

UN MUNDO EN  
EL QUE QUEPAN  
MUCHOS MUNDOS

WATER IS MORE  
PRECIOUS THAN  
GOLD

NO TO FREE  
TRADE THAT  
lets BUSINESS  
WRITE the LAW

WTO  
TRADING  
AWAY  
OUR  
FORESTS

RESIST CORPORATE  
TYRANNY  
WTO  
THE PEOPLE  
HAVE SPOKEN!

STOP  
WTO

EL PUEBLO,  
UNIDO, JAMÁS  
SERÁ VENCIDO

# BEYOND NAFTA 2.0

TOWARD A PROGRESSIVE TRADE AGENDA  
FOR PEOPLE AND PLANET

ETHAN EARLE,  
MANUEL PÉREZ-ROCHA,  
AND SCOTT SINCLAIR, EDITORS

FAIR TRADE,  
NOT FREE TRADE

ANOTHER WORLD  
IS POSSIBLE

NO  
CETA



CCPA  
CANADIAN CENTRE  
for POLICY ALTERNATIVES  
CENTRE CANADIEN  
de POLITIQUES ALTERNATIVES

ROSA  
LUXEMBURG  
STIFTUNG  
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## LIST OF ACRONYMS

AMLO: Andrés Manuel López Obrador	OHCHR: Office of the High Commissioner for Human Rights of the United Nations
ALBA: the Bolivarian Alliance for the Peoples of our America	OMB: Office of Management and Budget
BIT: Bilateral Investment Treaty	PMPRB: Patented Medicine Prices Review Board
CEDAW: Convention to Eliminate All Forms of Discrimination Against Women	RIA: Regulatory Impact Assessment
CETA: Comprehensive Economic and Trade Agreement	SDG: Sustainable Development Goals
COOL: Country-of-Origin Labeling	SIA: Sustainability Impact Assessments
CPTPP: Comprehensive and Progressive Trans-Pacific Partnership	SPS: Sanitary and Phytosanitary Standards
CSO: Civil Society Organization	SME: Small and Medium-sized Enterprise
EPSU: European Federation of Public Service Unions	SOE: State-Owned Enterprises
EU: European Union	SSE: Social and Solidarity Economy
FTA: Free Trade Agreement	TBT: Technical Barriers to Trade
GATS: General Agreement on Trade in Services	TiSA: Trade in Services Agreement
GMO: Genetically Modified Organism	TNC: Transnational Corporation
GRP: Good Regulatory Practice	TPP: Trans-Pacific Partnership
HRC: Human Rights Council	TRIPS: Trade-Related Aspects of Intellectual Property Rights
IIA: International Investment Agreement	TTIP: Transatlantic Trade and Investment Partnership
ICS: Investment Court System	UN: United Nations
ILO: International Labour Organization	UNCITRAL: United Nations Commission on International Trade Law
IP: Intellectual Property	UNCTAD: United Nations Conference on Trade and Development
IPRs: Intellectual Property Rights	UNIPCC: United Nations Intergovernmental Panel on Climate Change
ISDS: Investor-State Dispute Settlement	UPOV: International Union for the Protection of New Varieties of Plants
ISP: Internet Service Provider	USMCA: United States-Mexico-Canada Agreement
MIC: Multilateral Investment Court	USTR: United States Trade Representative
MSME: Micro, Small, and Medium Enterprise	WHO: World Health Organization
NAFTA: North American Free Trade Agreement	WTO: World Trade Organization
NGO: Non-Governmental Organization	
OECD: Organization for Economic Cooperation and Development	





# Foreword

By Ethan Earle and Andreas Günther

THE IDEA FOR this working paper was born at a conference convened in fall 2017 by the Rosa Luxemburg Stiftung—New York Office.<sup>1</sup> This gathering brought together trade unionists, labor activists, environmentalists, farming groups, trade experts, and allies from across Mexico, Canada, and the US. The goal was to analyze and act upon developments related to the renegotiation of the North America Free Trade Agreement (NAFTA) then taking place. In doing so, the group drew upon the long history of progressive alternative proposals to elaborate a tri-national response based around the needs of working people and our shared planet, as opposed to the demands of corporate profit.

