

# TRADE AGREEMENTS, INTELLECTUAL PROPERTY AND HEALTH MATTERS

A faint, light blue background image of a balance scale is visible on the right side of the slide. The scale has a vertical pillar and two pans hanging from a horizontal beam. The left pan is slightly higher than the right pan.

Global Technology Law and Policy

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Bocconi University

# Setting the TRIPS scene

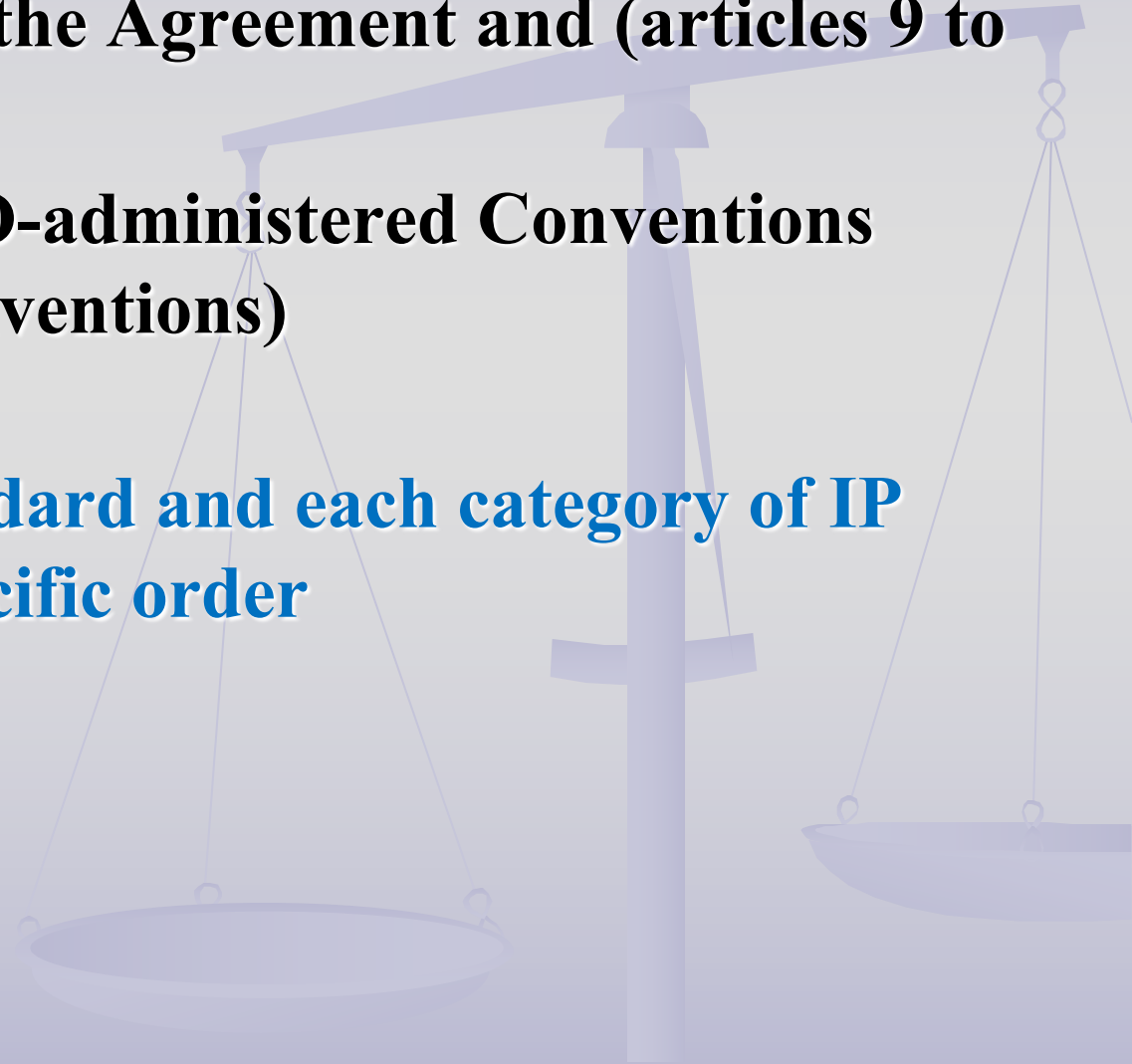
## TRIPS: AN IP TOOL OR AN IP TOLL?

- *A trade* agreement on IP and not an IP Agreement
- Minimum IP rules **for trade**, and not full uniform standards



# Contents of the Agreement

- IP Standards in the Agreement and (articles 9 to 39)
- Links with WIPO-administered Conventions (Paris + Berne Conventions)
- A minimum standard and each category of IP right in a very specific order



