D2 | SHIFTING PLAYING FIELDS: HOW NEW TRADE TREATIES GOVERN GOVERNMENTS

Introduction

Trade has been on the health activist agenda for many years, accelerating since the birth of the World Trade Organization (WTO) in 1995 which began re-making the global economy in ways that advantaged the world's high-income countries (HICs) and their transnational corporations (Chang 2002). Much of this attention continues to focus on the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and how this affects access to essential medicines. Ironically, whereas most WTO agreements are about liberalizing trade, TRIPS is protectionist since it provides for extended monopolies on patents and copyrights, "intellectual property" being amongst the new "goldmines" of post-industrial capitalism (see Chapter B4). But there are few aspects of contemporary life (and health) that are not directly or indirectly affected by trade; and trade itself has been an element of human societies for millennia. To the extent that the exchange of goods and services between nations increases consumption levels beyond the limits of our planet (described in Chapters A1 and A3) global trade could pose an existential health risk. But health concerns with trade are generally less about trade itself than with the health equity impacts of specific and enforceable rules that governments have agreed on to govern such trade, or, more precisely, to govern what public policies governments might pursue to ensure that they do not "unnecessarily" restrict trade (we return to this point later in this chapter).

The WTO represents the largest set of such agreements amongst the largest number of global nations, comprising 164 members and another 25 observer countries. There is little in its founding statement of purpose with which health activists might find fault:

> The field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development. (World Trade Organization 1994b)

Such statements, however, unlike trade agreement rules themselves, are unenforceable and little more than window dressing to make such rules more politically marketable. And it did not take long for cracks in the ability of WTO agreements to deliver on this promise to develop, with civil society organizations,

academic researchers, and WTO member states representing low- and middle-income countries (LMICs) pointing out the power and economic asymmetries embedded in the WTO system. Facing criticism from within (its LMIC member countries, notably African) the WTO launched the so-called Doha Development Round in 2001, focusing on "developing countries' needs and interests" (World Trade Organization, 2001). In the 20 years since, however, little progress on this agenda has been made. Even if completed, most of the economic benefits would go to the world's wealthier countries (Polaski 2006), and WTO observers have long questioned the organization's very survival (Vaughan 2018). This condition was not helped with the election of Donald Trump, with threats from the USA to withdraw from the organization while undermining the WTO's enforcement system by refusing to accept new nominations to the Appellate Body that oversees final dispute settlements between member countries.

For many health activists, a potential death of the WTO may be appealing. But we need to be careful what we wish for. In an anarchic (no rules-bound) global trading system there is no check or balance on the power of some nations to overpower any opposition. Although the current WTO and its many agreements skew in favor of the already mighty (the USA, EU, and other HICs which, after all, wrote many of the trade rules) there have been some health-positive developments within the WTO, notably the increasing acknowledgement of the importance of public health regulation in arbitrating trade disputes. The most notable one was the WTO's 2020 decision that upheld Australia's regulations on plain packaging of tobacco products.

It is also important that health activists concerned with trade and health intersections do not focus their criticism exclusively on the WTO itself. The WTO is an intergovernmental organization designed to facilitate ongoing trade negotiations and administer disagreements amongst member states. Officially "neutral" on matters of trade liberalization, institutionally it is heavily steeped in liberalized trade theory's argument that "freer" trade is important in generating economic activities that reduce poverty and improve economic growth (Gopinathan et al. 2018). But the abiding power in trade rests with the member states, notably the most powerful amongst them. If we take exception to trade or investment rules that directly or indirectly harm health, health equity, or the underlying social/structural determinants of health, our complaints need first to be made with our own national governments that created these rules or to which they initially felt compelled to agree with.

From multilateral trade to bilateral/regional power-brokering

There is a new WTO Director-General, Dr. Ngozi Okonjo-Iweala, the first female and first African head of the organization. Whether she can revitalize work on the unfinished "development" agenda is another matter. Multilateral negotiations at the WTO stalled even before the Doha Development Round was initiated, precipitated by the refusal by HICs to reduce their domestic agricultural subsidies to facilitate competition with agricultural imports from LMICs. Trade

negotiations quickly shifted to bilateral (two country) treaty-making, driven largely by the USA and the EU. These treaties introduce new rules or enhance existing liberalization measures that go beyond the WTO; hence, they are often described as "WTO+." The USA currently has bilateral treaties with 12 countries (United States Trade Representative 2021a); the EU has 44 such agreements with 76 countries (European Union 2020, 2–3). Many of these bilateral agreements are with LMICs, where the rich countries' "divide and conquer" strategy is simple. By negotiating with one country at a time, the more powerful nation can influence the new trade rules to their benefit, something no longer possible in the multilateral, developing country-dominated WTO.

In parallel with the growth of bilateral treaties has been the rapid rise in regional trade agreements, more commonly referred to as free trade agreements (FTAs). The WTO, which allows its member states to make these preferential agreements amongst themselves if they are more liberalizing, estimates that there are 339 such agreements in force as of February 2021 (World Trade Organization 2021a).

The result of these surging number of WTO+ treaties has been likened to a "spaghetti bowl" that can make it hard to assess fully what any one country's overlapping trade obligations are and to whom.

FTAs, because they involve more countries and usually include an investment chapter (on which more later), have received the greatest civil society and public health activist attention. Some of the major FTAs are described in Table D2.1; most of them include one or more dominant (HIC) members that, as with bilateral treaties, give them a powerful edge in negotiating new trade rules.

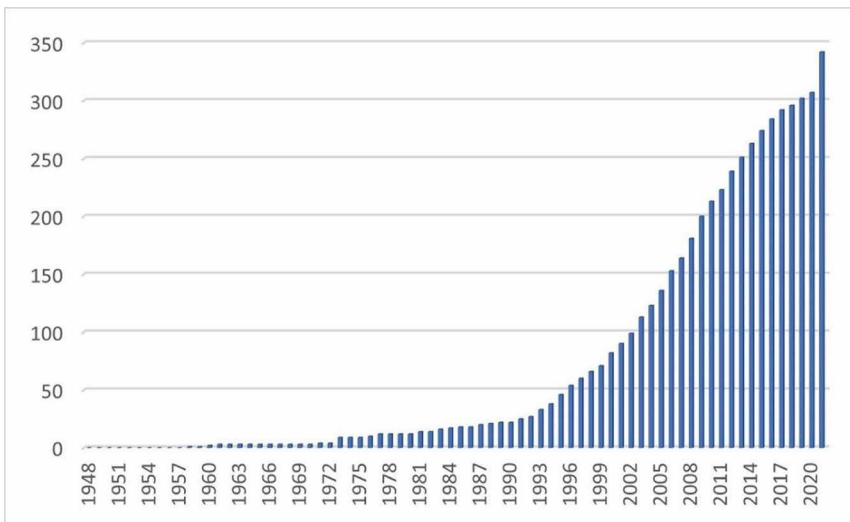

Figure D2.1 Cumulative number of free trade agreements 1948–2020.