At this conference, co-sponsored by the UCLA Labor Center and hosted at the United Electrical Workers union hall in Chicago, conversations ranged broadly, from the different realities facing progressive organizations in each of the three countries to tactics that might disrupt or otherwise influence negotiations.

On the conference's second day, one strand of conversation came to the forefront. We knew what we were *against*, and who we were *up* against, but what progressive trade values were we actually *for*? What would a NAFTA based around the needs of working people and our shared planet look like?

That afternoon, the conference broke out into smaller groups to plan follow-up work based around the conversations to that point. One of these

<sup>1</sup> More information about the gathering is available at: [www.rosalux-nyc.org/worker-solidarity-in-action-a-tri-national-labor-response-to-the-re-negotiation-of-nafta/](http://www.rosalux-nyc.org/worker-solidarity-in-action-a-tri-national-labor-response-to-the-re-negotiation-of-nafta/).

groups particularly focused its energies on elaborating progressive alternatives to NAFTA. While it was a good start, at the end of the meeting it was also clear that more work was left to be done.

Over the next months, this informal working group — led by this report’s editors in collaboration with RLS-NYC — developed a research project to explore what work on progressive trade alternatives had already been done throughout the Americas. The answer, perhaps unsurprisingly, was: *a lot*. The results of this research were compiled into a publicly accessible online document, available in Spanish, French, and English and titled “Alternatives to Free Trade and Investment Agreements.”<sup>2</sup>

This report hopes to build on the body of research compiled in that document. It does not seek to reinvent the wheel so much as to continue a conversation that has been taking place for decades, identifiable in its current form since the early-1990s debates around NAFTA. In doing so, it brings together a plurality of voices from some of the most important North American organizations currently working on the subject. Many of these groups were present at our tri-national gathering in Chicago, and their representatives are included among the report’s co-authors and reviewers.

Among the groups that contributed to this report, we would particularly like to highlight the work of our partner organizations in this research project: the Institute for Policy Studies and the Canadian Centre for Policy Alternatives. These two organizations have spent decades providing research, analysis, and other forms of critical support to progressive actors across North America and beyond. Their work on NAFTA and trade policy more broadly — including the work of our co-editors Manuel Pérez-Rocha and Scott Sinclair — has been particularly vital.

We at RLS-NYC are proud to work with these partners, as well as with other actors from the progressive trade movement, on this report. Our goal in doing so is to posit progressive alternatives to NAFTA on a series of critical issues, and thus to contribute to the broader conversation taking place around the trade policies toward which we strive.

We view this work as part of the broader mission of the Rosa Luxemburg Stiftung. As an international foundation of the left, we have also analyzed how these alternatives might be applied to other international trade agreements, for example, those negotiated between the European Union and the US (TTIP), Canada (CETA), and Japan (JEFTA). On the global stage, our office also monitors trade relations as they relate to the fulfillment of UN Sustainable Development Goal 10, “to reduce inequality within and among countries.”

<sup>2</sup> Available at: [docs.google.com/spreadsheets/d/1wCQU1P5RSOyPFOnNPoZ6nVCCWbCEPcbdI6cP52WV7jU/edit](https://docs.google.com/spreadsheets/d/1wCQU1P5RSOyPFOnNPoZ6nVCCWbCEPcbdI6cP52WV7jU/edit).

As clearly demonstrated by the work of our office, international network, and many allies, existing free trade and investment agreements not only increase inequalities but also contribute to the carbon emissions that increasingly threaten the wellbeing of our planet. We hope this contribution to the literature will serve as another small piece in our ongoing fight for a world built around progressive values of equality and sustainability.





# Introduction: Beyond NAFTA 2.0

By the Editors

TRADE IS AS OLD as human civilization. If international trade respects ecological limits and its benefits are fairly shared, it can be a positive force, both economically and socially. But in the current era of hyper-globalization, trade agreements have shown little regard for the planet's environmental boundaries, the needs of workers and the poor, and society as a whole.