# **Respecting the TRIPS Agreement**

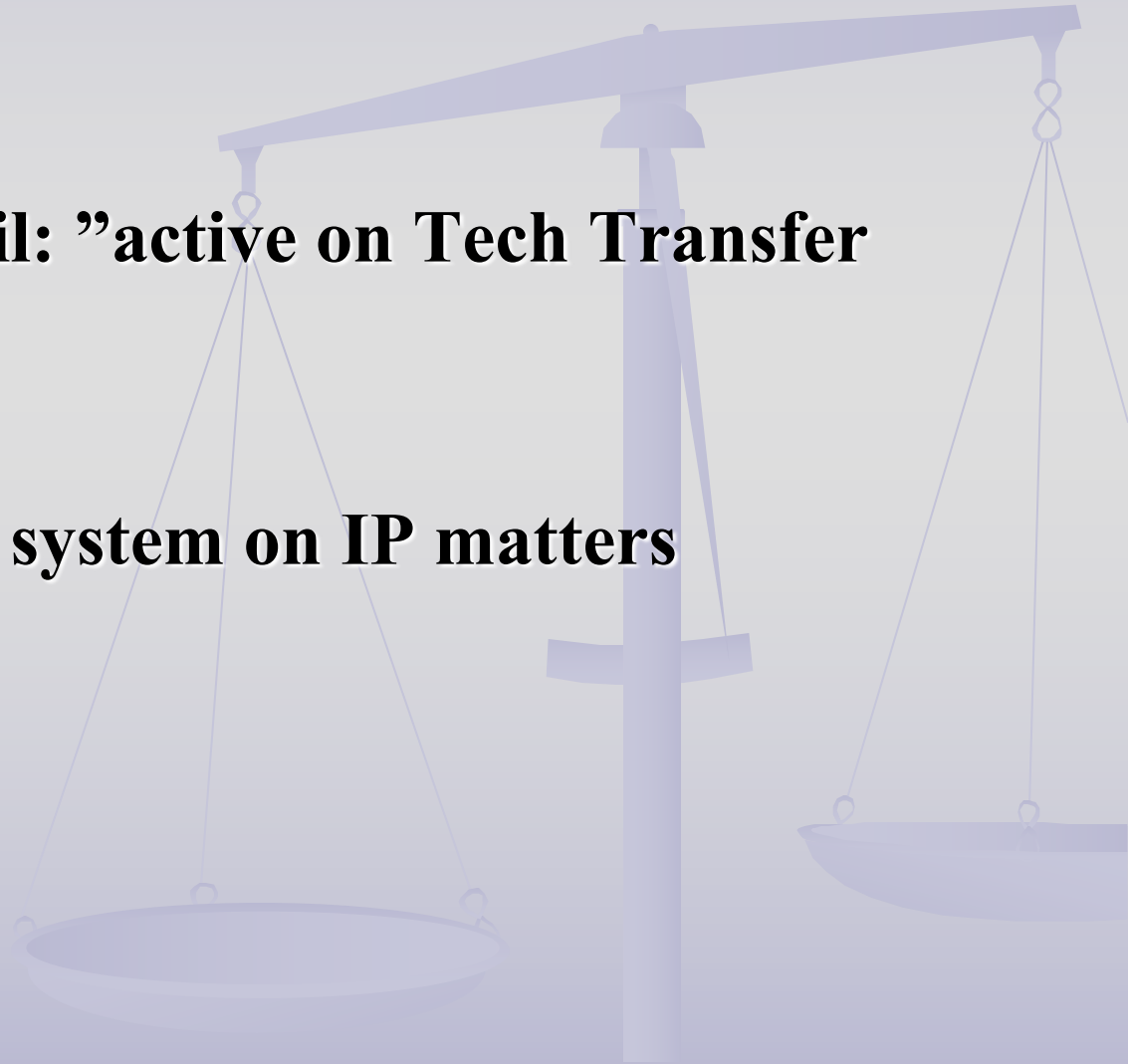
- Enforcement: civil, admin, criminal measures in the agreement**
- Need for national implementing laws**
- Deadlines for developing countries: 2000, 2005, and 2016, now 2021**





# **The TRIPS mechanisms within the WTO system**

- **The TRIPS Council: ”active on Tech Transfer issues”**
- **Dispute settlement system on IP matters**



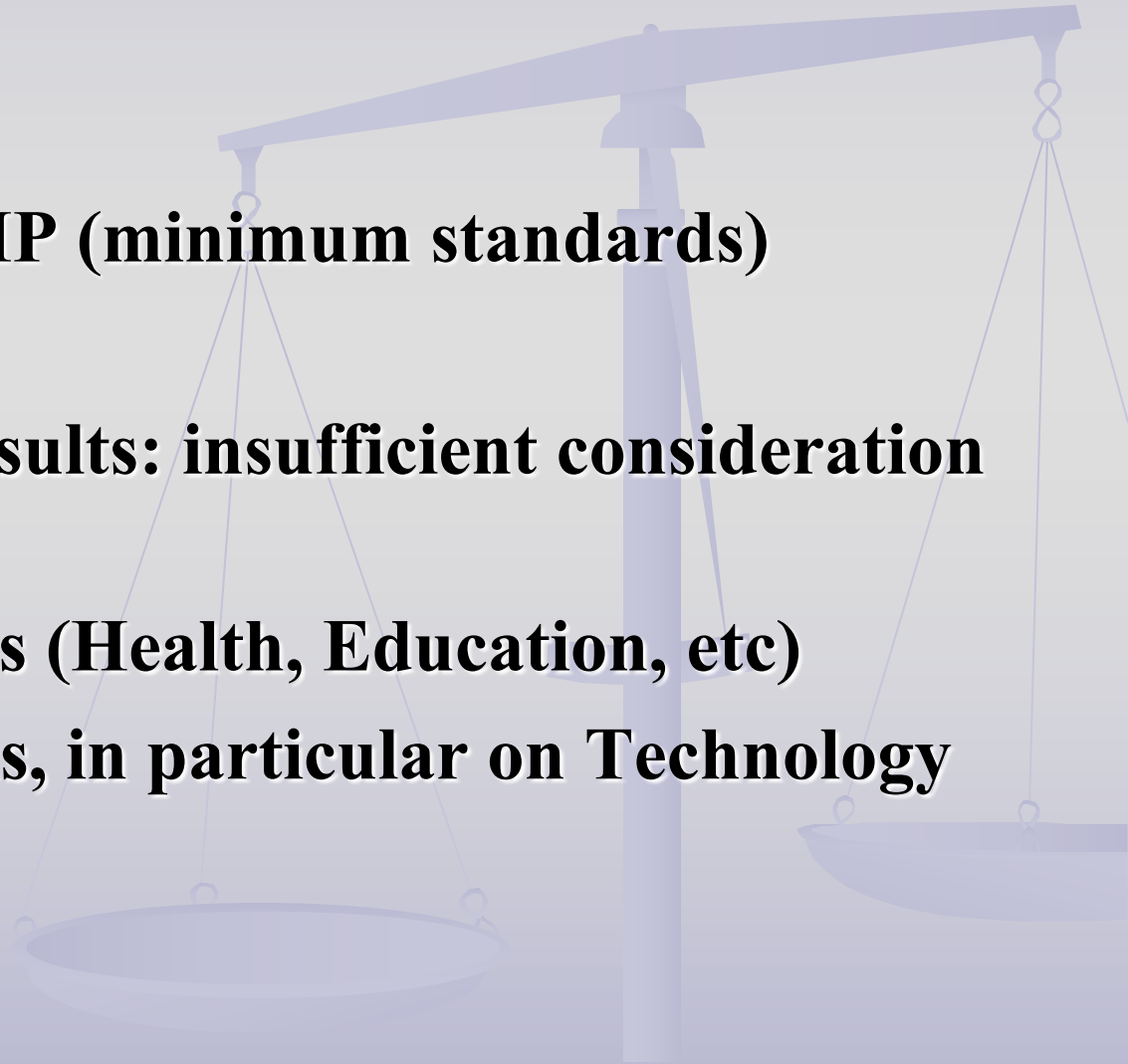
# **Positive effects of the TRIPS Agreement**

