandemic.”

According to Singh *et al.* (2023), the pandemic raised an ethical dilemma for global justice and made it apparent that intellectual property rights are one of the key impediments to health fairness. They lamented the shocking scarcity of vaccines available during the pandemic and said the scarcity of vaccines and medications called into question the global health governance system's effectiveness. However, they added that it was a deliberate, rather than a natural phenomenon, which highlighted the disregard for global justice and explained the concept of global justice in three ways, namely: "cosmopolitanism, communitarianism, and neorealism". The first approach – cosmopolitanism – considers global justice at the level of the individual and considers people as members of the global society. This approach also gives individuals the obligation to act as global citizens. The other two approaches, communitarianism and neorealism, are explained as state-centred views of global justice.

Oxfam was also very vocal in its support of the waiver proposal. Responding to news that there had been consensus on the proposal, Max Lawson, head of inequality policy at Oxfam, was quoted in a press release on 17 June 2022 as saying: "South Africa and India have led a twenty-month fight for the rights of developing countries to manufacture and access vaccines, tests, and treatments. It is disgraceful that rich countries have prevented the WTO from delivering a meaningful agreement on vaccines and have dodged their responsibility to take action on treatments while people die without them." (Oxfam, 2021).

Ali *et al.* (2023) further argued that the vaccine technology had been funded through public funds. Pfizer received \$1.95 billion, while Moderna received \$2.5 billion, both from the US Government. The sale of vaccines had resulted in profits of \$37 and \$13 million respectively for the two companies in 2021. This amounted to "double dipping" which the authors called unacceptable. Secondly, the capacity of these patent holders as well as their ingredient manufacturers, was not sufficient to produce enough vaccines for the whole world. There were companies in developing countries which could top-up the supply if intellectual property rights were waived. They said that developed countries had to balance protecting their pharmaceutical industry whilst trying to meet global vaccine equity goals. Nevertheless, the attempt to balance the interests of the different groups did not result in a positive and opportune result for

developing countries. They suggested that investments and technical know-how should be put into the WHO's mRNA vaccine technology transfer hub to mitigate the need for developing countries to rely on goodwill (Ali *et al.*, 2023).

Benyera (2021:201) stated that dealing with extraordinary events such as global pandemics combines four areas: "(1) pandemics which are predominantly a human security matter, (2) vaccines and vaccinations, which are predominantly a public health and epidemiological matter, (3) power which is the alpha currency in international relations, and finally (4) ideology. i.e., capitalism and nationalism." This neatly summed up the challenges that the proposal for a TRIPS waiver faced: the WTO member states had different views and priorities on whether they should regard it as a human security issue, a global health matter, a status issue, or an ideological one.

In addition, Singh *et al* (2023), state that since the end of colonialism, South Africa and India have taken the lead in representing developing countries through pursuing their interests in international fora. Therefore, when it came to the therapeutics and vaccine shortages experienced during the COVID-19 pandemic, developing countries once again required their leadership. South Africa and India stepped up as leaders in the quest for reducing the vaccine demand deficit. Vaccine shortages had become a key concern for the global south and, as expected, the two countries maintained their position as leaders of developing countries (Singh *et al.*, 2023).

Consequently, Amin and Kesselheim (2022), have argued that the global North and South have had different opinions on the right to scientific knowledge for more than 70 years. Through the TRIPS Agreement, the WTO has succeeded in keeping the global North and its businesses insulated. The pandemic demonstrated the threat which the current system presents to public health and demonstrated that the multilateral system is unprepared for dealing with today's global challenges. The authors therefore suggest that a comprehensive intellectual property waiver, as proposed by South Africa and India, is still relevant post the pandemic if the WTO is to be able to address the current challenges and become an effective global organisation (Amin & Kesselheim, 2022).

3.11 Conclusion

This chapter has shown that there was consensus on the fact that the COVID-19 pandemic necessitated a global response. The chairing of the AU by South Africa resulted in a coordinated and joint effort by the continent to implement continent-wide strategies and the AU formally supported the proposal, which meant that Africa was untied at the WTO. Conversely, other WTO member states were divided on what the comprehensive course of action should entail. The opponents of the waiver proposal, notably the EU, argued that protecting intellectual property rights was a crucial component of any global response to the pandemic. The US was quick to change its mind and support a proposal that referred to vaccines only. South Africa, India, and other co-sponsors of the waiver proposal argued that waiving some of the TRIPS agreement's obligations would facilitate the manufacturing of the required vaccines, therapeutics, and diagnostic materials in the developing world, thereby improving access. The final Decision was therefore a carefully balanced text to accommodate concerns from both sides.

CHAPTER 4

FINDINGS AND ANALYSIS

4.1 Introduction

The previous chapter outlined the sequence of events, as well as the reactions of the various role players in relation to South Africa's and India's proposal for a TRIPS waiver at the WTO. Upon realising the challenges that access to diagnostic and therapeutic materials presented, South Africa and India presented a proposal that included vaccines, even though at the time a vaccine had not been approved. The response to the proposal by government and non-government entities was informed by the interests of the different role players. South Africa and India managed to obtain a Decision at the WTO despite the polarisation that the proposal had kindled. This final chapter will discuss South Africa's role and influence as an emerging power at the WTO. It includes excerpts from the interviews that were conducted with the two diplomats who represented South Africa at the WTO during the time that the proposal for a TRIPS waiver was presented. The chapter will therefore also incorporate the primary data obtained from the interviews to assess South Africa's role with respect to the proposal for a TRIPS waiver. This will be done in order to answer the three subsidiary questions of this study, namely: (a) What attributes make South Africa an emerging power?; (b) Which perceived roles of an emerging power motivated South Africa's proposal for a TRIPS waiver?; and (c) What does the outcome of the proposal for a TRIPS waiver indicate about South Africa's influence at the WTO?

4.2 What attributes make South Africa an emerging power?

In chapter two, the attributes of emerging powers were outlined, and it was contended that South Africa is an emerging power. This section will therefore focus on the key attributes of emerging powers and will indicate how South Africa demonstrates these attributes. According to MacFarlane (2006), the concept of emerging powers assumes several attributes held by the state involved. These include challenging the seemingly unipolar configuration of world affairs, regional dominance, and aspirations for a global role. He says that these criteria can be helpful in analysis since they indicate the specific behaviour displayed by states which fall into this category (MacFarlane, 2006).

In addition, MacFarlane (2006) suggests that cooperation between the states in this category may lay the groundwork for alliances.

The attributes that South Africa displays at the WTO should be evaluated in the context of the dynamics of the multilateral institution itself. According to Alden and Viera (2005), the collapse of the WTO Ministerial Council in Cancun during September 2003 was a watershed moment in the evolution of a new post-Cold War paradigm. The reassertion of the South-North split as a defining axis of the international order was therefore significant. The collapse of the conference, due to the refusal by developing countries to endorse a declaration that was biased in favour of the US and EU, indicated the emerging assertiveness of developing countries. This also signified the rise of a group of countries of the South aggressively contesting the assumptions of the North's main positions, which was a highly noteworthy occurrence. The views expressed there were part of a larger strategy by developing countries to push for a more equitable system at the WTO. It was in this context that South Africa's, Brazil's, and India's activity, as prominent South-South governments, led to the emergence of a 'trilateralist' diplomatic relationship, a mirror of larger shifts in the developing world (Alden & Viera, 2005).

4.2.1 Regional leadership

According to Alden and Le Pere (2009), South Africa's intention to assume a leadership role in Africa, which was supported by its economic power and global political status on the continent, has contributed to an unprecedented reorganisation of the region's economic and political infrastructure. South Africa has used strategies such as institution building and moral persuasion to achieve this. As a result, South Africa was instrumental in the process of transforming the Organisation of African Unity into the AU between 1999 and 2002. It also led the process of enshrining a right for the organisation to interfere in situations of military coups and gross human rights violations in its 2000 Constitutive Act. In 2002, South Africa became the first country to host the newly formed AU in Durban. The African Peer Review Mechanism (APRM) and the New Partnership for Africa's Development (NEPAD) were both created by the country. It also hosts the AU Pan-African Parliament and the NEPAD and APRM

secretariats. South Africa's involvement has included military commitments to peacekeeping missions in Burundi and Sudan's Darfur area (Nagar & Nganje, 2016).