Source: WTO, "RTAs Currently in Force (by Year of Entry into Force), 1948–2021," RTA Tracker: Regional Trade Agreements Information System (RTA-IS), (n.d.). https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx

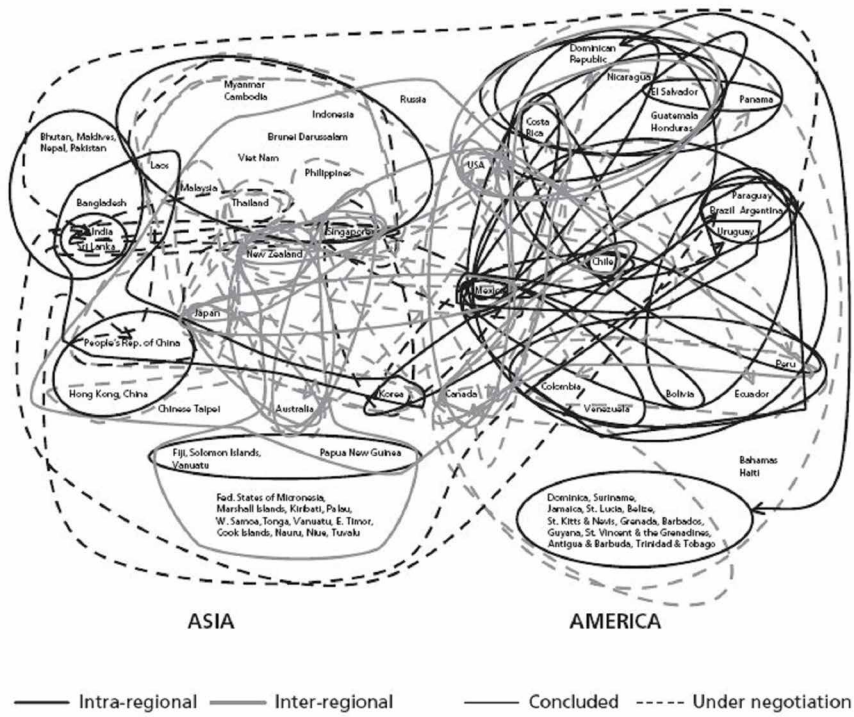

Figure D2.2 The spaghetti bowl of free trade agreements.

Source: Reproduced with permission from Scott L. Baier et al., "Do Economic Integration Agreements Actually Work? Issues in Understanding the Causes and Consequences of the Growth of Regionalism," *The World Economy* 31 (4) (2008): 461–497

TABLE D2.1: Recent free trade agreements

FTA	Key notes
Comprehensive Economic and Trade Agreement (CETA)	An FTA between Canada and the European Union signed in 2016. The Agreement is still subject to ratification by the EU and national legislatures, but most provisions are provisionally in force, including its TRIPS+ rules. It is widely regarded as the template for an eventual US/EU Transatlantic Trade and Investment Partnership (TTIP) agreement, negotiations on which have been on hold since 2017.
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)	An FTA between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam, in force since 2018. The CPTPP evolved from the Trans-Pacific Partnership (TPP). The TPP was the first "mega-regional" FTA, originally accounting for over 40% of the global economy, before the USA withdrew in 2017. The CPTPP then suspended several controversial US-driven TRIPS rules governing pharmaceuticals. Several other Pacific Rim nations and even the post-BREXIT UK have indicated interest in joining. The US Biden administration may also be encouraged to rejoin.

United States/Mexico/Canada Agreement (USMCA)	Agreed in October 2018 and ratified in 2020, the USMCA represents a renegotiation of the 1994 North American Free Trade Agreement (NAFTA). It incorporates many of the provisions in the CPTPP from which the USA withdrew. In December 2019, a "Protocol of Amendment" to the Agreement was made, involving four key and contentious areas: pharmaceuticals, labor, environment, and dispute resolution. The USMCA eliminates investor-state dispute settlement (ISDS) between the USA and Canada (apart from legacy disputes filed within three years), and significantly narrows ISDS scope between the USA and Mexico.
Regional Comprehensive Economic Partnership (RCEP)	Signed in November 2020, this Asia-Pacific Region FTA first involved 16 countries, including the Association of Southeast Asian Nations (ASEAN) members and the six countries that have existing trade agreements with ASEAN (Australia, China, India, Japan, the Republic of Korea, and New Zealand). India opted out of RCEP in November 2019. RCEP is often portrayed as competition to the more American-centric original TPP and was intended to reflect the diverse needs of its member states, which include a significant number of LMICs. More recently, the RCEP has reportedly grown to more closely resemble the CPTPP; as of May 2021, it awaits full ratification before entering into force.
Trade in Services Agreement (TiSA)	A proposed FTA covering trade in services (such as banking, healthcare, and transport), currently involving 50 mostly high- or middle-income countries. Negotiations were initiated in 2013 by a handful of countries responsible for over half of all global services trade (primarily the USA, the EU, and Australia), which were unhappy with lack of progress under the WTO General Agreement on Trade in Services. Leaked drafts show that TiSA is a complex agreement that applies to all sectors except those which governments explicitly exclude and includes multiple annexes, all intended to create an ambitious treaty that could pose risks to public services, especially if governments decide to rescind privatization experiments that prove to be too costly or inequitable. TiSA negotiations have been stalled since 2016.

Source: Adapted from McNamara et al. (2021a) and Gleeson and Labonté (2020).

WTO+ and weaker government regulatory powers

Trade rules are commercial rules, aimed at promoting economic exchanges between countries. For the past 40 years of neoliberal policy dominance, the rationale for deeper trade liberalization has been the pursuit of continuous economic growth and trickle-down poverty reduction, neither of which have produced equitable or environmentally sustainable outcomes. In this pursuit, trade rules aim to prevent government policies and regulations from becoming "unnecessary obstacles to international trade" (Gleeson and Labonté 2020). Apart from TRIPS (and TRIPS+) agreements (see Chapter B4), several WTO agreements that have been WTO-plussed in recent FTAs could challenge new public health measures.

The WTO Agreement on Sanitary and Phytosanitary Measures (SPS) sounds like a health agreement, but it is not. Its intent is to ensure that government

health regulations do not interfere "unnecessarily" with trade. It does so by requiring that such regulations be consistent with the WHO/FAO-managed Alimentarius Commission ("Codex"). Countries can exceed the Codex standard only if they have a scientific justification, but with some allowance for the "precautionary principle" to err on the side of health when there are new hazards with only limited scientific evidence. FTAs are toughening up this provision, requiring governments to provide "documented and objective scientific evidence" for any new regulation exceeding an international standard. This weakens the precautionary principle, something usually invoked by the EU and which the USA has never liked. The United States/Mexico/Canada Agreement (USMCA) goes further, calling on parties to strive to achieve the same standards and to provide detailed information on any new regulation that could impede trade.

The WTO Technical Barriers to Trade Agreement (TBT) already requires governments to implement only those measures that are "less trade restrictive"; it is the agreement that has been the source of most health-related trade challenges or formal disputes at the WTO. The TBT defers to international standards, such as Codex, meaning that if a country's new regulation uses that standard it would be considered in compliance with the TBT. Apart from criticisms that Codex is dominated by industry, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership's (CPTPP) and USMCA's TBT+ requires countries to cooperate to ensure that any new international standard does not become a possible trade barrier, before being agreed upon. This will likely have a chilling effect on new health and environmental standard setting. Both the CPTPP and USMCA also open the door to more private corporate involvement in setting new health or environmental regulations, risking "regulatory capture" by vested economic interests (McNamara et al. 2021a).