**Stronger worldwide IP (minimum standards)**

**....and incomplete results: insufficient consideration of**

- basic human needs (Health, Education, etc)**

- development needs, in particular on Technology Transfer**



# **COVID 19 and TRIPS**

**TRIPS and Public Health: a  
Development issue...**

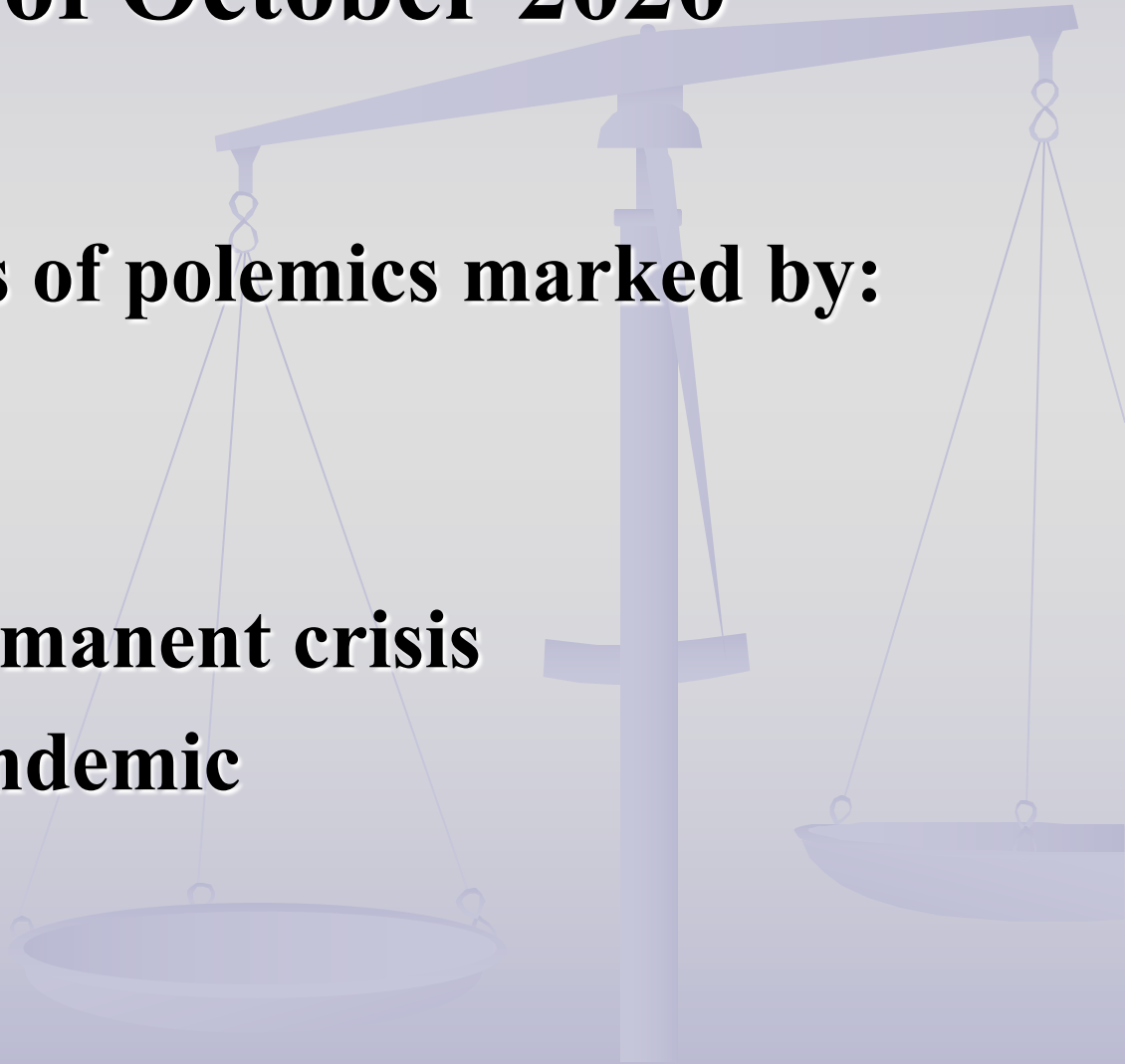
**but since COVID 19 pandemic  
not anymore a Development issue**