When South Africa presented the proposal at the WTO together with India, it was in its capacity as a WTO member state and not on behalf of the region. The primary motivation was based on its national interests. However, it was cognisant of its role in the region. At the time, South Africa was also the Chair of the AU, and it had already undertaken several initiatives to coordinate Africa's response to the pandemic in its capacity as the AU chair. These included a COVID-19 vaccination continental strategy and the adoption of a multisectoral approach proposed by Africa CDC in August 2020. Although not explicitly stated, South Africa was fully aware that it would use its leadership position in the AU to influence the Africa group at the WTO. This is supported by the interviews that were conducted as part of this study. The first participant, Mr Q, indicated that the strategic approach that South Africa used included influencing Africa and AU processes to ensure support from all the continental heads of state. Mr Q further said that the goal was to pursue inclusive multilateralism through an African lens, while articulating from a national perspective, guarding own economic interests, and ensuring that South African businesses remain competitive.

This is supported by Alden and Schoeman (2013:114) who are of the opinion that "unlike any of the other BRICS members, South Africa's Great Power claims are almost completely founded on its perceived ability to act as a regional manager and protector." By presenting the proposal, South Africa did not only demonstrate regional leadership, it furthermore ensured that it used its position as the Chair of the AU to influence AU processes in order to get formal support for the waiver proposal by the Africa group at the WTO. Mr Q indicated that advancing the African group position was a cardinal approach in the negotiations of the waiver proposal. In summary, South Africa's contribution to international discussions and negotiations can be considered as that of a system stabiliser, with Africa as a priority in its foreign policy posture (Qobo & Dube, 2015). This is in line with Holsti's (1970) assertion that that the foreign policy behaviour of governments is determined by their national roles which include commitments towards other states, and in particular, in multilateral organisations, where states hold positions of status. Holsti (1970) also says that there are implicit

behaviours, informal practices, and expectations that shape the behaviour of states according to their perceived status.

4.2.2 Assertiveness and challenging the rules of the game

While the WTO's primary mandate has not changed, the institution itself has. The WTO has faced many challenges in recent years, including limited negotiating success, an appellate body crisis, systemic protectionism, trade conflicts, and concerns stemming from the COVID-19 pandemic (Tigere, 2021). Additionally, periods of transition are often difficult and uncertain, and the WTO had been undergoing such a period before the pandemic. Emerging powers bring a significantly wider diversity of interests, priorities, principles, and history to the key issues of power and governance. According to Hurrell and Sengupta (2012), during these uncertain times, emerging powers have attempted to represent their own interests and beliefs, striving to challenge the status quo and to change the international system's prevailing norms. Emerging powers have placed great emphasis on arguments for fairness, particularly regarding the historical obligations of developed countries (Hurrell & Sengupta, 2012). Therefore, growing multipolarity, mixed with a weak institution, was a dangerous combination at the WTO. Mr Q indicated that when South Africa presented the proposal, the system was "broken" and it needed to be reformed in order to ensure that the intellectual property system does not constitute a barrier to the expansion and diversification of the production of COVID-19 health products.

Mr Q also said that developing countries had made an undertaking in 2001 with the launch of the DDR in Qatar, where the agreement with developed countries was: "we acknowledge that you have given us new disciplines in the previous round, but, this round will be a development round, and we will address your issues in agriculture." He lamented, however, that the developed countries had still not compromised enough. He further mentioned that there were many implementation issues in respect of the TRIPS agreement, and that from around 2010, there was an escalation where developed countries introduced a more restrictive definition of who qualifies for special and differential treatment. Whilst there had been an understanding that space would be left for developing countries to progress, developed countries had reneged on those

obligations. It was in this context that South Africa and India made the proposal, taking a definite step to change the rules of the game.

Another point that was raised in the interview with Mr X was that there had been a retreat from the shared ideas and values of a liberal world order, such as creating stability and managing public goods. This had put a lot of pressure on multilateralism, specifically from a WTO perspective. Therefore, the WTO reform process would have to ensure that the developmental objectives of Africa had a place in the new system. South Africa's plan was to make sure that this happens.

4.2.3 Cooperation and collaboration

Emerging powers have had a great impact at the WTO because of their tendency to collaborate on issues. South Africa is cognisant of its limited ability to effect change on its own and thus favours collaborative tactics (Hopewell, 2017). Additionally, the South African Government considers multilateralism as the ideal framework for preventing major economies from dominating international agencies. This approach continues to be the focal point of South Africa's involvement in international governance processes (Qobo & Dube, 2015).

South Africa and India are part of the IBSA grouping. Both countries have common objectives and interests, particularly on issues of market access, equity and fairness at the WTO, as well as common domestic challenges. As a result, they have worked closely at the WTO to advocate for global trade rules that are more sensitive to the specific needs and situations of developing countries. The IBSA nations have worked together on the continuing DDR, including the repeal of restrictive measures (Woolfrey, 2013). While the status of the IBSA group is beyond the scope of this study, South Africa approached India to partner with it on the proposal because of the relationship that the two countries have and the knowledge that they share the same aspirations at the WTO.

Mr Q indicated that, at the time of the pandemic, South Africa immediately understood that a worldwide concerted response that would put all available resources and tools into one mechanism, that could be activated, and which would enable a worldwide

joint effort which would ensure equity was needed. However, South Africa understood that it would need a partner with the same attributes and ideals to push for the WTO to take action. The goal was to pursue inclusive multilateralism, whilst guarding national interests and ensuring the attainment of the country's economic interests. This would determine the type of partner South Africa needed to push the proposal and India therefore became a natural partner, given their close historical relationship and shared ideals. South Africa and India are both members of several formations such as IBSA, BRICS, and the G20. They also share the same domestic challenges and have facilities that would have enabled them to produce vaccines at relatively short notice.

Mr X confirmed that South African and India have very close historical ties and a good bilateral relationship. In addition, they work together not only in terms of BRICS, but also in the context of the IBSA Dialogue Forum. It was therefore natural that when South Africa came up with the idea for a TRIPS waiver proposal, it was India that was supportive of the idea and wanted to partner on it from the beginning.

4.3 South Africa's role as an emerging power

South Africa's role conception in international organisations has been informed by its foreign policy priorities, particularly its desire for a global role. Foreign policy in South Africa is primarily the responsibility of the President, who is tasked with providing leadership in foreign policymaking and thus shapes the role of the country. The implementation of foreign policy is informed by the interlinking of various players such as the ruling party, government departments, and parliament who are all involved in the process depending on the issue at hand and time period in which the decision is being taken (Ogunnubi, 2019). South Africa's foreign policy has been widely analysed (Nathan, 2005; Habib, 2009; Landsberg, 2010; Ogunnubi, 2019). This study refers to some of the opinions by these scholars.

South Africa's conviction in multilateralism originates from the prospects for improving global justice and fairness via international collaboration and maintaining international law standards. The reform of the system of global governance has been a priority during all presidential administrations, especially during the Mbeki era, during which the country was part of a more clearly identified strategy and geopolitical calculation.

South Africa's international credentials were bolstered by its show of ethical dedication and its actions as a "norm entrepreneur" (Geldenhuis, 2016). Soon after being re-admitted to the UN, in 1995, South Africa pushed for the indefinite extension of the Nuclear Non-Proliferation Treaty, followed by active participation in the 1997 Anti-Personnel Mine Ban Treaty. In 1998 it ratified the Rome Statute to establish the International Criminal Court. Subsequently, South Africa began to assume leadership roles in multilateral fora and has served as a non-permanent member of the UN Security Council three times (Le Pere, 2014).

Alden and Schoeman (2013:118) indicate that South Africa's role conception is that of being part of the "progressive forces globally working for a better and just world order." In this context, its membership of the most prominent groupings of the South indicate that South Africa is still trying to reach a balance between consolidating its role as an independent actor and as a mediator and integrator (Alden & Schoeman, 2013). Mr Q confirmed this by saying that, although the final Decision was not ideal, South Africa was looking for a solution that would make a tangible difference to everyone, not an ideological one. It agreed to a solution that maintains the principles that it set up to achieve such as ensuring access and equity whilst balancing all the viewpoints.