Trade in services was already important with the birth of the WTO and its General Agreement on Trade in Services (GATS). The health concern with GATS is the extent to which decisions to liberalize certain sectors overlap with government policies to increase privatization (notably in healthcare, social protection, and environmental services such as water), making it extremely difficult for governments to reverse privatization decisions if they prove inequitable or unpopular. This is of particular concern given the extent of initiatives to increase private sector participation in many government-provided services (see Chapters B1 and B3). The WTO's GATS used a "positive" approach to liberalization: only those sectors that governments chose to liberalize fell under the agreement. Many countries have chosen not to commit their health, education, or social services under GATS. GATS+ in FTAs, however, use a "negative" approach, where all services are considered liberalized except those which governments specifically exclude. Negative listing increases the risk that negotiators inadvertently fail to exclude a service they did not intend to liberalize. With the rise in e-commerce, FTAs also prohibit localization policies requiring digital data to be stored within the country of origin, something considered to be important

in terms of privacy protection. Although government-collected data may be excluded from this requirement, most other digital data is not. With tech giants moving increasingly into health services commerce and personalized healthcare it is likely that such firms will "harvest" non-excluded health records from other countries for commercial purposes (see Chapter B2).

Although much of the trade and health policy attention has shifted to the proliferation of bilateral and regional FTAs, the WTO is far from being left out. Rather, developed country WTO members began negotiating voluntary "plurilateral" agreements covering many of the liberalizing issues (services, investment, e-commerce) initially opposed by many developing country WTO members. The game plan here, as with new bilateral and regional FTAs, is for these plurilateral agreements to become part of the multilateral WTO system, eventually binding on all WTO members (apart from some transition periods for developing and least developed countries). The scope of these new agreements, and their health equity implications, are potentially troubling (see Box D2.1).

Box D2.1: Health implications of WTO plurilateral negotiations

A number of WTO member countries have begun plurilateral negotiations at the WTO on a range of topics, without any legal mandate and without releasing the negotiating text to the public. Below are highlights of some of the main plurilateral proposals in leaked negotiating texts that can harm health.[1]

The services domestic regulation disciplines (DRD) plurilateral negotiations involves 64 members. The text is largely concluded and members are now deciding which service sectors the DRD will apply to. The aim is to have concluded the negotiations by the 12th WTO Ministerial Conference (MC12) which will be held from November 30 to December 3, 2021.[2] The services DRD agreed text to date[3] applies to the service sectors the participating members have liberalized at the WTO[4] and possibly additional sectors, and includes:

- Restrictions on authorization/licensing fees which can be charged in the service sectors covered by the rules to those that are reasonable, transparent, and do not restrict the supply of the service. Governments (including at the municipal or provincial level) may use annual authorization fees (e.g., for casinos) for revenue to fund public health clinics or other public services. Such cross-subsidization may no longer be possible for countries in the plurilateral DRD negotiations because doing so could be seen as restricting the supply of the service.
- To the extent practicable and in a way consistent with its legal system, participating members must: a) allow companies (including foreign

companies) a reasonable opportunity to comment on proposed laws and regulations and b) consider those comments. There is no specific exception in the DRD text to keep certain companies at arm's length (e.g., alcohol/junk food/tobacco companies). How this might affect countries wanting to abide by recommendations under Art 5.3 of the WHO's Framework Convention on Tobacco Control (FCTC) to restrict interactions with the tobacco industry only to the extent necessary for effective regulation is unknown (WHO Framework Convention 2008).

- Laws and regulations for services licensing must be based on objective and transparent criteria. The WTO jurisprudence could mean fixed requirements such as maximum prices for water or tobacco/alcohol control requirements are not permitted and subjective regulations such as "affordable" prices for health insurance may also not be permitted (Smith 2017a). A footnote tries to clarify that health and similar regulatory requirements would be allowed, but it is not clear whether affordable water would be a "health" requirement.
- A health exception would apply to these rules; however, it is part of the General Agreement on Tariffs and Trade/General Agreements on Trade in Services (GATT/GATS) exception which requires so many tests to be passed that governments involved in a WTO dispute have only succeeded once in 44 attempts to invoke it (Public Citizen 2015).

The investment facilitation (IF) plurilateral negotiations involve about 106 members. There is already a consolidated negotiating text and a substantive outcome is expected by MC12 (WTO Investment Facilitation for Development 2021). The proposed IF rules (World Trade Organization 2021b) would apply to all service sectors as well as to non-service sectors like manufacturing and agriculture. Equivalent rules have been proposed to DRD to:

- restrict authorization fees
- require investment authorization laws and regulations to be based on objective and transparent criteria
- allow and consider comments by all companies and
- incorporate the general health exception in GATT/GATS.

Eighty-six members are involved in the e-commerce plurilateral negotiations and they have already reached agreement on some aspects of the consolidated text like e-signatures (World Trade Organization 2021c). The proposed plurilateral e-commerce rules include (World Trade Organization 2020a):

- Complete liberalization of advertising services. This would mean that participating countries could not ban or restrict tobacco, alcohol, guns,

prescription medicine, and junk food advertising, as some countries did when liberalizing advertising under the WTO GATS. The requirement for full advertising liberalization is also contrary to the FCTC requirement to ban tobacco advertising (World Health Organization 2003, art. 13).

- Participating members must allow data (including personal health data) out of their countries. Since countries like the USA do not adequately protect the privacy of personal data including health records, once health data is in the USA health insurers can buy records from pharmacies to find out which are the sickest 5% of the population (who are responsible for almost half of health costs) to avoid insuring them, or instead use that information to charge them more for coverage.[5] Australia, among other countries, does not allow health records to leave the country so that its stronger domestic privacy law applies (Smith 2017b).
- Restrictions on checking source code (software), e.g., in cars which have fatal crashes, or hackable pacemakers/insulin pumps (Smith 2017c).
- Deregulating e-signature provisions, leaving it up to health insurers and hospitals whether their IT systems should be interoperable. This means that requirements in US laws that the same system should be used to reduce paperwork and save time and money would not be allowed (Smith 2018).

As with the other plurilateral agreements, incorporating the challenging general health exception in GATT/GATS. Countries wishing to join the WTO must obtain the consent of all existing WTO members. Acceding countries are usually asked to agree to more than the standard WTO rules require (e.g., increased intellectual property [IP] protection on medicines), and joining "voluntary" WTO plurilaterals. Based on past WTO accessions, (World Trade Organization n.d.) the 23 countries in the process of joining the WTO are likely to be asked for a variety of commitments that can harm health, such as greater IP protection on medicines, tougher restrictions on services regulation, as well as possibly liberalizing advertising services.

Beyond WTO+: new trade regimes

Some bilateral and FTAs are introducing new regimes outside of the multilateral WTO, with chapters covering labor, environment, and regulatory cooperation. The first two are usually marketed as progressive improvements in trade treaties, while the third poses the risk of regulatory capture.