**Public health and TRIPS: a symbolic issue for  
TRIPS opponents, yesterday again now**

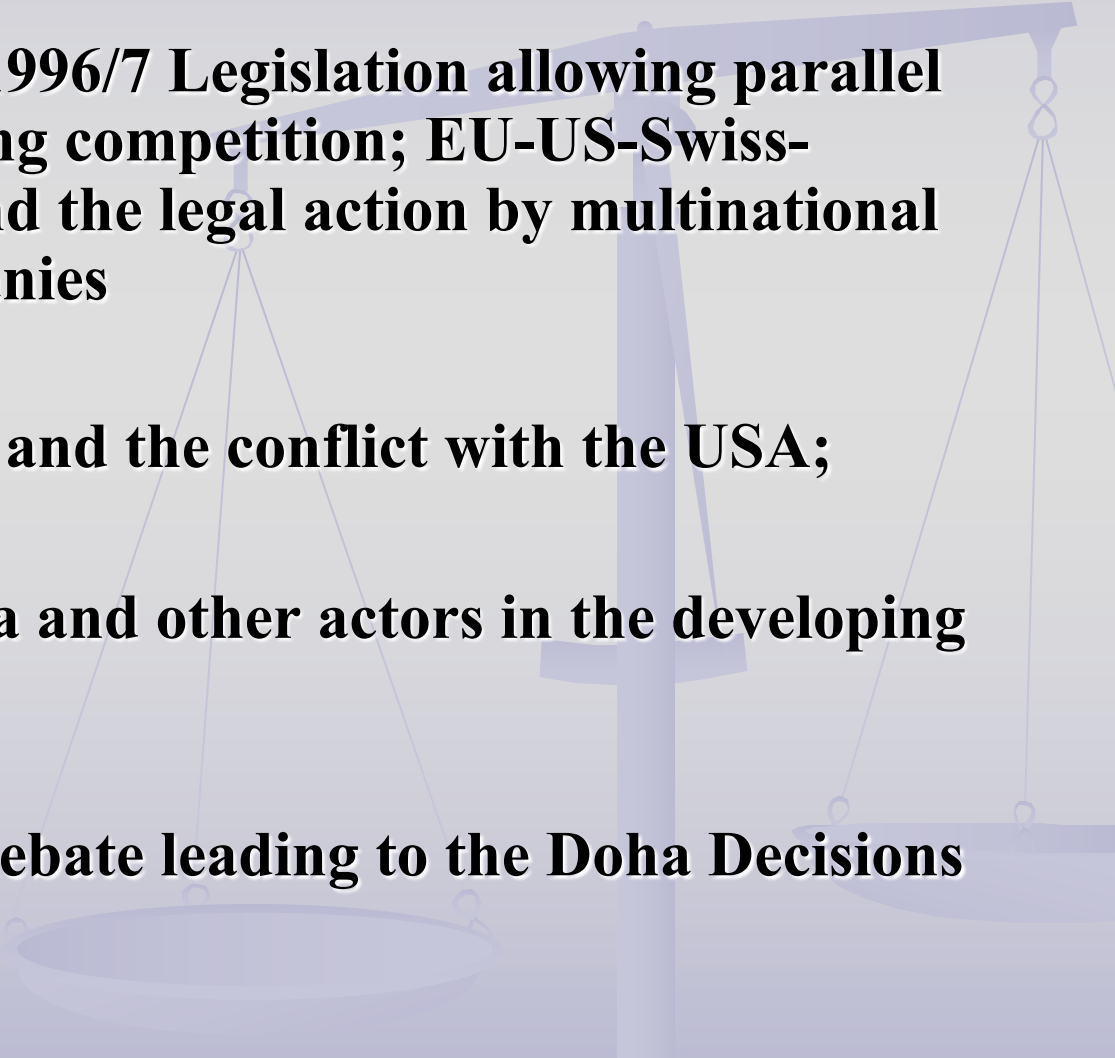
# **From Marrakesh 1994 to the India /South Africa Waiver Request of October 2020**

**27 years of polemics marked by:**

- AIDS crisis**
- Ebola crisis**
- TB + Malaria permanent crisis**
- Now Covid19 pandemic**