4.3.1 Promoting national interest and fighting for the concerns of the developing countries

According to Landsberg (2010), national interest forms the foundation that guides the behaviour of states in relation to their external environment. For South Africa, in the context of global governance, this includes, amongst other things, actively monitoring whether global organisations honour their commitments. Mr Q indicated that when South Africa put forward the proposal, it was "articulating from a national perspective, guarding its own economic interests, and ensuring that South African businesses remain competitive." This confirms that the proposal was also based on national interest. In reference to discussions during workshops hosted by DIRCO to discuss the issue of national interest, Alden and Schoeman (2013:118) said: "South Africa's national interest, as defined during the various discussions and workshops, is focused not only on its material objectives, which require the country to manipulate its external environment as far as is possible to promote domestic imperatives, but also on its

external role conceptions, and particularly on that of being an anti-imperialist agent.” As stated in chapter two, role conception questions the conventional wisdom that states perform a single role in the global system of governance; states can also demonstrate national interest in their approach to issues (Miliband, 1983).

Mr Q stressed that the approach of South Africa in the negotiations of the text for its proposal for a TRIPS waiver was to stick to what had been agreed to and what was promised but that it was also willing to negotiate on new issues. Furthermore, he lamented that agreements had not been honoured, and that South Africa had preferred to apply principles and legal prescripts. South Africa's approach has also been to garner consensus around developing country issues and concerns guided by its foreign trade policy and the desire to represent African interests and defend developing country positions.

Mr Q also said that South Africa has been actively involved in the WTO Doha Development Agenda (DDA). He expressed regret that there has not been consensus on executing the DDA and that there was lack of support by developed countries on developmental objectives. He added that what is important for South Africa is to reverse the trend of deindustrialisation and ensure that the multilateral trading system and its rules are supportive of South Africa's industrialisation goals. He concluded by saying that the new WTO reform process would have to ensure that the developmental objectives of Africa have a place.

Another characteristic of emerging powers is their role as a spokesperson for their designated groups in the multilateral arena. Mr Q indicated that South Africa's approach was guided by the developmental agenda, with a view to ensuring that trade rules support the developmental objectives of developing countries. In this regard, South Africa demonstrated its leadership and commitment to pursuing not just its own national interest but also the interests of the continent at large.

4.3.2 Aspiration for a global role

South Africa's foreign policy decisions and attitude have been influenced by a combination of conventional nationalist aspirations of equality and activism, as well as a determination to undermine existing power structures. The Mbeki government argued that only such a sophisticated policy would assure the attainment of a fairer global order, upon which South Africa's and the continent's growth prospects are dependent. South Africa's modern foreign policy thus cannot be understood separately from this aspect of the post-apartheid government's desire and strategic orientation (Habib, 2009). Furthermore, South Africa has embraced multilateralism in the international system as the best way to maintain global order, handle global problems, mitigate big governments' dominance and unilateralism, and empower weaker countries (Nathan, 2005).

The role conception of a state is largely influenced by a combination of its national experiences, history, norms, and the behaviour of its political leaders (Ogunnubi, 2019). According to Geldenhuys (2011), South Africa's standing and its role as an emerging power has included both 'hard' and 'soft' characteristics. A regional leader may portray soft characteristics such as excellent political and social principles, cultural attractiveness, and a credible diplomatic image abroad and such traits were conspicuous in South Africa's the case in multilateral organisations, including the WTO. Despite its reluctance to play any 'big brother' role in Africa, South African authorities have undoubtedly been aware of the obligations that come with regional leader status and have been willing to shoulder the weight of leadership (Geldenhuys, 2011).

Mr Q also expressed the view and explained that, whilst facilities like COVAX were set up, those initiatives were never set up with the objective of creating equal access. It was always a donor-driven process that would cast developing countries as beggars. The process did not identify the structural deficiencies in how the global value chain works, and it concentrated on developed countries. There was no attempt to redirect investments or technology transfer so that regions could become independent and start to service themselves. This was the fundamental problem for South Africa since its goal was to push for an independent Africa that produces for itself and is not

dependent on the outside world. He lamented that, currently, Africa imports 99% of all its vaccines and 80% of all its medical needs. South Africa's goal was to change this status quo. He said, going forward, the realisation was that there should not be a concentration of supply chains in any one region. There was also a realisation that, from a health security perspective, relying on other states is not advisable.

4.4 Foreign policy principles that motivated South Africa's proposal for a TRIPS waiver

According to Mr Q, the motivation to present the proposal related to unfinished business. South Africa was at the epicentre of the HIV/AIDS pandemic and, between 1997 and 1998, 43 of the world's biggest pharmaceutical companies sued it because South Africa wanted to implement compulsory licenses to enable the cheaper import of Anti-Retroviral drugs. The complaint by the companies was based on the TRIPS Agreement. South Africa was accused of denying intellectual property holders the protection granted by the Agreement in articles 28 and 27, thus violating the requirements that were imposed by the agreement. The challenge had been that these provisions require cumbersome incorporation into domestic laws (Sibanda, 2012). The difficulty to comply led to a worldwide protest that resulted in the Doha Declaration in 2001, which focused on implementing flexibilities for countries that do not have manufacturing capability. However, that Decision was interpreted in a way that made it very difficult to access any of the flexibilities through the granting of compulsory licences. As a result, the process did not benefit South Africa in the fight against HIV/AIDS.

It was incumbent on South Africa to avoid a repeat of the challenges that had been experienced. Mr Q stressed that, prior to the COVID-19 pandemic, South Africa had had previous challenges with implementation issues in respect of the TRIPS Agreement. From around 2010, there had been an escalation whereby developed countries introduced a more restrictive definition of who qualifies for special and differential treatment, reneging from the understanding that space would be left for developing countries to progress. Therefore, the proposal also related to unfinished business, South Africa had been the epicentre of the HIV/AIDS pandemic and had challenges with the TRIPS provisions.

4.5 What does the outcome of the proposal for a TRIPS waiver indicate about South Africa's status/influence at the WTO?

The WTO Ministerial Council adopted several Decisions in June 2022, including a package on WTO responses to emergencies. This package included a Decision on the TRIPS Agreement which granted a waiver of the manufacture of COVID-19 vaccines. The adoption of the proposal was a watershed moment at the WTO and Bacchus (2023) accurately stated that the WTO regained some level of effectiveness with the agreements that were reached. It was only the second time since its establishment in 1995 that all 164 member states reached an agreement that would be satisfactory and binding on all WTO members. The significance of these Decisions was that they indicated that WTO member states can reach an agreement (Bacchus, 2023).

The outcome was a limited victory for South Africa and India. The Decision only pertains to vaccines, whereas the initial proposal also included diagnostics and therapeutics. The question of the limited success was posed in the interviews and Mr Q indicated that South Africa faced two main stumbling blocks. The first obstacle was the current architecture of the intellectual property protection system. The second obstacle was political consensus. As has been illustrated in chapter three, South Africa and India struggled to convince the EU to change the provisions of the intellectual property system. On the other hand, the countries were very effective in lobbying and garnering political consensus.

Mr X also expressed similar sentiments, indicating that the two main obstacles were the result of the influence of the developed countries at the WTO, notably the EU, which was initially completely against any form of waiver and was not willing to engage on relaxing some of the conditions. The EU argument was that intellectual property protection is an enabler rather than a barrier. Mr X indicated that there were fundamental differences in the ideological approach of developed countries and of South Africa. The objective of the EU was to represent the interests of certain stakeholders, particularly the multinational pharmaceutical corporations. It was

therefore incumbent on South Africa and India to challenge this view and persist with the proposal despite the concerted attempts to block it.

4.5.1 Consensus in multilateral organisations

Kissack (2010) refers to Inis Claude's three models of decision making in international organisations. The first model is the international law principle of equality. This gives equal weight to sovereign states and provides that every state has an equal voice in international proceedings, and that no state can be bound without its consent. This implies that there should be agreement in all decisions made in the organisation. Based on the principle of equality, there should be unanimity, which corresponds to each state having an effective veto over the others. This entails the rule of all by all. A dispute by one can affect the technical ability and ethical principles to implement decisions. The authors say that the significance of consensus is that, when one considers the multilateral system, it is evident that states strictly defend their sovereignty and are therefore reluctant to commit to international agreements (Kissack, 2010). Both Mr Q and Mr X raised this point, indicating that negotiations are about compromise and finding something that all parties can live with. They pointed out that this was especially difficult in an organisation of 164 members, where even one member state could break consensus. They indicated that we should celebrate that South Africa and India managed to garner consensus.