In 1995, only three FTAs had labor provisions; by 2016, the number had reached 77 with the major proponents being the USA and EU. US-dominated FTAs rely upon reference to the International Labor Organization (ILO) 1998 Declaration on Fundamental Principles and Rights at Work. A limitation is

that the Declaration concerns only "respect" for its core principles, whereas the ILO's eight Core Conventions have legally binding obligations (see *Global Health Watch* 5, Chapter C4, for an early discussion of this issue). The CPTPP does add that each signatory country "shall adopt and maintain statutes and regulations … governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health" (Global Affairs Canada 2017, 19.3.2). But there is no minimum requirement; it is up to each country to set the levels they think appropriate. In theory this creates a "floor" below which a country's labor standards should not fall, protecting trade from becoming a "race to the bottom." But there are no incentives to improve working conditions, and even the USA is not abiding by several of the labor rights in the ILO Declaration (Cimino-Isaacs and Villarreal 2020). Moreover, labor obligations are only violated if a country, in failing to uphold its existing laws, affects trade or investment between FTA member countries. Labor measures in EU-led FTAs go beyond the ILO Declaration and refer to the Core Conventions. Disputes over labor violations, however, rely on cooperative mechanisms regarded as largely ineffective (McNamara et al. 2021b, 2).

There is some evidence that labor chapters in FTAs may improve minimum wage levels for workers, but the findings are mixed. The USMCA requires Mexico to allow independent trade unions which could strengthen the bargaining power of organized labor and subsequent wage rates. Three complaints have so far been lodged under an enforceable "rapid response labor mechanism." The first was by Mexican women migrants who filed a complaint that the US government was failing to enforce gender discrimination provisions in the labor chapter (DiCaro and Macdonald 2021). In May 2021, unions and labor activist groups in the USA and Mexico initiated and were successful in a second complaint over a US auto parts company in Mexico that was interfering with independent union organizing (Stone and Verdi 2021). A third complaint led to Mexican workers at a General Motors truck plant voting against an earlier imposed agreement, paving the way for independent union organizing (Solomon 2021). Whether these labor victories translate into better pay and working conditions remains to be seen.

The USMCA, however, is also unique in being the first trade agreement to include a minimum wage obligation. It stipulates that at least 40% of auto components traded between the three countries (the USA, Mexico, and Canada) must be made in factories paying at least $16/hour to qualify for duty-free treatment (Harrison 2019), which is three times the average wage currently paid in Mexican factories. Some observers think the requirement is more to appease US labor than to improve Mexican working conditions, and exports to the USA that do not comply with this standard will be subject to a 2.5% tariff, negligible compared to the cost of meeting the treaty's hourly wage minimum (Labonté et al. 2019).

Similar weaknesses exist in FTA environment chapters, which, like labor chapters, began popping up in FTAs in the 1990s with politicians celebrating

their inclusion as evidence that international trade was becoming more responsive to social concerns and civil society criticism. FTAs generally refer to existing multilateral environmental agreements (MEAs). The main provision to which governments must commit is to uphold their existing MEA commitments and not to lower them in a way that affects trade or investment. In the CPTPP, even if they are found to do so, there is no formal dispute settlement, only consultation. The USMCA does allow for formal disputes but only if lowering a standard affects trade. A post-signing "Protocol" did clarify that if there is a conflict in obligations under a MEA and any provision in the USMCA, the MEA obligations prevail, which puts a bit of a floor in some countries' push to deregulate environmental standards. Remarkably, environment provisions in most FTAs are silent on climate change and greenhouse gas emissions. An Organization for Economic Co-operation and Development (OECD) study found no statistically significant improvement in air pollution measures in countries with environmental chapters in their trade agreements compared to those without (Yamaguchi 2018), begging the question: how good are they? But there has been one positive development: some FTAs require bans on subsidies to fishing fleets that work in overfished waters – something the WTO has been unable to reach multilateral agreement on after 20 years of trying (International Institute for Sustainable Development 2021a).

One could view labor and environment provisions in FTAs as baby steps forward (where giant strides are needed), or as window dressing to make new trade treaties more politically palatable, or as simply the wrong place to create rules governing how economies should function with respect to workers' right or protection of the environmental commons. At best, they do no (or little) health harm. There is now even momentum to introduce gender relations as a trade policy issue, under the banner of ensuring that trade improves gender equality and women's economic empowerment (see Box D2.2).

Box D2.2: Trade treaties and women's economic empowerment: a healthy gain or just more window dressing?

Trade and investment rules and agreements normally contain no reference to gender inequities. And, until recently, there was little consideration of how trade relations might affect men and women differently. But, just like the economy, trade is gendered – trade has an impact on gender relations, often working to exacerbate existing differences, and forms of inequity and exclusion. Trade liberalization, the reduction of barriers to imports and exports, has been a key element of globalization, which has often had a negative effect on women, although in an uneven fashion.

In recent years, various actors – states, international organizations, academics, and civil society groups – have begun to examine the ways in which

trade may affect gender relations, and how these effects can be mitigated or overcome. For example, over 120 WTO members have signed on to the Buenos Aires Declaration on Women and Trade, which was launched in 2017 at the eleventh WTO Ministerial Conference. The declaration acknowledges "the importance of incorporating a gender perspective into the promotion of inclusive economic growth, and the key role that gender-responsive policies can play in achieving sustainable socioeconomic development" and that "inclusive trade policies can contribute to advancing gender equality and women's economic empowerment, which has a positive impact on economic growth and helps to reduce poverty" (World Trade Organization 2017).

The relationship between trade liberalization and gender inequalities is complex, and difficult to pin down using the standard macroeconomic tools used by policymakers, particularly when there is insufficient gender-disaggregated data available. The difficulty in evaluating trade impacts is compounded by the importance of examining this issue in an intersectional fashion – looking at how gender, race, ethnicity, sexual orientation and gender expression, age, ability, location, and other dimensions of inequality interact (see Chapter A2).

Feminist economists, however, argue that there are several ways in which women and other marginalized groups may be disproportionately and negatively affected by trade liberalization. First, opening markets to liberalized trade benefits sectors that export, while often disadvantaging economic sectors that produce primarily for the local or national markets. In general, women-owned businesses are much less likely to export than male-owned businesses or male-operated businesses. Secondly, women are affected as workers in the formal and informal sectors. Globalization has been associated with an increase in women's participation in waged work, which might be expected to benefit them and increase their power and status within the household. Countries like Mexico, Haiti, Morocco, Colombia, Kenya, Bangladesh, China, and Vietnam recruited large numbers of women workers in labor-intensive export sectors like electronics, textiles, and agriculture, in part because firms could pay women less than men, and because they were expected to behave in a more docile fashion because of their traditional socially constructed gender roles. Workers in these sectors often receive low wages and benefits and are subjected to sexual discrimination, harassment, and violence.