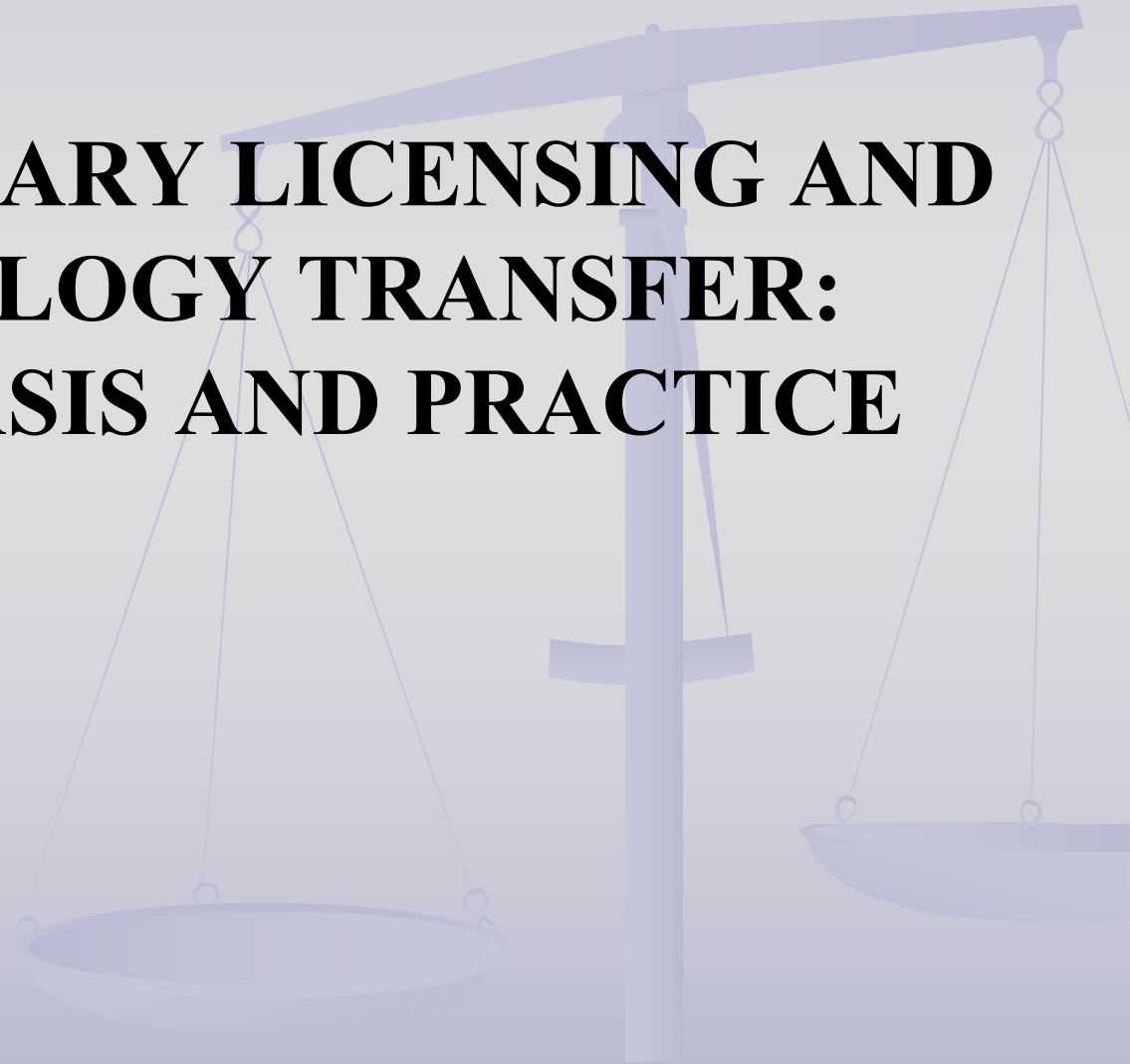


# **Facts about the conflict on Health issues**

- **(1) South Africa : the 1996/7 Legislation allowing parallel imports, and reinforcing competition; EU-US-Swiss-Japanese criticisms, and the legal action by multinational pharmaceutical companies**
  - **(2) The Brazilian case and the conflict with the USA;**
  - **(3) India, China, Africa and other actors in the developing world;**
  - **(4) The international debate leading to the Doha Decisions**
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**A legal debate and a political debate**

**NON VOLUNTARY LICENSING AND  
TECHNOLOGY TRANSFER:  
LEGAL BASIS AND PRACTICE**



# **PRO-SOUTH PROVISIONS**

## **Legal debate: general scope**

### **■ Article 7 Objectives**

**The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.**

### **■ Article 8.1. Principles**

**Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.**

# PRO-SOUTH PROVISIONS

## Legal debate:

### - **Art. 27.2. no “anti-health” patents**

« 2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law»

### - **Art. 30: exceptions possible to exclusive rights of patentees if no unjustified prejudice**

«Exceptions to Rights Conferred

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.»

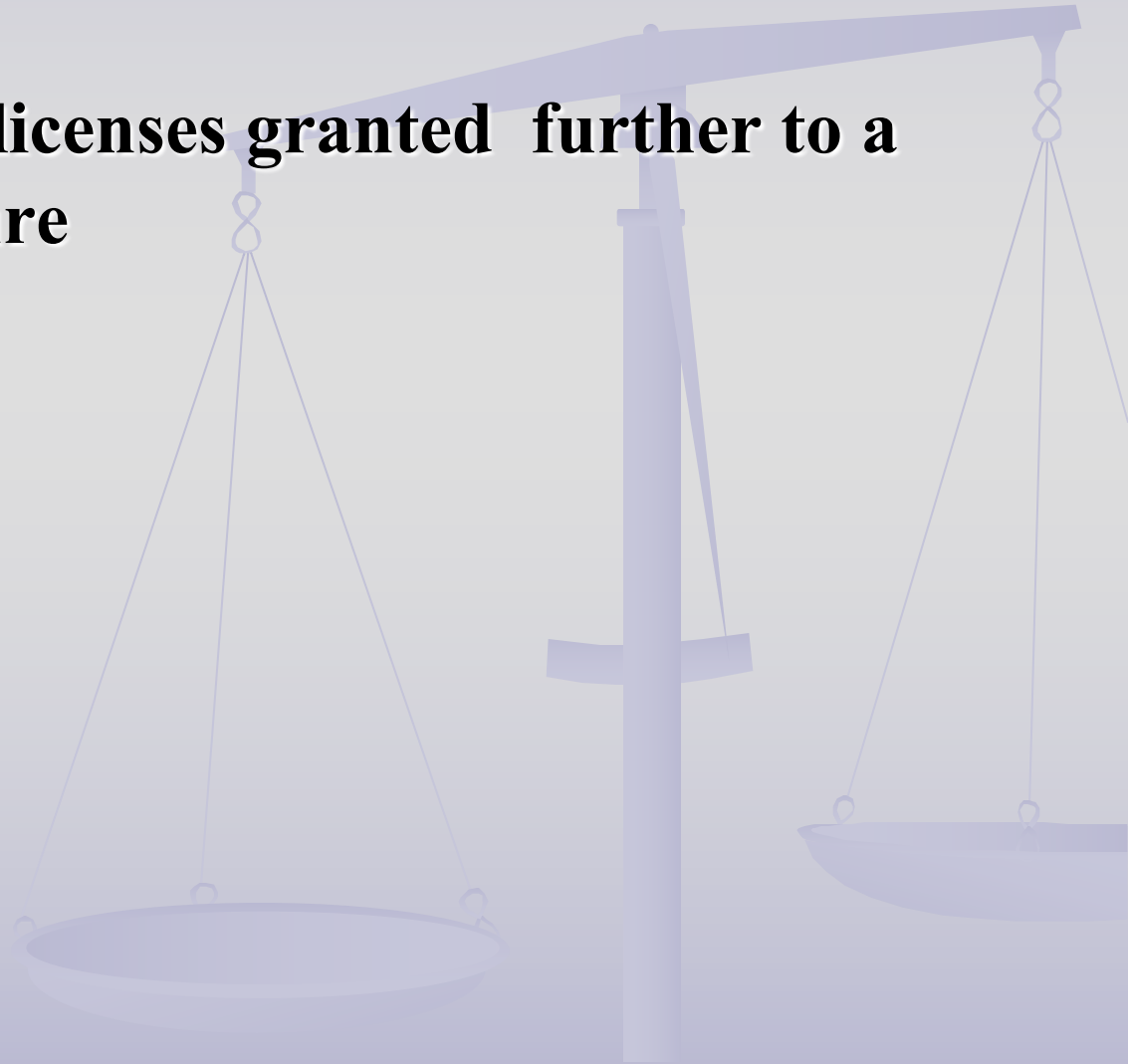
### - **Art. 40: patents should not be anti-competitive**