The extraordinary expansion of international trade and globalized supply chains over the past several decades clearly exceeds the planet's ecological limits. Rapid climate change is simply the most alarming symptom of multifaceted environmental destruction and unsustainable resource exploitation (from fossil fuels to forests, farmlands, and fresh water) at the heart of this system. At the same time, the economic gains from growth in trade have been overwhelmingly captured by global elites.

It is therefore imperative that we rethink free trade ideology and the prevailing template for the agreements that govern globalization. This does not mean rejecting trade or its potential benefits. But we do need to look at other methods of organizing and regulating international trade and investment. A primary aim of this report is to challenge former British prime minister Margaret Thatcher's infamous slogan that "there is no alternative" by demonstrating that there actually are many practical alternatives that can sustain healthy international commerce and exchange without harming workers and the planet.

The issue is not, as it is sometimes depicted, that international trade and commerce are currently unregulated. In fact, trade is closely regulated, just overwhelmingly in the interests of global corporations and the super-rich. Free trade agreements have become policy straightjackets, reinforcing rigid conformity to neoliberal policy strictures, especially among those smaller, weaker or trade-dependent economies most vulnerable to trade retaliation.

As the essays in this report discuss, modern free trade agreements (FTAs) typically include grossly corporate-biased provisions such as excessive intellectual property rights, imbalanced investor rights, and attacks on public protections for health, consumers and the environment, framed in Orwellian terms as “regulatory cooperation.” Underlying current controversies is a growing realization that far too many features of the existing free trade regime unjustifiably restrict democratic policy choice and international cooperation.

Contemporary trade and investment treaties reach far beyond purely trade matters. They deter *bona fide* environmental protection, food safety and labelling, and other forms of public interest regulation. They weaken workers’ rights and bargaining power and displace small-scale agricultural producers. And they undermine local and regional economic development policies, including green industrial strategies. These impacts severely reduce essential public policy flexibility, discourage effective policy responses to pressing environmental and economic challenges, and diminish democratic authority. The processes through which such sweeping agreements are negotiated are also so secretive and corporate-dominated that they virtually guarantee imbalanced outcomes.

Today, particularly within the United States, the backlash against such trade deals has spread across the entire political spectrum. Disturbingly, the most energetic challenge has come from right-wing, xenophobic, isolationist political movements promising a return to a mythical economic golden age (Make America Great Again) before the rise of emerging economies and the onset of planetary-scale environmental problems.

The neoliberal elites who continue to profit from this unjust system have been ineffective in countering the right-wing critique of trade deals or offering any convincing program of reform. This futility has provided a path to power for demagogues like Donald Trump. The US withdrawal from the Trans-Pacific Partnership and its assertive trade stance with China are examples of how the Trump administration has exploited trade grievances to consolidate its political base. A central plank of this more aggressive trade agenda was the administration’s insistence on renegotiating NAFTA, which it intends to replace with the so-called United States-Mexico-Canada Agreement (USMCA).

The need to distinguish a left, internationalist critique of corporate globalization from authoritarian and racially divisive perspectives has never been more urgent. The chauvinist policies of the Trump administration and its imitators need to be strongly condemned. But if the progressive movement is simply reacting to the neoliberal trade agenda and its right-wing disruptors, it is unlikely to achieve meaningful change. North American politicians and policymakers — from AMLO, to Elizabeth Warren and Bernie Sanders, to the inspirers of the Leap Manifesto — should unify around a progressive version of trade that can guide an international system that places people and planet over profits. That is why a bold new vision for international economic cooperation and global development is so crucial.