Beyond the impact of trade on women's employment, other aspects of women's lives may be affected by changes in trade policy. Trade liberalization may disrupt sectors and markets where women are active, thus jeopardizing their employment and pushing them into unregulated and poorly compensated jobs in the informal sector. The rollback of public services as

a result of liberalization of services trade can also add to women's workload, who traditionally are responsible for much of this service provision. It is important to note that these policies have a more pronounced impact on the most vulnerable women: women of color, Indigenous women, (im)migrant women, and women with disabilities. Agreements to open up economies to greater levels of foreign investment can negatively affect Indigenous women through the increase in investment in the mining sector, since women are less likely to gain employment in this sector, and their health can be affected by pollution of water sources as a result of the use of chemicals like sodium cyanide to refine minerals (see Chapter C4).

The potential negative impacts of trade liberalization on gender relations are now commonly recognized, but there are profound differences about how to reduce the negative impacts and increase the positive ones. Many governments try to promote greater access of women-owned businesses to trade opportunities through training, networking, and provision of export credits. While such measures may help individual businesses, they do not have a significant impact on the situation of most women.

One newer approach adopted by the Canadian government is the inclusion of separate gender chapters in new trade agreements. These chapters promote the development of cooperation and sharing of best practices to promote women's economic empowerment and participation in the benefits of trade. Canada has included such chapters in recent agreements with Chile and Israel. Feminists have criticized these agreements, however, arguing that the objectives expressed in these chapters are purely aspirational, and that they lack the ability to enforce compliance through sanctions, as is common in most provisions in trade agreements.

Other measures that have been considered and promoted are improved consultation with women and feminist organizations, improved evaluation of the gender impact of trade, especially through greater availability of gender-disaggregated data. The Canadian government has also begun mainstreaming gender-related provisions in other sections of trade agreements, including labor chapters. Here, the Trudeau government has pushed for inclusion of ILO core labor standards, including prohibition of gender discrimination in the workplace. This type of provision may be more effective in reaching less privileged women than many other policies that have been adopted so far but will neither reach women working in the informal sector nor unwaged women performing essential care work.

Feminist organizations around the world have rejected the dominant approach adopted by governments and international organizations like the WTO. In 2018, the Gender and Trade Coalition, made up of over 200 feminist organizations, networks, and allies, including many based in the

Global South, issued a critique of the impact of the Buenos Aires Declaration at the one-year mark:

> … since the issuance of the Buenos Aires Declaration, there has been a series of WTO-organised events which have … failed to ensure the meaningful participation of women's rights organisations and civil society. Here it is key to remember that current trade policy impacts not just the women entrepreneurs on whom there seems to be overwhelming emphasis, but women as farmers, workers, patients, caregivers, environmental defenders, and so on. We do not see any attempt to understand the varied and complex impacts they face, most often unknowingly, from the current trade regime or to include them in these discussions.[6]

Doing the difficult work of incorporating gender concerns into trade agreements and trade relations has just begun. It is crucial that such efforts not act as a fig leaf on otherwise harmful trade agreements but serve as an entry point into serious consideration of how trade can be made more beneficial to women, men, gender-diverse people, and the planet.

The same cannot be said for the intrusion of new rules on regulatory coherence. TBT/TBT+ and SPS/SPS+ agreements, as noted earlier, already impinge upon governments' regulatory space to prevent "unnecessary" obstacles to trade. A recent innovation has been the inclusion of whole chapters in FTAs governing "regulatory coherence," with the CPTPP and the USMCA having the most detailed provisions. The CPTPP sets out a long list of requirements on how governments develop, publicize, or inform about new regulations they are considering. These requirements are likely to slow down regulatory development, perhaps "chilling" such efforts as being too troublesome. But they are not enforceable under dispute settlement rules, and so are more statements of parties' intent to reduce differences in their regulatory standards to prevent such standards getting in the way of trade. The USMCA regulatory chapter's commitments are more extensive and enforceable through state-to-state dispute settlement. The intent of these new chapters is to harmonize possible regulations between countries that are party to the trade agreement, but the issue then becomes: which country's regulations should set the harmonized standard? Will this lead to improved, or lowered, standards across harmonizing countries? Already the US plastics industry is lobbying against Canada's intention to ban plastics, which the industry believes may be contrary to the USMCA's regulatory chapter. Similarly, the US processed food industry is using both the WTO TBT and the USMCA regulatory chapter to lobby against Mexico's front-of-pack

food labeling (see Chapter C3). The processed meat industry in Canada and the USA is making the same argument in opposing Canada's proposed front-of-pack food labeling.[7]

International investment agreements (IIAs)

The USMCA surprisingly eliminated one of the North American Free Trade Agreement's (NAFTA) more controversial provisions: its investment chapter. This applies only for disputes involving Canada and the USA, while limiting its scope for disputes involving Mexico. The (still untested) scope of the agreement's regulatory chapter may become the new means by which foreign companies, via their governments in state-to-state disputes, challenge new regulations affecting the value of their investments.

NAFTA's 1994 investment chapter was the first one in an FTA and became the model for many others that followed. But it was far from the first such treaty covering foreign investment. Between 1959 and 1989, 386 bilateral investment treaties (BITs) were concluded, approximately one per month worldwide, expanding rapidly in the early 1990s (the peak decade of neoliberal expansionism) to four per week. As of early 2021, an astonishing 2,336 BITs are in force and a further 323 treaties (FTAs, such as the CPTPP and USMCA) that contain investment provisions (United Nations Conference on Trade and Development (UNCTAD) 2021a), collectively referred to as IIAs (UNCTAD n.d.). The surge in IIAs follows capital's (investment's) need for continued expansion (profit-making). In turn, as many of the West's former colonies in Africa, Asia, the Pacific, and the Caribbean became independent states, their desire to industrialize and develop their domestic economies needed capital in the form of foreign investment. But HIC investors were wary that these fledgling governments might choose to nationalize the industries in which they invested (mostly in mining and fossil fuel), and that their national courts may be prone to political capture denying foreign investors just settlement. These may be reasonable concerns but are hardly unique to "developing" countries.

Nonetheless, to address this concern, IIAs created a system whereby foreign investors could directly sue governments for direct expropriation of their assets (seizure with or without compensation) and indirect expropriation (where government measures destroy the value of the investment or the ability of the investor to manage, use, or control it). A third provision in most IIAs obliges governments to treat foreign investors "fairly and equitably."[8] Investor-state disputes settlements (ISDS) are decided upon by specialized tribunals, panels generally comprised of three investment lawyers representing the investor, the country being challenged, and a third "chair" selected by the other two. Because there is no precise or consistent definition for many of the IIA provisions, especially of the fair and equitable treatment (FET) obligation, interpretation is largely a matter of tribunal discretion. Tribunal meetings are confidential, and decisions are final, although the amount of awards can be challenged. Although

there have been some procedural improvements made in recent treaties, there are major concerns over lack of transparency and conflicts of interest among tribunal members who can – and do – work on both sides of the fence.