This is confirmed by MacMillan (2014) who is of the opinion that the WTO's DDR's lack of progress poses a challenge to economic theory which contends that global trade discussions are an effective structure for trade liberalisation. He contends that the circumstances are caused by a mix of the WTO's specialised decision-making processes and the fact that the WTO's present membership is broader and more diversified than in prior rounds. His argument is supported by two characteristics of WTO rules: the necessity that WTO decision making be based on consensus, and the single-undertaking principle. As a result, attaining consensus among a larger and more diversified membership would eventually be hampered by coordination failure (MacMillan, 2014). The fact that South Africa and India were able to coordinate effectively and achieve consensus is therefore significant.

4.5.2 Opportunities and constraints of emerging powers

The post-Cold War system of global governance has traditionally been skewed in favour of developed countries. In chapter two it was argued that emerging powers have realised the benefits of existing global governance institutions and have opted to use these rather than destroy them. However, their resistance to accept existing rules has complicated processes in these institutions (Stephen, 2017).

When South Africa became a democracy, it was just as the Cold War ended. It aligned itself with the global South, advocating for a re-evaluation of the distribution of power in the global governance system. Its diplomatic actions sought to contest the predominance of developed countries. The increased assertiveness of developing countries, as well as their desire for collective diplomatic strategy, has contributed to a surge in multilateralism, which was fuelled by the fact that developing countries constitute the majority of UN member states (Spies, 2010).

Despite the shift in the distribution of power in multilateral institutions, emerging powers still need to play by the rules of the game. Mr X indicated that, during the negotiations, the EU approach was much narrower than the South Africa and India approach. The EU resisted attempts to convince it otherwise. Ultimately, South Africa and India had to narrow their approach and to focus on patents and technology transfer in order to facilitate progress in the discussions. He said that even after the shift by South Africa and India, the EU was very sensitive when it came to technology transfer. This represents the challenges that emerging powers face, in that they need to adjust their positions to find common ground with developed countries.

Mr X concluded by indicating that the battle would not be won in Geneva and said that what happened in Geneva indicated that there was a need to engage and apply pressure on member states bilaterally on a capital-to-capital basis. He added that Cuba's position had been very disappointing because it was opposed to the TRIPS waiver on vaccines as it saw the waiver as a threat to the vaccines which they developed. However, given the very close historical ties and significant solidarity that South Africa has shown towards Cuba over the years, this should be the basis for the foreign ministry to engage Cuba. Mr Q concluded by indicating that, although the

outcome was not perfect, it served the purpose in that it gave pharmaceutical companies in the South the space to be able to manufacture vaccines under licence agreements with their counterparts from the North. He added that the opening of the international policy space should be followed up by concrete actions domestically.

4.6 Conclusion

Both participants indicated that in the period before the COVID-19 pandemic the state of multilateralism had deteriorated and that the collapse of the DDR was a contributing factor to the challenges faced by the WTO. They also referred to the implementation challenges of the TRIPS Agreement. The motivation to pursue the proposal for a TRIPS waiver was in the context of unfinished business with regards to the challenges South Africa had faced at the WTO. The attributes that South Africa displayed by presenting the proposal and how it handled the negotiations are all indicative of its status as an emerging power which includes regional leadership and the push to challenge the status quo. Additionally, it was necessary for South Africa to partner with an ally in presenting the proposal to the WTO, given the obstacles faced by emerging powers in multilateral organisations. The outcome was considered a win. The ability of South Africa and India to garner consensus will remain a significant moment in the history of the WTO.

CONCLUSION

The purpose of this study was to answer the question, “Is South Africa, as an emerging power, influential in multilateral organisations?” The question was explored using the joint proposal by South Africa and India for a TRIPS waiver at the WTO as a case study. Chapter one provided the contextual background to the study, whilst chapter two provided the analytical framework that was used to evaluate South Africa’s influence. The case study in chapter three explained the sequence of events, the activities of the various role players, and the developments that influenced the outcome of the proposal. In chapter four, the literature as well as the primary data from the interviews confirmed that South Africa has the attributes of an emerging power, particularly in respect of its display of regional leadership, collaboration with allies, and its readiness to fight for the interests of developing countries. The outcome of the proposal by South Africa and India was indicative of the influence South Africa has at the WTO. The fact that WTO member states reached consensus on the proposed waiver, which resulted in the adoption of a Decision by the Ministerial Council, is indicative of South Africa’s influence. South Africa’s status and the skill of its diplomats played a major role in the outcome.

Reaching consensus only happens in exceptional circumstances, deadlocks at the WTO have become the norm and can last many years, as in the case of the DDR. This study concedes that the final text that was adopted was a considerably watered-down version of the original text as the flexibilities offered in the final Decision are limited and only cover vaccines excluding diagnostics and therapeutics. The interviews indicated that the negotiations had been acrimonious, and it was incumbent on South Africa and India to compromise, and to narrow down the scope of the proposal in order to achieve progress. The text was also adopted at a time when the pandemic had largely come under control and, therefore, the demand for diagnostics and therapeutics had declined considerably.

This study therefore concludes that South Africa is influential at the WTO, albeit to a limited extent. This limited success is due to the constraints faced by emerging powers in the system of global governance, such as the need to compromise. The literature has indicated that emerging powers also need to acknowledge their capabilities and

constraints, that the contribution of emerging powers to global governance tends to depend on their ability to recognise their limitations and thus avoid raising expectations by taking on issues that they may not be able to address. Furthermore, although there has been a shift in the level of influence in multilateral institutions, emerging powers still need to play by the rules of the game.

The posture taken by South Africa in multilateral organisations is indicative of its dilemma as an emerging power. It has to balance the need to pursue a reformist agenda and to fight for the needs of the developing countries, whilst playing by the rules and maintaining good relations with developed countries.

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Annexure A

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Research title: SOUTH AFRICA'S MULTILATERAL TRADE DIPLOMACY IN THE POST-COVID WORLD: A CASE STUDY OF THE APPLICATION FOR A TRIPS WAIVER

INTERVIEW SCHEDULE

The broad research questions to be explored in the interviews are listed below. This is not an exhaustive list of questions since new issues and questions may arise during the interview, due to the nature of unstructured interviews.

1. How long have you worked for government and what has been your involvement in multilateral trade?
2. What is your view on the current state of multilateral trade globally?
3. What guides South Africa's policy and approach to multilateral trade?
4. Were you involved in the SA-India application for TRIPS waiver, what motivated the application?
5. Do you think the application was successful/ are you satisfied with the outcome?
6. What were the key regional dynamics and how did they affect the outcome?
7. Are there any areas that could have been approached differently?
8. What other options could South Africa have explored?
9. South Africa has previously had challenges at the WTO specifically with TRIPS provisions with respect to antiretroviral generics for the treatment of HIV and AIDS, this was more than 10 years ago, what has been done to address the problems on intellectual property rights and flexibilities?
10. Do you have any other comments or observations?

ANNEXURE B

Transcript of interview with Mr Q - date: 13 September 2022

I: Good morning.

R: Good morning Ms Malefane. How are you?

I: I am fine, thank you, and thanks for making the time.

R: No, no, it's a pleasure. Sorry, it has taken so long and right now I'm kind of in transit, but yeah, I am happy to speak with you.

I: I understand it is a busy time of the year. You know when Europe is on a break it gets quiet, things slow down, and then all of a sudden, things start happening all at once.

R: Exactly. Yeah. They are back from their summer break. Now we have to jump.

I: Anyway, I hope this won't take long so that I can release you. Did you perhaps have a chance to look at the questions?

R: I sort of skimmed them, but I mean, just pose them to me and then we can just go through them.

I: Ok, thank you. Can you tell me a little bit about the Investment Act? That sounds interesting.