# **PRO-NORTH PROVISIONS**

## **Legal debate**

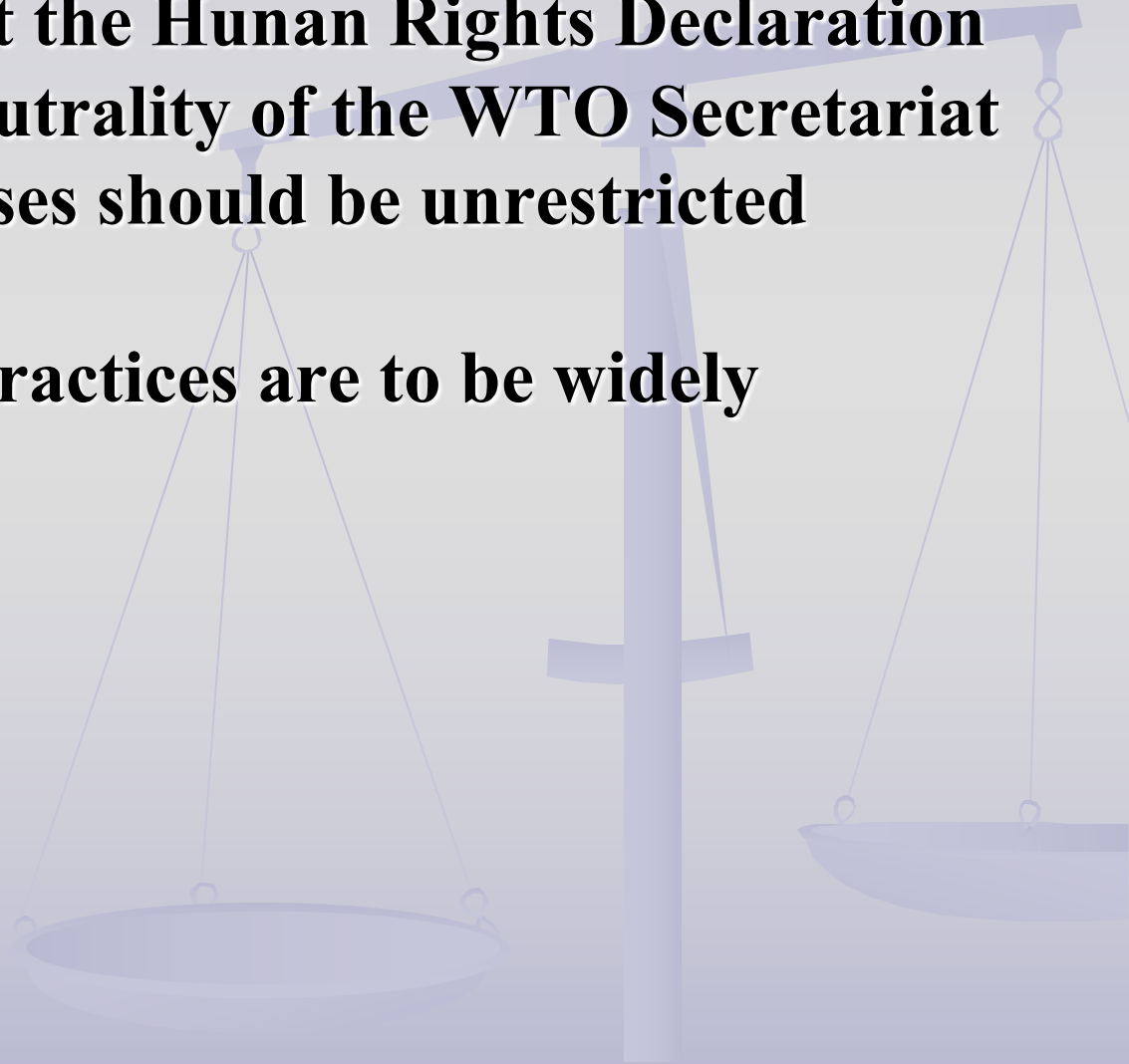
**Art. 31: compulsory licenses granted further to a restrictive procedure**