IIAs and their ISDS system have been extremely controversial as foreign investors have increasingly used the system to challenge a wide array of public policy measures, including measures on taxation, chemical and mining bans, environmental restrictions, transportation and disposal of hazardous waste, health insurance, the price and delivery of water, and regulations to improve the economic situation of minority populations (Bernasconi-Osterwalder et al. 2012). Since ISDS was first discussed in *Global Health Watch 5* (Chapter D2), the number of disputes continued to rise and only began to decline slightly in 2019. The value of awards granted by tribunals, however, continues its upward trajectory, with two multibillion awards made in 2019 ($5.9 billion in *Tethyan Copper v. Pakistan*, and $8.4 billion in *ConocoPhillips v. Venezuela*). In the Pakistan case, the tribunal's finding was based on the country's denial of a mining license following the company's preliminary explorations. The denial was considered to be an indirect expropriation. An example of one the main criticisms of ISDS, the award was not based on the actual loss of the mining company's original investment (around $150 million) but on its "legitimate, investment-backed expectations" of the profits that the mine would earn. Pakistan is seeking relief from the award, which would consume almost the entire amount of a $6 billion IMF stabilization loan the country received in 2019. Billion-dollar ISDS awards are rare, but the UNCTAD estimates the average award at $522 million (Labonté 2020).

Other recent ISDS cases raise the health activist alarm. Some involve the Energy Charter Treaty, an agreement with investment provisions, which is the most frequently used agreement within the ISDS system with a massive 131 cases initiated related to energy and climate policy. Most recently, a German coal operator has initiated a €1.4 billion ISDS lawsuit against the Dutch government over a plan to phase out coal power, a decision compelled by the Dutch Supreme Court to protect Dutch citizens from climate change. Pulling out of the Energy Charter Treaty is a long-term solution, as the agreement will remain in force for 20 years, known as a sunset clause. This case is quickly becoming a focal point for civil society activism, much as the Philip Morris cases attempting (unsuccessfully) to sue Australia and Uruguay over tobacco control regulations did (People's Health Movement et al. 2017).

In recent years there has been a disturbing uptick in third-party financing of ISDS claims, especially in the wake of the 2008 global financial crisis and the search by speculative finance for new investment vehicles. Under "no win-no pay" agreements, speculators offer to finance ISDS claimants' legal costs in return for 30% to 50% of the final award. Given that awards frequently dwarf the cost of litigation, even if many such cases rule in favor of the state, the returns to speculators can be significant. In one case, Burford Capital, which

specializes in "litigation finance," earned $140 million on a $13 million investment in financing a successful ISDS case involving Argentina's renationalization of two previously privatized airlines (Dayen 2017). Contingency fee arrangements, whereby investment lawyers are only paid if they are successful in a case and on a percentage of award basis, are also becoming more common. The incentive-to-litigate nature of such financing arrangements is argued to be in conflict with the United Nations' goal of promoting equal access to justice. Litigation investment firms have already identified the pandemic as "the beginning of a boom" with such firms receiving "a significant uptick in inquiries" from potential claimants (see Box D2.3) (Labonté 2020).

Box D2.3: Trade and the pandemic

With borders closing and people locked down, it is not surprising that global trade took a nosedive. The WTO early in the pandemic estimated a 13% to 32% decline in overall trade in 2020 (McNamara et al. 2021b), although it later revised this upwards to a drop in merchandise trade of just over 9% (International Institute for Sustainable Development 2020). Much of the decline was a result of collapsing supply chains and a reduced consumer demand for finished goods. Services trade took a much sharper plunge, down by over 20% compared to 2019 and expected to continue worsening (World Trade Organization 2020b). For most LMICs, the recessionary impacts of such steep declines, alongside their own public health lockdown measures, have more direct and negative health effects than in HICs, where governments' fiscal capacities could prop up affected workers and businesses, even if only partially. Although there are signs in early 2021 that trade volumes are on a slow uptick, global economic (and trade) recovery is expected to be "weak" with a long period of stagnant economic growth, especially if global COVID-19 vaccine herd immunity remains unattainable for several years (see Chapter B4). As earlier *Global Health Watch 6* chapters argue, however, such growth (weak or strong) needs to be radically redistributive in favor of LMICs, and within global environmental limits.

Trade is also likely to be dampened by a 42% drop in global foreign direct investment (FDI) in 2020, with a predicted ongoing decline of 5%–10% in 2021 (United Nations Conference on Trade and Development 2021b). To the extent that FDI in LMICs creates decent employment (a questionable assumption) the decline in capital flows will negatively affect their economies. So, too, will be an estimated 14% decline in remittances (the money foreign workers send home) between the start of the pandemic and the end of 2021 and likely beyond (Ong 2020). The most direct trade-related health impact of the pandemic was in its early months when

shortages in medical supplies and personal protective equipment (from face masks to ventilators) led many countries to impose export bans or restrictions. Such temporary measures are allowed under WTO rules, and most were relaxed by late 2020 when supplies improved. Conversely, many countries also introduced measures to reduce existing and allowable trade barriers, such as lowering tariffs on medical imports or suspending excise or value-added taxes on such goods (World Trade Organization 2020c).

The pandemic is also incentivizing many countries to "re-shore" (or shorten) global supply chains for essential goods, notably medical supplies, drug treatments, and vaccine production. Some WTO member states are suggesting that amendments should be made to trade agreements to limit future export or import barriers on medical and other essential goods in future pandemics or other health crises. While not inherently unreasonable, the proposals make no mention of the temporary TRIPS waiver request initiated by WTO developing country members to increase global supplies of COVID-19 vaccines, drugs, and medical supplies, and are being promoted by countries that are opposed to the waiver (World Trade Organization, General Council 2020) (see Chapter B4).

A festering pandemic issue concerns FDI, specifically the likelihood of ISDS challenges to many of the pandemic actions taken by governments. Although only one has been initiated (as of April 2021), a suit for compensation to Santiago airport investors for losses due to pandemic-related decline in international travel (International Institute for Sustainable Development 2021b), over 60 corporate law firms have sent circulars advising their clients to consider suing governments over pandemic policies that may have lowered the value of their foreign investments, or even just investors' expectations of that value. Many governments COVID-19 measures are potentially at risk of an investment dispute, ranging from travel bans, requisitioning hotels or facilities, mandating medical supply production, regulating prices of essential goods, suspending payments (rents, mortgages, utilities), tax measures, and even lockdown rules (Labonté 2020). This risk is aggravated by the recent entry of hedge funds (speculators) as third-party funders willing to pay the hefty corporate legal fees for investors who launch such suits, in return for half the financial award if the suit is successful (ibid.). Hundreds of non-governmental organizations (NGOs), scores of leading economists, and several UN organizations are calling for a moratorium on all ISDS activities during the pandemic, and an intergovernmental declaration exempting all future ISDS claims related to the pandemic. That such a risk nonetheless exists buried in the legal texts and procedural shortcomings of many investment treaties is one more reason why international investment law needs a thorough overhaul, as discussed elsewhere in this chapter.

Efforts from advocacy groups across the globe, particularly in relation to ISDS, have helped put the international investment system under the microscope and initiated a comprehensive process of reform under the auspices of the United Nations Conference on Trade and Investment Law (UNCITRAL). While reforms started with a narrower focus on matters of procedure and arbitration (such as the introduction of the more transparent "Investment Court System" in the Comprehensive Economic and Trade Agreement (CETA)), the agenda has been expanding, and states are increasingly advocating for more substantive rule reform (Roberts and St. John 2019). Widespread disapproval of the use of ISDS to challenge legitimate public policy in the Australia and Uruguay tobacco cases has been instrumental in the reform process. The CPTPP, for example, includes an optional "carve-out" of tobacco measures from ISDS. Ultimately, this is a narrow protection that applies only to tobacco and only under this one agreement (leaving all previous agreements between members in play). More ambitiously, the Peru–Australia Free Trade Agreement, which entered into force in 2020, includes a provision in its investment chapter, stating that "No claim may be brought under this Section [ISDS] in relation to a measure that is designed and implemented to protect or promote public health" (Australian Government 2020).