R: So, by the time I joined the department, we had already had one case where South Africa was sued for not protecting foreign investors. Now, the one case and there was another case on its way, so as I joined the legal team, I landed right in the middle of this case. The second case actually targeted our BEE policies, affirmative action and so forth. Where investors that came in before the advent of democracy in South Africa, before 1994. They said, well, they do not have to adjust to any of the new legal measures because they were not in place when they invested and these are discriminatory against them. Any measures or any advantages given to historically disadvantaged individuals must be given to them as well. And this specifically related to changes in our mining legislation, the so-called mining rights, you know? Okay, and so they fought it and said, well, you know, this is an expropriation and so forth. Long

story short, we prevailed in that case, but it was a very important case because, you know, had we lost that case, it would've really seen a regression of all the progress we had made for putting in remedial measures, addressing the apartheid legacy and so forth. So, you know, I think in that context, once we had dealt with that case, it became important to transform the way we deal with investment domestically. So it was felt that we needed an investment act and this would go hand in glove with cancelling very restrictive international agreements called bilateral investment treaties that put really, really, onerous obligations on us. So, our Cabinet took a decision in 2010 that we cancel and so we have cancelled many of our bilateral investment treaties with the Europeans, for example because they restrict our policy space. They don't recognize, you know, the needs that obviously South Africa as a developing country has, and they don't recognize our obligation to remedy the legacy of apartheid, so to speak and, you know, this is not a short-term project and progressively we have to implement measures that will discriminate of course. You know, but of course, but there is a background and I think there is an obligation, constitutionally and otherwise, for us to do so. So we felt that a lot of these treaties, limited our policy space and so we wanted to move away from these and replace them with domestic legislation that essentially addresses the core issues and concerns that we have as South Africa.

I: Okay, thank you very much. I want to go back to the WTO, what is your view of the state of multilateral trade just before the Covid-19 pandemic, like the environment in which South Africa made the application for TRIPS waiver, how were things at that time?

R: Well, I think it was pretty toxic because at that time it was nearing the end of the Trump administration and remember, the Trump administration had come in and essentially castrated multilateralism at the WTO and everywhere else. Well, the health organization, NATO, everywhere. There was a retreat from, you know, the shared ideas and values of a liberal world order, creating stability, managing public goods such as international security, cooperation on climate change, on the health run on everything, so there was an ostensible retreat by the United States and this put a lot of pressure on multilateralism and specifically from a WTO perspective, things were very bad because at that time. The Trump administration had essentially brought to an end the dispute settlement system because they vetoed the appointment of appellate body members. So, which meant that even if cases could be brought, they

could never be appealed. And so this was in any case, a big blow to the multilateral system. But not only that, I think the continued disagreement about the role and function that the multilateral system should play. Developing countries had made a commitment in 2001 with the launch of the Doha development round in Qatar, and the agreement by developed countries was, well, look, you have given us new disciplines in the previous round. This round will be a development round and we will address your issues in agriculture around issues of development for example, there were a lot of implementation issues in respect of TRIPS for example. None of that materialized, and so from around 2010, 2013, you found an escalation where, developed countries basically said, well, you know, you've had your chances to develop, and now we will kick away the ladder. We will make more restrictive the definition of who qualifies for special and differential treatment. Now, this is part of a more common principle, found in international law, common but differentiated responsibility. So you find this term a lot in climate change, for example, but this is also a trade term given the colonial situation and the disadvantage that a lot of developing countries still have. There was this progressive understanding that space would be left for these countries under more liberal situations and conditions, but developed countries basically stepped away from those obligations and it's not only on the trade front, so many other fronts as well. And so to characterize the situation of multilateralism just before Covid-19, I think very toxic, very adversarial, you know, and a huge disagreement. The US wanted to expand the negotiating areas to issues around investment, for example, around, environmental standards, around industrial subsidies and so forth and there was a big contestation, also on the digital economy, but we know that if they impose rules at this point, it would be at our cost and we would not be able to compete. So, I mean, in total, very, very, adversarial, very messy, you know, very confrontational. Let me stop there.

I: Thank you very much, coming back to South Africa, what is South Africa's policy and approach to multilateral trade in this toxic environment that, you have just outlined?

R: Well, I think South Africa's approach is a principled approach. And that principle relates to the Latin phrase, 'pacta sunt servanda', that contracts must be upheld. We have an agreement, the Marrakesh WTO agreement that sets out certain processes, and to which all countries have pledged allegiance and so if you want to act differently

to the obligations that you've undertaken, you have to take the legal route to change those obligations. You cannot just rock up one day and say, well, we don't find that we are obligated any longer, we think this should apply, that doesn't work. So, our approach is stick to what you've agreed to. However, if you want to change things, don't impose it. Talk to us and let's negotiate it, if you think that there are areas that should be covered that's not covered at the moment, talk to us. Don't break away, and do what is called, you know, independent or standalone agreements. Don't try to do it through so-called FTAs, and so forth. So, our approach is very principled. We say, do what you promise to do, but at the same time, we can also negotiate on issues, that are new and that will address, you know, new era concerns. But at the very least, you promised to give us various things. There's a sequence that we agreed to, and you've not given any of these. So, we will apply the legal route, we will apply the principle route and hold you to account to these things. But of course, also what South Africa's approach has also been is to garner a consensus around developing country issues and concerns and I think this is where our foreign trade policy has made a very big impact because in many instances African delegations are not well-resourced. There's one person that covers you know, several organizations and they just don't get to things. So as South Africa, we have been able to pivot. We have been able to act as a contact point to defend developing country positions. So, many of our positions are coalesced around African positions, around you know, the African agenda, and things that we want to protect, not only for the continent, but also for ourselves. So, advancing the African group position has been a cardinal approach, especially in the Geneva context and then to ensure that those positions are also taken over and reflected. Not only in our national positions, but also regionally. So, influencing Africa, African Union processes where we could get our world leaders, or at least our continental leaders, to support us, in many of the initiatives and that has been also hugely successful. Not because ideologically, you know, we are beating a particular drum. But I think we've also been able to buttress this with a lot of factual and I think strategic, socio-political impact and to large extent, trade diplomacy has led the way in how we articulate things, whether it's on fisheries, whether it's on climate change, whether it's on IPRs, you know, intellectual property, whether it's on competition issues, whether it's on digital economy issues, we always take it back to what do we want to see, from an African perspective. And where, are we to situate this debate. So I think it's an inclusive multilateralism, through an African lens and specifically, you know, then articulating

from a national perspective, what we require in terms of our economy, ensuring that our businesses are also able to access not only the continent, but also be competitive, you know, from a multilateral perspective. I leave it there.

I: Thank you very much, so based on all of this, what would you say motivated the application for a TRIPS waiver?

R: Well, several factors I think, the application for the TRIPS waiver is just one of many events that that triggered this, and I think it relates to unfinished business. We were the epicentre of the HIV/AIDS pandemic, epidemic, and in 1998, 97, we had, you know, 43 of the world's biggest pharmaceutical companies take on the government of Tata Nelson Mandela, and at that time, Dr. Zuma was the minister of health and we wanted to implement compulsory licenses to enable cheaper imports of ARVs. And, we base this right on the TRIPS agreement and the flexibilities that the TRIPS agreement gives and those countries, those companies said, well, you do not have those flexibilities, we will take you to court and I think this was the genesis of a worldwide movement that resulted in the first TRIPS Decision and implementing particular flexibilities for countries that do not have manufacturing capability. That Decision was implemented in a way that made it very difficult to really access any of the flexibility, very onerous, and so, you know, from that perspective, that system didn't contribute much to us, you know, fighting the fight against HIV and AIDS, and I think, in the years that ensued we also ran into trouble with NCDs, not non-communicable diseases. You know, so cancers and lifestyle diseases, all of these drugs remain prohibitively expensive, inaccessible, and we are totally reliant on Western companies and pharmaceutical companies to produce these, and we import them and they are subject to ridiculous patent regimes. So, for a long time, South Africa, and at least, since the time that I have taken over the TRIPS council responsibility, we have put papers on the table indicating where we felt the system was broken and needed to be reformed, but no one listened to us. In 2016, the then Secretary General of the UN Ban Ki Moon issued a high-level panel report on access to medicines with all of the most distinguished personalities such as Mary Robinson and so forth, you know, bringing out the set of recommendations on how access to medicine can be advanced, how prices can be curbed and brought down, how technology transfer can be facilitated and so forth. That report was blocked at the UN. It was blocked everywhere. The first time that the report was ever discussed was at a TRIPS council meeting in