# *The political debate*

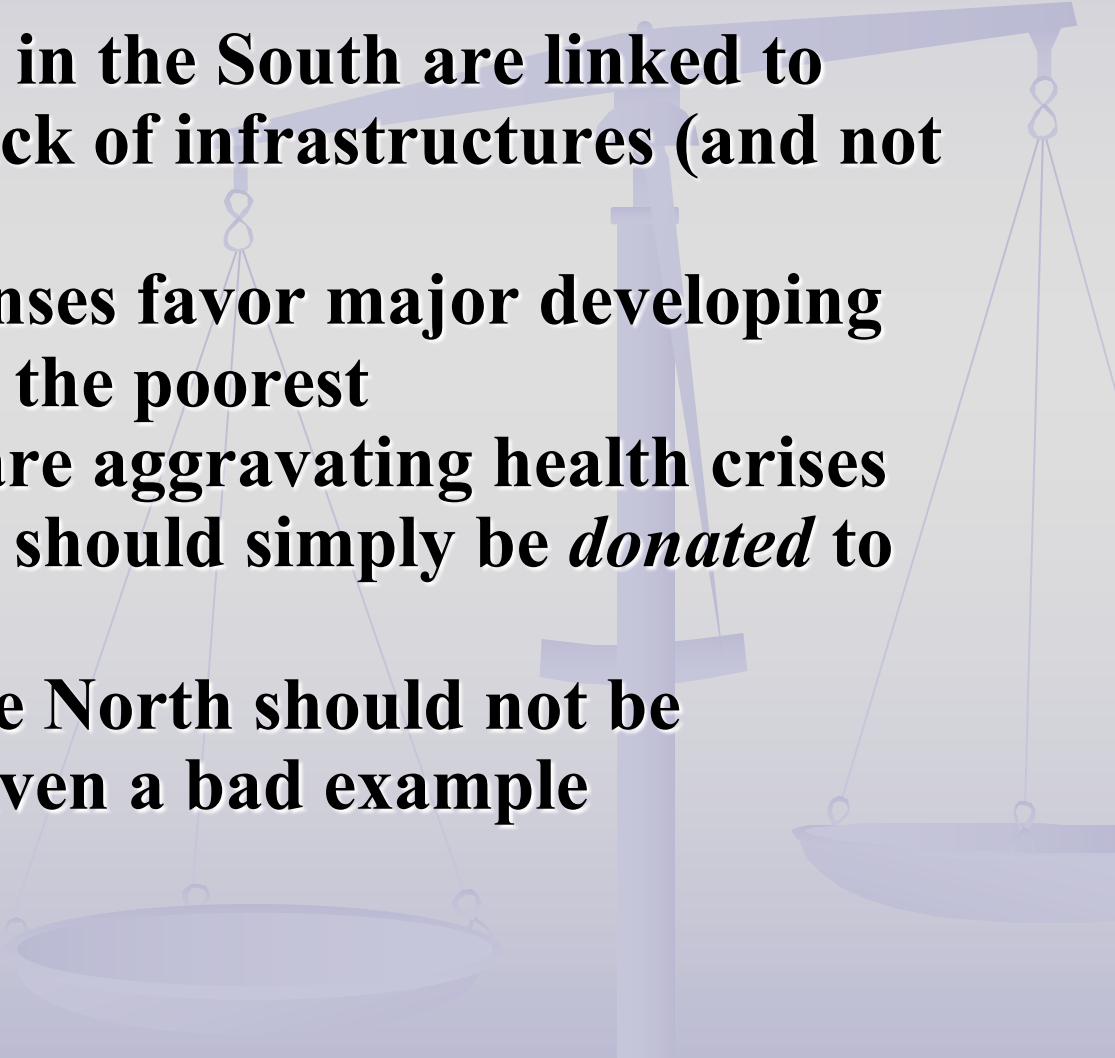
## **PRO-SOUTH**

- TRIPS are against the Human Rights Declaration**
- Alleged lack of neutrality of the WTO Secretariat**
- Compulsory licenses should be unrestricted  
(Canadian ex. ++)**
- Pro-competitive practices are to be widely  
accepted**