The EU and Canada, building on their (not yet ratified) Investment Court System, are pushing for a new plurilateral and then multilateral investment agreement under the aegis of the WTO. While such an agreement could prevent "treaty shopping" by investors, their lawyers, and their third-party funders, it would need to exclude all non-discriminatory government measures related to health, social, fiscal, and environmental conditions, and allow governments to require new investments to conform to their country's economic, human, and sustainable development goals. Given that an increasing number of LMICs are notifying their intent to withdraw from (or not renew) investment treaties under the present system (they are not gaining much by way of increased FDI and risk losing considerably in disputes) such a paradigmatic shift in IIA rules in the near future is imaginable. In the UNCITRAL reforms some countries have been very ambitious in their attempts to rebalance public and private interest in the investment system. For example, in its submission to the reforms, South Africa noted that "Promoting and attracting investment should not be an end in itself, but a step toward realizing the broader objectives of the SDGs and human rights obligations, such as reducing poverty and hunger, empowerment of Indigenous peoples, promoting decent work, and reversing environmental degradation and climate change" (Government of South Africa 2019).

Geopolitics of trade and investment

What of the post-pandemic future of trade and investment treaties? Any answer to this question rests on the dynamic changes occurring in the geopolitics of global

power. Mercantilism (the centuries-old practice of states actively promoting the interests of their own industries in international trade) still largely defines how nations engage in trade and investment rule making. This largely unacknowledged practice was brought into media glare with the Trump administration's "America First" policy, which intensified the US shift away from multilateral trade negotiations to bilateral trade agreements. When Trump withdrew the USA from the TPP and ceased trade talks with the EU, his administration instead focused on increasing tariffs on imports from several US trade partners (trade rivals) on goods such as solar panels, steel, and aluminum. Much of this targeted China, instigating an escalating tariffs "trade-war" between the two countries. Econometric analysis of the impacts of the US tariff exchange with China indicated a reduction in US trade income and a significant cost to US consumers (Amiti et al. 2019). The new Biden administration quickly wound back some of Trump's "America First" policies by re-joining multilateral negotiations and agreements, including the United Nations Paris Climate Agreement and World Health Organization. The US approach to trade policy is still unclear; however, the Biden administration has indicated favoring trade deals which promote domestic US growth and which counter China's rising influence (Lawder 2020). In keeping with its climate change emphasis, the administration is also arguing how trade and trade treaties need to strengthen environmental protections and not simply prevent an environmental "race to the bottom" (United States Trade Representative 2021b).

The risk of a US/China trade war becoming something other than a spat about tariffs remains a critical global security concern with the pandemic providing cover for both countries (though now lifting in the USA) to pursue more aggressive and authoritarian nationalist politics. The Asia-Pacific region is likely to be a new geopolitical flashpoint with trade playing a part in the unfolding drama, especially if the USA rejoins the CPTPP. Two mega-treaties: one, the CPTPP, perhaps again dominated by USA and a few other HIC liberal democracies; and another, the Regional Comprehensive Economic Partnership (RCEP), overshadowed by the USA's Chinese hegemonic rival. Several Asia-Pacific countries are parties to both agreements, making for a potentially very messy "spaghetti bowl." China is forecast to scoop up over 50% of the RCEP's projected increased export earnings, though it may also feel competition from RCEP HICs (Japan, Australia) that are exporting high-end products, and from RCEP LMICs with their low labor-cost advantages (Nian 2021). This, and competition from the CPTPP, is likely to incentivize China's "Belt and Road" initiative's move further west, where its trade and investments already reach many Middle East and African countries. China's use of "vaccine diplomacy" in the pandemic era is one more element in its efforts to enhance its geopolitical influence, although a January 2021 survey indicates that most ASEAN country respondents would still favor the USA over China if they had to pick sides in their ongoing trade and economic rivalry (Shotaro Tani 2021).

The EU exercises its geopolitical power primarily through its trade policy focus on bilateral agreements. It signed the world's largest bilateral agreement with Japan in 2018, doubled its agricultural exports to Latin American countries, and doubled its trade with sub-Saharan African countries through its regionally based "economic partnership agreements" (EPA) (European Union 2020, 17). Intended to include ambitious trade and services liberalization commitments, only one region (the Caribbean) saw all members ratify their EPAs. Under the threat of losing preferential access to the EU market, several low-income African countries ratified bilateral EPAs with the EU. West African countries also agreed as a region in 2014, but Nigeria (the largest country in the group) has so far refused to sign. Overall, only 13 African countries are implementing an EPA, 12 are not, and the group of "least developed countries" are still exempt from pressures to do so. Similarly, only 3 of 14 countries in the Pacific Island group have ratified an EPA ("EU-ACP EPAs" 2020). The reason for such enduring hesitancy is acknowledged in a European Parliament brief: "[EPAs] are the first attempt to liberalize trade between economies with such a disparate level of development, which … possibly explains the difficulties encountered during the negotiations" (Zamfir 2018).

Civil society development organizations and trade unions have long opposed the EPAs, which modeling suggests will disproportionately benefit EU exporters with only much longer-term industrialized benefits flowing to LMICs (Marí 2018). Some view the agreements as little more than a new form of colonialism, given that all the EPA countries are former European or British colonies. The African Union, in the process of implementing its own continental free trade agreement, is now positioning itself to be the main player in overhauling EPAs for the entire continent to give greater export and industrial development benefit to is member states. Some EU countries, such as Germany, believe the EPAs should be re-opened or scrapped entirely (Fox 2021).

The world-as-geopolitics has transitioned from bipolar (the Cold War years) to unipolar (the brief period of the touted history-ending triumph of (neo) liberal global capitalism) to a fluctuating multipolar world (the USA, Russia and its satellites, China, the EU). India's geopolitical positioning in this group is less obvious. Its decision to withdraw from RCEP de facto increases China's dominance in intra-regional trade and, like other powerful nations, it is focusing on an "India first" economic strategy in which bilateral trade and investment treaties are regarded as more flexible for protecting their domestic manufacturers (Roy Choudhury 2020). The price of that may be a loss in its economic and strategic influence in the region, although its role as "pharmacy of the world," in addition to COVID-19 vaccine diplomacy, is increasing its presence globally, notably in Africa where China already has significant sway (Banik and Modi 2021).

All geopolitical actors in the multipolar world face human rights and domestically divisive challenges intersecting with trade and investment. The USA is

still recovering from the Trump era and remains politically polarized. Russia's Crimean expansionism has increased tensions with the EU, its main trading partner, while the country is experiencing its highest level of internal dissent since the dismantling of the USSR (European Commission 2021). China is facing sanctions from many of its HIC investors and trading partners over its treatment of its Uyghur minority (Wintour 2021). India is experiencing opposition from its farmers over policies to create foreign-invested and industrialized agriculture[9] (Huang 2021), while its swerve towards Hindu nationalism is increasing domestic division and risks escalating conflict with its Muslim neighbors (Bandow 2019).