the WTO and this was because of the coalition between South Africa, China, India, and Brazil, where we operated as the BRICS. So, we had been able to bring to bear such a discussion. But once again, you had a lot of hostility. You had a lot of naysayers saying, well, you know, if you attack, you know, IP rights, you will stymie innovation, you will create a large-scale collapse of new drugs coming into the pipeline and so forth. And we were always of the opinion, but, you know, if you really look at the drug pipeline and you look at the types of investments that IP companies that, pharmaceutical companies make, a lot of that is either financed by government funding or they, you know, they go to higher education institutions and they buy molecules and things like that. And, and then they put some money into that system. But a lot of the innovation didn't come from industry. It actually came from public bodies that operate on tax money, money that us as taxpayers put into the system. And so, in any case, you know, we had made a lot of noise about the competition issues. Our competition commission had also, you know, done health sector surveys and so forth. So, long story short, it was not new. It was not something new. So, at the time of the pandemic, we immediately understood that what we needed was a worldwide concerted response that put all available resources and tools that we had into one mechanism that could be activated and that would enable a worldwide joint response and that would also ensure that there would be equity, because at the time when we brought the application, we weren't certain what would be required. So at that time, there was a shortage of PPE because a lot of rich developed countries just held back their PPE for their own use. A lot of them confiscated means, a lot of them had concentrated the production either in their territories or in China. So, when all of this broke down, there was a worldwide shortage and so, you know, so it wasn't obvious that there would be a vaccine. So, when vaccines did actually arrive, it confirmed everything that we were fearful about, that rich countries would reserve the technology and the vaccines only for themselves and that poor countries would not get access to what they required. So I think against that background, there's a long backstory, but you know, as it started to escalate, so did our support escalate, you know, from three to four to five countries up to 66 other countries signing up and supporting this, in over a hundred countries in the WTO, supporting the waiver. I think there was, you know, I think there was a good basis for us to do that historically, but also as the pandemic was busy unfolding, the rationale for that proposal was actually justified.

I: Okay, thank you. You mentioned that at one stage there was a joint effort as the BRICS partners, so this time why only India? What was the position of the other BRICS partners or was there another reason?

R: Well, I think over time and to be honest, over time the BRICS coalition has fractured, you know, the political consensus that was there at the start of the BRICS has disintegrated to a large extent. I think China has found a path that is much more stable and independent. The Russians have found a path that designate themselves as a developed country. So, every time we ask for flexibilities, even within our BRICS conversations, that is a point of contention. So, I think in the years leading up to the pandemic, there would've also been a little bit of a chill on the type of collaborations that we would see, you know, especially with the focus on developing countries. A primary objective of Russia today is to cast itself as a developed strong country, a world leader, and so, you know, from that perspective, Russia would not support the waiver in so far as it also had vaccines that needed to be protected, and they didn't want the waiver to impact on their ability to commercialize this (off the record). But I think the same for China. China had concerns that it had two or three vaccines and it did not want those intellectual property rights to be impacted. So, you see the problem here is that even though there was a consensus necessarily that there would have to be more equity and there was also a consensus that the Russians through Sputnik and Sinovac and all of that, you know, did do more deals, did put more money into the whole thing but their products were also seen as less effective than those in the West. A good example is also Cuba. Cuba never joined us because they had a few vaccines, which they wanted to protect and a waiver they felt would, you know, would not send the right signal. So, I think already, before the pandemic, you know, the kind of geopolitical context and, you know, the drivers within the BRICS had already started to change. I hope that that explains it.

I: It does. Thank you very much. You have touched on the next question a bit, but maybe just to go into a bit more detail, what were the stumbling blocks to the application?

R: Well, I think there were several stumbling blocks. The first was developed countries. They control everything, and so the moment you suggest that there should be a relaxation of the regime that applies, they were negatively inclined. So, they

basically said, well, if you touch the IP system, you touch the most fundamental aspect of the trade relationship. You should not touch IP but of course insofar as this is a question of.. huh! Do as we say, do not do as we do. It is very instructive that many of the things that we were asking for they had already done and put into their legislation so they can confiscate patents, they can force companies to produce at lower prices, you know, they can issue compulsory licenses and they did that in the initial stages. They can basically nationalise hospitals, you know, but if we do it, it is obviously, a big deal. So, a lot of double standards applying, but, you know, they didn't want more general exceptions to allow developing countries to do this. So, this was the first stumbling block was the current architecture of IP protection. I think a second stumbling block was the political consensus. Now everyone agreed that the approach to Covid-19 should be a global common good. And so, institutions like Covax and so forth were set up, but those institutions were never set up with the objective of creating equal access. It was always as a donor driven process that cast developing countries as beggars. It was never a process that says, well, okay, we have identified structural deficiencies in how the global value chain works. How supply chains work, over concentrated in certain countries. Let us start to redirect investments, redirect technology transfer so that regions can actually become independent and start to service themselves. Africa as a continent, imports 99% of all its vaccines, 80% of all its medical needs. So that is a cash cow, and the minute you start to interrupt this, Western companies, Eastern companies, will start complaining. An independent Africa that produces for itself, that is not dependent on the outside world, is a very big threat. 1.23 billion people and projected to be in the region of 1.3 billion in the next two or three decades. The youngest population, fastest growing continent, so obviously geopolitically and otherwise a big threat. If you allow Africa to become independent, it means a big dent in revenues that are derived from it, as such, and then of course, the divide and rule. Unfortunately, Africa is very susceptible to this and especially the Francophone divide, where the France can come in and tell Francophone countries don't support, don't do this, don't do that, and so, you know, that political muscle is always being exercised. And from that perspective, you clearly saw it, you know, questions being asked even internally after we have subscribed to it as the African group. But is it in our best interest? Because, you know, countries are under pressure will cut your bilateral donor funding if you if you fully support this or if you speak out against these things and then of course, LDCs that have no obligations to implement

TRIPS were forced through World Bank Structural Adjustment programs to actually protect IP, that was exploitative at the very least. So I think these are all, you know, different types of barriers, and then of course, you know, there is this North-South divide and a lot of the dynamic had also kind of, you know, started to play on this particular dynamic and then the China-US issue vaccine diplomacy, for example. You know, wanting to use this as a mechanism to gain, you know, a political point scoring, you know, China's better because it donated more vaccines. Then the US comes, no, well, we have donated better vaccines. Our vaccines work better than the Chinese and so forth, so, you know, lots of factors that, that actually hampered much of the negotiations as such.

I: Okay. And then just perhaps zooming into the EU proposal, which a lot of people, saw as a counter proposal to the South Africa – India proposal, our application. What are your comments on that and what were the dynamics on the ground that led to that?

R: Well I think the EU didn't want, you know, a kind of regime that would suspend all patents at least and so, they wanted to use the so-called compulsory license regime, and we had told them, look here, most of us don't even have legislation. How do we use it? So, they said, well, we are flexible to expand the concept of compulsory licenses to any authorisation or legislative measure that countries can use. You know, you don't need the TRIPS flexibilities, you don't need a Decision, but if you if you need this Decision, we could do it through the lens of compulsory licenses, and this will still allow you to achieve the same objectives as opposed to just suspending the whole patent system. So this was their argument and they said we could look at particular types of flexibilities, that would enable countries not only to access, but that could also support the manufacturing of vaccines or any other components of therapeutics, diagnostics or vaccines, if that is necessary. So I think, from a practical point of view, the EU wanted to use something that is already in the TRIPS agreement, without suspending, you know, the patent regime as such, which they felt would send a negative message, would, you know, impact investment would lead to abuses and so forth. So, this was the basis of the EU approach essentially, which was much narrower than ours, and I think ultimately, we had also narrowed our approach to look at patents and technology transfer. They were very sensitive on technology transfer. They did not want to agree to a large scale obligation to transfer technology, but they wanted

firstly, they said, well, to address the problem, why don't you enter into voluntary agreements? And there has been many of them, South Africa you have Aspen, look how well it is working. Why do you need compulsory licenses? and they said technology was transferred on contractual terms, allow the private sector to do this. If they refuse to do it, then of course we can agree to a compulsory license regime where you could threaten these companies and they would comply and if they do not comply, nonetheless, you could issue compulsory licenses with the appropriate limitations in terms of national use, but also exceptions for regional use and so forth. So, this is really the thinking and the approach of the EU and their proposal.