Drawing on the rich history of trade policy alternatives, this working paper articulates key pillars of a progressive trade and development agenda. In this framework, trade and investment are regarded as means to enhance material and social well-being, not ends to be pursued at any cost. Existing trade and investment agreements, and proposals for a progressive trade agenda, must be judged against the following overarching principles:

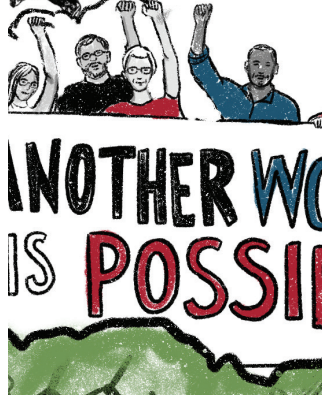
- I. Human rights in the broadest sense, including economic, social, cultural and environmental rights, must have primacy over corporate and investor rights, and there needs to be legally binding obligations on transnational corporations.
- II. Democratic governments must have the policy space to pursue and prioritize local and national economic development, good jobs for their citizens, and the preservation, promotion and restoration of public services.
- III. Citizens, communities, and the environment have the right to protection through public interest regulations.
- IV. A climate-friendly approach should be adopted whenever pursuing trade and investment, which can no longer be allowed to outpace the carrying capacity of the planet.

Framed by these overarching principles, the contributors to this report explore the challenges to be overcome in a broad range of issues. Through analysis of the signed but not yet ratified USMCA — alternately referred to herein as the “New NAFTA,” or “NAFTA 2.0”<sup>3</sup> — these authors explore the problems with the current neoliberal trade and investment regime and explain why the Trump administration’s claims to have replaced it are largely hollow. Finally, each section outlines practical, progressive alternatives that, rather



than rejecting international cooperation, seek to reorient it so that it stops serving only the needs of global corporations.

True cooperation will support the broad public interest in a more egalitarian and ecologically sustainable system, while ensuring fair and prosperous international trade. The progressive trade agenda outlined herein is forward-looking and aims to mobilize urgently needed international efforts to address intolerable levels of inequality and the existential threat posed by rapid climate change.



# Toward a New Multilateral Trade System

By Sarah Anderson, Andrés Peñaloza Méndez,  
and Stuart Trew

SINCE THE LAUNCH of “Alternatives for the Americas” at the 1998 People’s Summit in Santiago, Chile, civil society organizations across the hemisphere have declared that: “Trade and investment should not be ends in themselves, but rather the instruments for achieving just and sustainable development. Citizens must have the right to participate in the formulation, implementation, and evaluation of hemispheric social and economic policies. Central goals of these policies should be to promote economic sovereignty, social welfare, and reduced inequality at all levels.”<sup>4</sup>

Building on this perspective, the regional political and economic grouping known as ALBA, the Bolivarian Alliance for the Peoples of our America, have called for “economic complementarity and cooperation between countries [...] in such a way that it promotes an efficient and competitive productive specialization [...] compatible with the balanced economic development of each country, with the[ir] strategies to fight poverty, and with the preservation of the cultural identity of the peoples...”<sup>5</sup>

<sup>4</sup> Alternatives for the Americas, “Building a People’s Hemispheric Agreement.” Available at: [archives-2004-2012.rqic.quebec/eng/desalte2.htm](http://archives-2004-2012.rqic.quebec/eng/desalte2.htm).

<sup>5</sup> Permanent Secretariat of SELA, “The Bolivarian Alliance for the Peoples of Our America — Peoples’ Trade Agreement (ALBA-TCP).” Caracas, Venezuela, August 2015 SP/Di No. 11-15. Available at: [sela.org/media/2087752/di-11-alba-tcp-ing.pdf](http://sela.org/media/2087752/di-11-alba-tcp-ing.pdf).

The vision of international trade and investment behind these civil society and governmental projects could not be more different from the one driving the current multilateral trade system, which remains markedly corporate, growth-driven, and clearly unsustainable. Current rules grant maximal benefits to transnational corporations, serving to concentrate and centralize international trade while imposing few or no social, development-oriented, or ecological obligations on these actors.

These rules embedded in “free” trade agreements (FTAs) go far beyond regulating trade in goods, rather restricting the role of the state in many different areas. As a case in point, of the 22 chapters in the North American Free Trade Agreement, two-thirds deal with topics scarcely related to trade in goods, such as intellectual property, energy, government purchases, financial services, and the treatment of inward investment.

The recently signed United States-Mexico-Canada Agreement is even more expansive in scope. Its 34 chapters include new topics such as anti-corruption, government regulations, macroeconomics, and exchange rates.