Reforming the agenda

Geopolitics are hard to avoid when considering how trade and investment rules might be reformed for equitable global health benefit. As with many progressive global reforms of past decades, however, such reforms are more likely to rise from civil society activism (see Box D2.4), groups of like-minded "middle power" nations, and organized LMIC advocacy, than from the world's mega-powers. From wherever they emanate, they will need to advance reform agendas that include:

- Fuller transparency and public/political participation in negotiations as they proceed (and not simply in the run-up to new treaty initiatives).
- Assessing health, social, environmental, and labor market impacts of treaties before they are signed or ratified.
- Full carve-outs from all treaty provisions for all non-discriminatory government measures affecting economic or health equity outcomes, food security, and occupational and environmental protection, and for services that are wholly or partially publicly funded or provided.
- No TRIPS+ provisions and a critical review of how effective or necessary to innovation in the health sciences (research and development) is the current TRIPS regime of patent protection.
- No ISDS provisions apart from those affecting direct expropriation of investors' assets without reasonable compensation, and only if it can be demonstrated that domestic courts are unable to effect a fair ruling.
- Required ratification of the Paris Accord on Climate Change and all new multilateral environmental agreements.
- Required ratification of the eight core ILO conventions with incentives for upwards harmonization of domestic labor laws.
- Flexibilities for governments to impose performance requirements in their contracts with foreign investors, or for foreign bids on government procurement contracts (Labonté and Ruckert 2019).

Box D2.4: Public health activism

Health activists have long joined with other civil society organizations (CSO) pushing back against trade and investment agreements whose rules could imperil health. One of the first of these challenged the attempt by members of the OECD, the club of rich nations, to create a binding Multilateral Agreement on Investment (MAI) granting corporations and investors unconditional rights to engage in financial operations worldwide. The MAI would allow foreign investors the right to sue governments for policy changes that affected the value of their investment – a right that existed in earlier bilateral investment treaties and can now be found in most FTAs. MAI negotiations were abandoned in 1978 after fierce CSO opposition.

More recently, with the number of bilateral and FTAs increasing, health activists began focusing on new treaties as they were being negotiated. This posed challenges, as trade negotiations are not public and CSOs must rely upon leaked documents, reports, and potential contents of new treaties based on recently completed ones. Many public health groups began undertaking health impact assessments (HIAs) of new FTAs, focusing on the potential impacts of WTO+ rules related to "technical barriers to trade," "sanitary and phytosanitary measures," "TRIPS+," "investor-state dispute settlement," and wholly new agreements on "regulatory coherence," "labor," and "environment" (McNamara et al. 2021a; 2021b). In undertaking these HIAs, a paramount concern has been the extent to which WTO and newer WTO+ provisions could limit governments' "policy space" to introduce regulations to protect public health. A key area of interest has been "unhealthy commodities" – tobacco, alcohol, and obesogenic (highly processed) foods (Friel et al. 2013) (see Chapter C3) – but also more systemic issues related to economic development (who benefits, effects on employment) and environmental impacts. In many cases, such as with the CPTPP and the USMCA, preliminary HIAs based on leaked documents were amended once final signed agreements were publicly released.

Activism on trade issues also shifted from earlier street protests of general opposition (though these still exist) to media campaigns and formalized advocacy in efforts to have new treaty rules be more health protective. Some examples include:

- CPTPP optional exclusion of any tobacco control measures from ISDS rules, following successful opposition to efforts by Philip Morris to sue Australia over its plain-packaging law.
- CPTPP suspension of many TRIPS+ provisions after the USA (which had insisted on these provisions) withdrew from the agreement.

- CETA changes to its ISDS rules in response to criticisms and procedural weaknesses in the dispute panel arbitration system (although still regarded as imperfect and yet to be ratified by all EU member states).
- US withdrawal of its demand to ban front-of-pack nutrition labeling in the USMCA when information of this demand was leaked, generating immediate public health outrage in all three negotiating countries.
- USMCA elimination or weakening of ISDS rules (notwithstanding a three-year period for new "legacy claims" to be made) following two decades of public health and CSO criticism.
- Weakening of some agreed upon TRIPS+ measures following CSO and political criticism by the Democrat-controlled US Congress prior to USMCA ratification.
- Absence of most draft TRIPS+ rules in the final RCEP agreement, following regional public health advocacy campaigns (Third World Network 2016) and a deferral of any decision on ISDS rules allowing for now only state-to-state investment disputes (Ewing-Chow 2020).

The RCEP agreement was a catalyst for civil society networking and social movement mobilization, both within countries and within the wider Indo-Pacific region. Movements played a key role in India's withdrawal from the agreement in late 2019, and in pushing several governments to allow civil society and public health presentations to the negotiators later in the negotiations, although this was limited and significantly less than industry access to negotiators facilitated from the beginning of the negotiations. Mobilization continues now against ratification in the member countries. Six ASEAN parties and three non-ASEAN parties must ratify the agreement before it enters into force.

The above efforts represent small but important activist gains. Despite some of the downward changes in trade and investment flows due to the pandemic, new treaty-making continues and, with it, more public health attention to how such rules should be generically overhauled or temporarily re-worded to protect health now and into the future.

Fundamentally, new trade and investment treaties must be able to defend rigorously how their rules will improve health and well-being in an equitable way whilst preserving (indeed, remediating past damages to) the environmental commons. Liberalization and economic growth are no longer appropriate metrics by which such treaties should be adjudicated.

Notes

1 The leaked negotiating texts for some of these plurilaterals can be found at https://www.bilaterals.org/?-other-292-.

2 The 12th WTO Ministerial Conference was postponed due to the outbreak of the Omicron variant of the coronavirus, that led several governments to impose travel restrictions. No date has been set for the rescheduling of the Conference at the time of writing.

3 See the draft text of the service DRD as of December 18, 2020 at https://www.bilaterals.org/?wto-plurilateral-services-domestic.

4 See which service sectors each country has already liberalized at the WTO in the schedules of commitments at https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm.

5 Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information*. Cambridge, MA: Harvard University Press, 2015.

6 Gender and Trade Network, "Letter on the Buenos Aires Declaration Anniversary." n.d. Accessed May 31, 2021. https://sites.google.com/regionsrefocus.org/gtc/letter-on-the-buenos-aires-declaration-anniversary.

7 To obtain this information, consult https://www.regulations.gov/docket/OMB-2018-0006/document to request access to the relevant docket pertaining to Canada's Regulatory Cooperation Council (RCC).

8 For a more detailed discussion of these and other IIA provisions, see *Global Health Watch 5*, Chapter D5, "Investment Treaties: Holding Governments to Ransom." See: https://phmovement.org/wp-content/uploads/2018/07/D5.pdf.

9 In November 2021, following a yearlong protest by Indian farmers nationally, and internationally, the Modi government retracted its legislation. Committed and persistent activism can work.

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