I: Okay, and now the Decision that was taken now at the MCO only pertains to vaccines. It doesn't cover therapeutics and diagnostics. What is the way forward?

R: Well, that particular Decision, if you read it says that within six months, members will decide on how to treat therapeutics and diagnostics. So that process has already started, and it is ongoing in Geneva.

I: Ok, and, do we anticipate there will be any problems this time, or do you think this one will go through much easier than the first one?

R: No, I think there's already big problems. The US said they are not obligated to agree to this. So yeah, probably another protracted discussion and negotiation.

I: Okay, so another two years, or even longer.

R: Even longer, I don't know, but in any case, I think at the end of the day, we have started the ball rolling. We have seen good successes, especially in South Africa. The mRNA hub in there are challenges currently with pre-existing patents and so forth. So, we just have to look and to see how we could clarify our domestic situation so that we can take advantage of the Decision. I think going forward, the realization is you cannot just concentrate supply chains in any one region. What if that region is impacted? What if there is an earthquake? What if there is a flood? What if there is another pandemic, that makes it unfeasible to be shipping things? So, creating, you know, further regional hubs for production, you know, R&D, creating capacity to sequence genomes, to do testing, you know, depending on what strategy you take. All of this, I think there is a realization that from a health security perspective, putting all your eggs in the hands of your enemies is actually not good. The same thing the Europeans are finding out

about the gas supplies from the Russians. You know, they have put their energy security in the hands of someone that wants to do them harm. And so, I think at the end of the day, we have to think about, you know, what we do from a strategic and a security perspective. About you know, our health, our production capacity and so forth. And I think it is the very start of that of that process. And I think, you know, very bold and robust, policy interventions will be required for us to achieve the type of insulation and independence where we are not a hundred percent reliant on external forces for us to manage internal and regional dynamics. And given that I think Africa as a common market and building its infrastructure and capacity, collaboration, common standards, you know, that is really where we need to move. And I think the pandemic has shown us the way.

I: Okay, thank you. That is the end of my questions, I do not know whether you have any other comments, or that would like to add anything that you think is important that I did not cover?

R: Well, maybe I have already touched on it, the last point that yes, we have this Decision, the question is what are we going to do with this Decision? We have a limited period of time in which to act. So, the leadership that we showed in negotiating this, we should also have the leadership to demonstrate that we are using it. And so, this has always been our problem. We fight for things, we get entitlements, and then we do not use it. So, we shouldn't be resting on our laurels. We should be doing the type of reforms that enable us to accelerate. Based on the decision, but also to go beyond this.

I: Okay. Thank you very much. This is much appreciated. I must say it was worth the wait, so thank you.

ANNEXURE C

Transcript of interview with Mr X - date: 22 August 2022

I: Good afternoon.

R: Afternoon

I: Thanks for agreeing to do this.

R: No problem.

I: Okay. Yeah. we will not mention your name. Remember, you are supposed to be anonymous for this particular exercise. So, we will just continue without mentioning your name per se, because I don't know where the transcript will end. Can we perhaps start by a brief background to say how long have you worked in government and what your role has been and how are you related to this particular issue of the application for a TRIPS waiver?

R: Okay, sure. I mean, I started in the government in 2016, at the Department of Trade Industry and Competition. When I joined them, I was actually responsible for developing our 2018 intellectual property policy. We have a national intellectual property policy of the Republic of Africa, of 2018 approved by Cabinet in May, 2018. So I was responsible for developing the policy in 2016, we started the work and, it looked at two things.

One, it looked at the relationship between intellectual public rights and public health. We also looked at South Africa's engagement with international institutions, the WTO and the WIPO et cetera, and then of course, at the time I was not in the Geneva office. I joined the Geneva team in June and August. You can say I started working in the Geneva team August 2021. So I have been here for about a year. So I have been involved now in the TRIPS work since I came to Geneva. So both in terms of the local IP policy and legislative processes, dealing with public health, as well as international negotiations.

I: Okay. No, thank you for that background. And when you arrived in Geneva, how far was the process of South Africa's application for TRIPS waiver?

R: We were far, we started in October 2020. The original waiver proposal was made in October 2020, and then it was revised, in May of 2020. So the original proposal was IPC W 669 of 2020, October, and then there was the revised proposal, IPC W 669 Rev 1 in May, 2021. So of course, although I was in capital, I was working with the colleagues here in Geneva. And then when I came, I became the one who was, you know, actively engaged in the negotiation team.

I: Okay. So when you arrived, and before then, of course, though you were not working on this particular issue, I understand that we have been at the DTI for a while. What are your personal thoughts about multilateral trade in general?

R: Yeah. Well, that's quite broad. I think of course it is important, we know that we are integrating into the global economy. you know, that is important. But of course, we also have to ensure that we have policy measures in place to promote our industrial development goals. So, I suppose, it is about balancing between ensuring the trade, or the multilateral trading system facilitates not only the trade, but also local production. So it's about finding a balance.

I: Okay. No, let me rephrase my question. There are people who are of the view that multilateral trade was already in trouble. And, what the pandemic did was simply to highlight the problems that were already there. So I just wanted to find what are your views? Do you think that were problems or you think the system is okay and is working?

R: Of course, the system does need reform. I think there's, I mean from the developing country perspective, you know, in the WTO there has been, the development agenda that was launched in Doha in 2001, and South Africa has been actively involved in the development agenda, unfortunately, we haven't reached consensus on executing that agenda, and of course, as I say, what is important is to have a system that is supportive about developmental objectives of a country like ours, developing countries as well as 'visible' countries. For us what's important is to reverse the trend of deindustrialization and ensure that the multilateral trading system and the rules that the 'potents' are supportive of our industrialization goals. And as now we move away from, the active engagement in Doha development agenda towards now a new WTO reform process, we have to ensure that the developmental aspect, we

have to ensure that the regional, industrial development objectives that Africa has, find a place in that.

I: Oh, okay. Yeah. You, you've already answered part of my next question talking about what South Africa is doing, but can you expand a little bit more on South Africa's approach to multilateral trade and what the priorities are? You spoke about, industrialization and opening up those opportunities.

R: That's key of course, that is key and in general, like I said, the developmental agenda, ensuring that, you know, the trade rules support of the developmental objectives of developing countries that's critical for us.

I: Okay. The application for a TRIPS waiver that South Africa did with India, what was the motivation behind that?

R: Clearly, it was to ensure that the intellectual property system does not constitute a barrier to expansion and diversification of production of Covid-19 health products, that was the underlying motivation.

I: Oh, okay. And the reason to go in with India? Why India and not any other country? How did it become South African and India?

R: Well, I think you know that, being in DIRCO you know, that South African and India have got a very close relationship. We work together not only in terms of BRICS but previously had the IBSA Forum where we are very much aligned and even bilaterally, we are very close. That is a historical relationship. So we are very close partners. You know, when we came up with the proposal, we discussed it with many of our trading partners, but India was the one that was very supportive and wanted to partner from the beginning. Later on, others joined, but the initial partner was India.

I: Oh okay, and what would you say were the stumbling blocks to the application?

R: Well, I think probably, we had some members that, you know, in terms of how they see their stakeholders in the in the WTO, they are only interested in representing the interests of certain stakeholders in particular, in this case, the pharmaceuticals, the multinational pharmaceutical corporations. That is the only stakeholder that, they were interested in representing. For instance, we had a number of members that were opposed, a handful of members, and those jurisdictions actually, their people had been

very clear that they supported the waiver. So for example, the EU, the European Parliament was very clear that it supported the waiver. The US had civil society and members of Congress supporting the waiver, but those members were only interested in representing the interests of the industry. So that was the main stumbling block that we had.

I: Oh, okay. I don't know, you said you joined government in 1996?

R: No 2016.

I: Oh, okay. So the next question might not be applicable to you, specifically, but, during the time when there was a lot of controversy around anti-retroviral drugs for HIV and AIDS, South Africa had some issues in the WTO where they were calling for generics to be made available and for the manufacturing of generics. I just wanted to check, link the truth. Were there any lessons that we learned then that we now used this particular time?