According to the Citizens Trade Campaign: “Trump’s NAFTA 2.0 proposal expands monopoly rights for pharmaceutical giants. It weakens regulations in the financial sector. It carves out special rights for oil and gas companies. It undermines food safety. Perhaps most importantly, Trump’s NAFTA proposal fails to include the strong labor and environmental standards with swift and certain enforcement needed to protect jobs and raise wages.”<sup>6</sup>

Trade agreements like the USMCA are out of touch with today’s priorities. Their core “free” trade principles of national treatment and “most favored nation” — intended both to prevent states from discriminating between domestic and multinational investment, and to provide investors and corporations with the best treatment available in any trade agreement — act as serious obstacles to the protection of the environment and public health, and to the industrial strategies of developing countries. These principles should be rebuilt on foundations of human and environmental rights, and instead guarantee “special and differential treatment” that recognizes and values asymmetries between nations, sectors, branches, and activities.

To shift away from the prevailing corporate values and rules in today’s “free” trade deals, we need a long-term strategy guided by principles of solidarity, fairness, and sharing: the opposite of savage competition. All public policy, including trade, should be transparently and democratically discussed, agreed upon, applied, and evaluated. This is a key step toward creating domestic and global frameworks for trade that generate positive

<sup>6</sup> Arthur Stamoulis, “Nationalism Has Nothing to Offer Working Americans.” Medium, October, 2018. Available at: [medium.com/@citizenstrade/nationalism-has-nothing-to-offer-working-americans-920c0646d9e5](https://medium.com/@citizenstrade/nationalism-has-nothing-to-offer-working-americans-920c0646d9e5)



economic development, with more and better jobs and dignified wages. New approaches must address inequality both among and within nations, as well as rebalance the enormous power appropriated by transnational and national corporations over all spheres of social, economic, and cultural life.

To create incentives for good job creation, it is both possible and desirable to include wage provisions in determining the rules of origin on which preferential tariff treatment is based. These wage provisions should be accompanied by the principles of special and differential treatment to address economic disparities not only between nations but also between regions.

Special consideration should also be given to establishments of a social nature, as well as to micro, small, and medium enterprises (MSME). Rules of origin, technical trade rules, and aspects of customs should also facilitate linkages in the processes of production, distribution, and performance of goods, with the active participation of social enterprises and MSMEs in value chains.

A central objective of trade agreements, therefore, must be to increase trade in sustainably produced goods with a greater national content. Higher value-added production would help create and re-establish productive linkages within local and national economies and generate positive economic multiplier effects. Along these lines, it is essential for governments to be able to help incorporate MSMEs and social establishments (like cooperatives, for example) into value chains by facilitating the creation, financing, and adoption of technology, and to provide infrastructure and institutional support.

## Progressive Alternatives for a New Multilateral Trade System

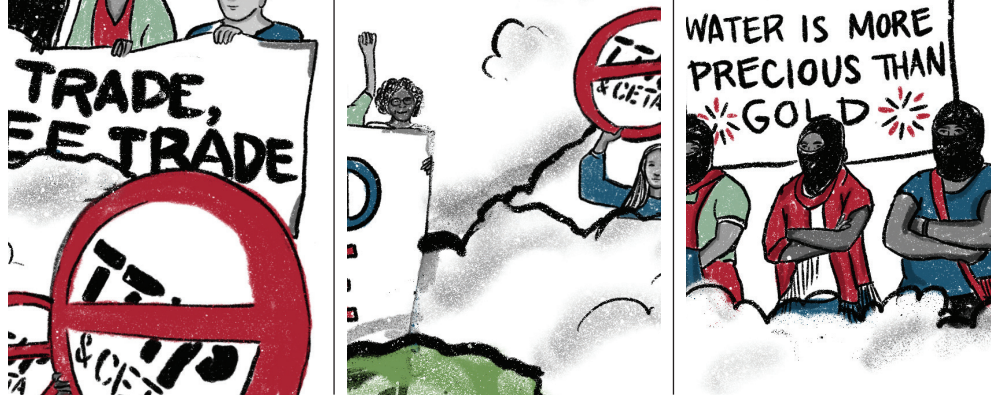
New trade rules will only be effective if they are linked to pro-worker policies with respect to labor rights, wages, and social security, as well as strong environmental, health, social inclusion, education, scientific-technological, infrastructure, transport, and communications policies. Only in this way will trade cease to be a stumbling block to fair and sustainable development.