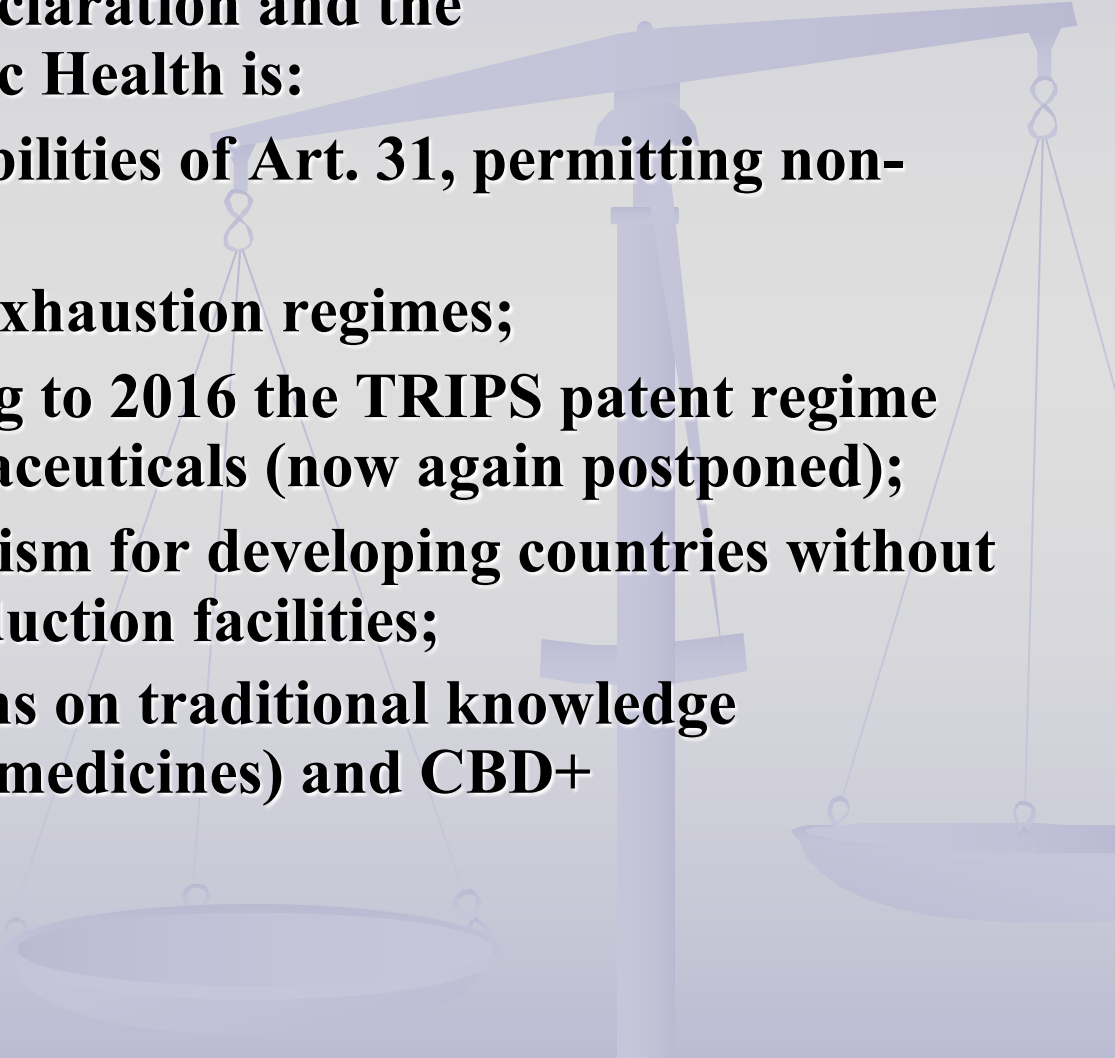
# *The political debate*

## **PRO-NORTH**

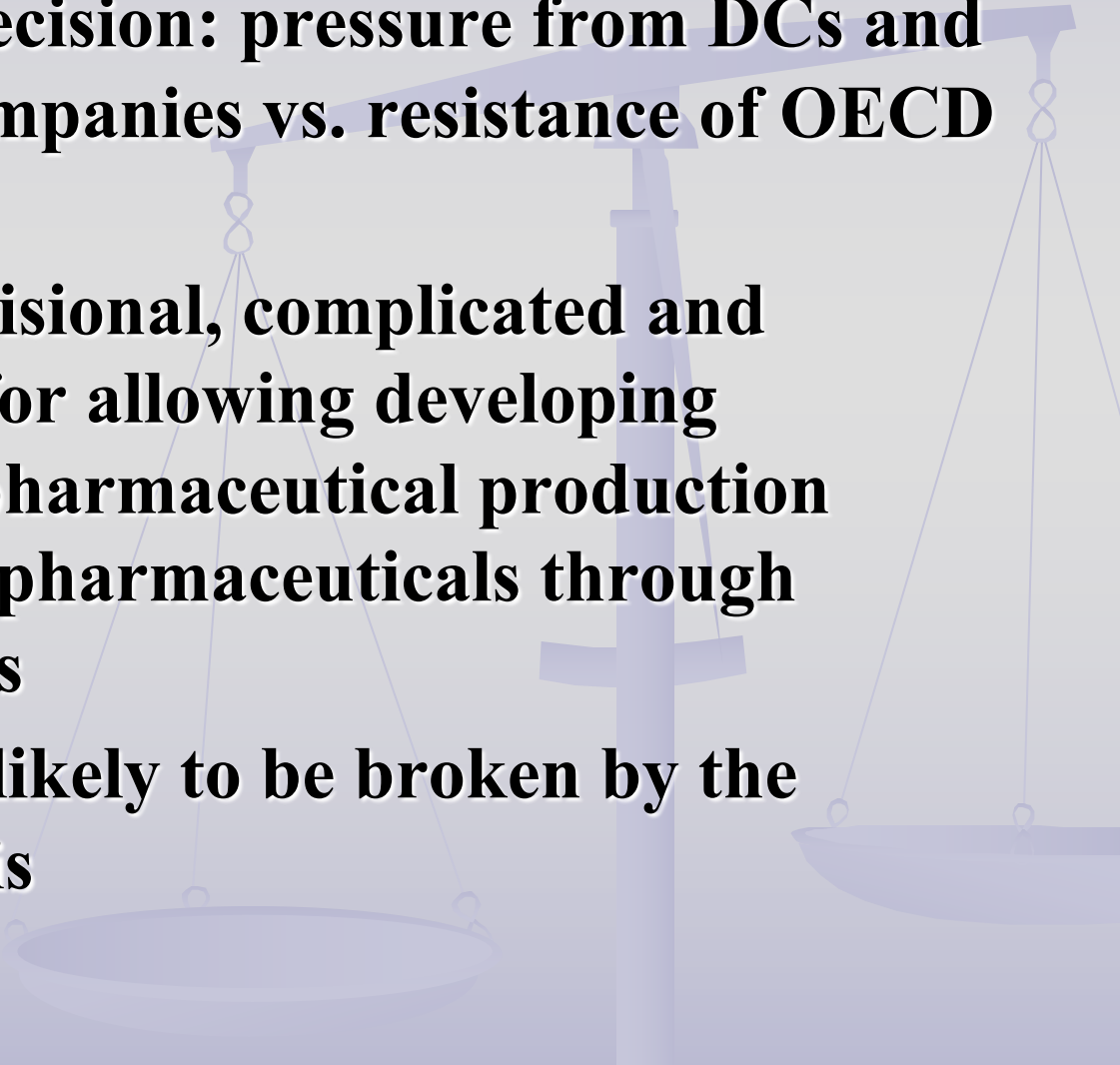
- Health problems in the South are linked to corruption and lack of infrastructures (and not to patents)**
  - Compulsory licenses favor major developing countries and not the poorest**
  - Pricing policies are aggravating health crises**
  - Pharmaceuticals should simply be *donated* to the poorest**
  - Consumers in the North should not be abused... or be given a bad example**
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# **The Doha decisions and their incompleteness**

**The Doha Ministerial Declaration and the Declaration on Public Health is:**

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- (1) reaffirming the flexibilities of Art. 31, permitting non-voluntary licensing;**
  - (2) leaving freedom on exhaustion regimes;**
  - (3) for LDCs, postponing to 2016 the TRIPS patent regime applicable to pharmaceuticals (now again postponed);**
  - (4) requesting a mechanism for developing countries without pharmaceutical production facilities;**
  - (5) requesting discussions on traditional knowledge (including therefore medicines) and CBD+**

# **The Decision of August 30, 2003**

- **(1) genesis of the decision: pressure from DCs and pharmaceutical companies vs. resistance of OECD Countries**
  - **(2) Results: a provisional, complicated and ineffective system for allowing developing countries with no pharmaceutical production facilities to import pharmaceuticals through compulsory licenses**
  - **An unfair balance likely to be broken by the current health crisis**
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## **Towards better solutions than Art. 31?**

- A more systematic use by developing countries of the “Bolar” provision and of parallel imports and the attitude of pharmaceutical companies**
- A Global Post-Pandemic New Deal?**



# Conclusion

**The economic battle for  
middle-income countries' markets:  
close to a compromise,  
or towards new IP & Trade wars?**