R: Indeed. I mean if you look at, you know, the work that we initiated in the WTO around that period culminated in the first wave of the TRIPS agreement discussions. Now that you recall in 2001, there was a mandate given by paragraph six of the Doha declaration and it gave a mandate to members to expeditiously come up with a solution to the inherent problems in the compulsory licensing system. That made it impossible for members that had none or limited manufacturing capacity in the pharmaceutical sector to be able to use the compulsory licensing system. This resulted in the first waiver of the TRIPS in 2003, which then, was then converted into an amendment of the TRIPS agreement in 2005. South Africa led the way, in that regard. So certainly, the lessons learned in that negotiation, were quite germane in this conversation.

I: Oh okay. Well, thank you. And then coming back to the current application, the negotiations stalled for quite a while and, notably the EU was saying something else, but also doing the opposite in the WTO and then they put forward a proposal, which some say was a compromise. And there is a whole lot of views around the EU proposal. What are your views on it?

R: We really moved. In the initial stages the EU was completely against any waiver. They approached it from an ideological perspective in the beginning. What they said was that intellectual property is an enabler rather than a barrier and such,

not willing to engage on the proposal. Then in June of 2021, they came with their own proposal, which was basically a few clarifications which, you know, clarifying, issues that were not in any doubt. And so, it then became clear that the solution would be middle ground between the EU communication of June 21 and the proposal 669, Rev 1 and eventually we found each other.

I: Okay, but can we really say we found each other, or we sort of then gave in to say if this is the best that we can get, then we go with it.

R: Well negotiations is not my way or the highway, at the of the day a negotiation is about finding something that all parties can live with, especially in an organization of 164 members. We have consensus, but certainly, the outcome that we came up with on 17th of June, 2022 at the end of the Ministerial Conference is one that gives us the requisite policy space to be able to ensure that intellectual property rights do not constitute a barrier to expansion and diversification of production of Covid-19 vaccines. You will have seen, I hope you have seen that on the 17th of June, the three south African players in the biopharmaceutical space welcomed the outcome and indicated that it gives them the requisite space that they need to be able to manufacture. So we were looking for a solution that would make a tangible and difference, not ideological for us, and so hence we came up with a solution that actually maintains the principles that we set up to achieve. However, the one major flaw of the outcome is that it does not deliver on therapeutics and diagnostics immediately. Hence paragraph eight of the Decision makes it clear that members shall decide within six months on extension of the Decision to therapeutics are diagnostic. So that is the work that is before us right now.

I: Okay yeah. In fact, what you've mentioned now runs into my next question because part of the criticism I have heard is the fact that the current Decision only talks to vaccines and doesn't talk to therapeutics and diagnostics, it falls a bit short of what we intended and therefore it is not really what we wanted. So what are the next steps that we are anticipating to try and perhaps then get some sort of agreement also on the therapeutics and diagnostics part of it?

R: Yes. So, we will have to negotiate, we as South Africa and other cosponsors, released the document termed RDIP 49. Which does two things, it sets out the case as to why we're saying that therapeutics and diagnostics are important, as part of the

comprehensive solution. And it also sets out a timetable for the negotiations to ensure that we deliver by the 17th of December as mandated by our Ministers. We are working according to that, unfortunately the chair of the TRIPS Council has not complied or abided by the proposed timetable. Nevertheless, we continue to try to stick close as possible to that.

I: Okay, so what are we anticipating would happen by the 17th of December?

R: Well, I say paragraph eight of the Ministerial Decision on the TRIPS agreement says that members shall decide within six months on the ...

I: Oh, okay. So 16 December will be the six months. And, thereafter, what are you anticipating? Are we going to have another drawn out negotiation session where we are now debating on the therapeutics and diagnostics, or do you think it will be easier this time around?

R: It will be much more difficult now. That is okay. their industry does not want these included, the US is not with us on this occasion, you recall that in May of 2021, the US indicated that it was ready to support a limited vaccine waiver. They have not indicated any support for therapeutics and diagnostics. Switzerland is very against therapeutics and diagnostics. Included is the EU, which had indicated that does not have a problem with our product scope. In other words, the comprehensive vaccine and diagnostics, but they seem to be backsliding now, so it's going to be very difficult to get consensus on therapeutics and diagnostics. And in fact, we will need people like you in capitals to engage with counterparts in other capitals. We will not win this in Geneva. It is going to need pressure, capital to capital, if we're going to make it.

I: Oh, okay. But you anticipate that if there is enough effort, we will succeed?

R: I anticipate it is going to be very difficult. That is what we anticipate, but at the end of the day it is not going to be long. The mandate is clear that we have to decide by 17th of December. So, that decision could be a yes, it could be a no, if it is a no, we will have to reflect on what that means and what are the next steps.

I: Okay. You are actually anticipating my questions. So, for arguments sake, let us assume it's a no. Do we then throw in the towel or, or do we have a plan B?

R: We will have to reflect and decide on the next steps.

I: Oh, Okay. Just round off, do you have any other comments that you would like to include, perhaps the things that I have not asked you directly, being on the ground in Geneva.

R: I think I want to elaborate on the plea that I made now. Because I think you at DIRCO have a role to play. We are not going to win this thing in Geneva, we are going to win through pressure that is applied on a capital to capital basis. So where there are opportunities to engage with the different capitals, it will be very important that our teams, in the various Embassies, you know, engage with our trading partners to really try to persuade them. One of the very disappointing experiences we had was that, you know, with the vaccine, Cuba was opposed to the TRIPS waiver on vaccines, and the reason for this was because they saw the waiver as something which is a threat to their vaccine that they developed called soberana, we don't agree with this, but that was their view. But nevertheless, I think given our very close historical ties and very significant solidarity that we have shown towards Cuba over the years. We felt that there's a basis upon which, you know, our foreign ministry could engage to get them to be supportive, because actually it is quite important because Cuba not joining meant that the ACP couldn't reach consensus to co-sponsor the proposal. And had the ACP group been able to co-sponsor the proposal it would have been quite significant. So, as I say, now that it is no longer vaccines, it is therapeutics and diagnostics, maybe people will be more amenable because they don't have therapeutics, they don't have diagnostics. So I think it will be important for DIRCO to engage with the Cuban officials to engage with Havana and similarly, you know, to engage financially with the various trading partners that are presenting us with challenges.

I: Oh, okay. That actually now brings me back to the other BRICS partners you mentioned when we started that the choice to go with India was because the other BRICS partners were not really open to the idea. What were the views of the likes of China and Russia?

R: No, I do not say they were not open to the idea, but I'm just saying that they came on board. Yeah, they came on board. But, I mean China was supportive, especially when it came to vaccines. China was supportive. They didn't co-sponsor, but they were supportive. Russia didn't really have an interest in this, their main interest was to ensure that if the waiver is approved that the members that could make

use of it produce safer 'implications' products. But they did not have a principled view either way.

I: So they also didn't co-sponsor?

R: No.

I: Oh, okay. Both China and Russia are producing vaccines, do they have therapeutics and diagnostics

R: China has, Russia, err I don't believe so. China has.

I: Oh, okay. And you don't know what their view would be this time around?

R: Well, they have always been clear that they can support vaccines, but we will have to engage them on therapeutics.

I: Oh, okay. And with Africa, is the Africa group still joined and united on this issue?

R: Indeed, I mean, they have no choice. They have to be, you will recall that some of us have made it a position of the African Union that we support the TRIPS waiver proposal. And this is an extension of the TRIPS waiver discussion. So it still falls under that mandate that was given by the Summit.

I: Oh Okay. That is all from me. I do not know if there's anything else that you feel is important.

R: Really, just to reiterate, you know, that to our colleagues at DIRCO, really, that you need to help us to advocate with the trading partners. International relations and of course we remain ready to engage with you to brainstorm about this. But I think in the platform that you have you are ready to help us to advocate.

I: So basically, you think the solution is political. That there is no other way.

R: Yeah on a bilateral level.

I: Okay, thank you very much. Much appreciated. We struggled to be to get the time, and I will contact you if I have any further questions. What will happen is that I will then transcribe the interview and then will send it back to you just to make sure that I did not misrepresent you in any way. And thereafter, I promised the department that I will share the final mini dissertation with them.

R: Oh, great. I appreciate that and thank you reaching out to meet. Pleasure to meet you.

I: Thank you. Bye.