The following reforms would re-align global trade and investment rules to make them more cooperative and geared toward development, job creation, sustainable economic activity, and the fair redistribution of wealth:

1. Developing countries should work with developed countries to implement special policies to address the inequalities between our countries. The current dominant principle of national treatment severely restricts national development planning. Governments should be allowed to pursue policies to strengthen domestic demand rather than relying entirely on external markets.

2. New trade rules should seek to advance environmental sustainability by promoting, under the criteria of proximity and complementarity, a decrease in international trade to reduce its ecological footprint, and an expansion of domestic and regional trade.
3. In particular, we must review transport activity (air, naval, and land) associated with foreign trade to reduce and reconvert flows, and the infrastructure associated with them, so as to avoid environmental damage. We must also connect eco-friendly transport to the large established commercial routes to create and prioritize local and regional hubs over long international supply chains. This will help reduce the harmful ecological and social impacts of excessive high-speed commercial vehicles and vessels.
4. Countries should agree to rules of transparency, anti-corruption, efficiency, effectiveness, and accountability, in order to avoid fraud, money laundering, illicit capital flows, misinvoicing, and the manipulation of tariff classifications to the detriment of consumer protection, public health, the environment, and tax collection.
5. Countries should elevate the concept of “fair trade,” which ensures “better prices, decent working conditions, local sustainability, and fair terms of trade for farmers and workers in the developing world. By requiring companies to pay sustainable prices (which must never fall lower than the market price), fair trade addresses the injustices of conventional trade, which traditionally discriminates against the poorest, weakest producers.”<sup>7</sup>
6. In light of technological changes, we must increase job training for workers oriented toward innovation and the acquisition of technical knowledge. This would allow them to share in the benefits of increased productivity and new sectors and kinds of work.
7. Trade and investment agreements should not undermine the ability of the nation-state to meet its citizens’ social and economic needs. Nation-states should have the right to maintain public sector corporations and procurement policies that support national development goals.

<sup>7</sup> Fair Trade Foundation, “What Is Fair Trade?” Available at: [fairtrade.org.uk/What-is-Fairtrade](http://fairtrade.org.uk/What-is-Fairtrade).



# International Investment Agreements and ISDS

By Sarah Anderson, Alberto Arroyo,  
and Manuel Pérez-Rocha

THE EXISTING INTERNATIONAL investment regime reflects the stark asymmetry in current rules that govern international investment. Through investor-state dispute settlement (ISDS) mechanisms, it allows corporations to sue governments for hundreds of millions, and even billions, of dollars for potential lost profits. The ISDS system, entrenched in more than 3,000 bilateral investment treaties and free trade agreements, gives foreign investors powerful tools to undermine the authority of governments, courts, and human rights bodies to protect the environment and the public interest.

Studies demonstrate how the purported benefits of International Investment Agreements (IIAs) to attract foreign investment are highly dubious at best and even deleterious to the extent that they promote a race to the bottom in protections for labor, the environment, and human rights.<sup>8</sup>

Rather than reforming this dysfunctional system, it would be better to start from scratch. As the United Nations Conference on Trade and Development (UNCTAD) has stated, “Reform of investment dispute settlement cannot be viewed in isolation; it needs to be synchronized with reform of the *substantive investment protection rules* embodied in IIAs. Without a comprehensive package that addresses both the substantive content of IIAs and ISDS, any

<sup>8</sup> Lise Johnson, Lisa Sachs, Brooke Güven, & Jesse Coleman, “Costs and Benefits of Investment Treaties: Practical Considerations for States.” Columbia Center on Sustainable Investment, March 2018. Available at: [ccsi.columbia.edu/files/2018/04/07-Columbia-IIA-investor-policy-briefing-ENG-mr.pdf](https://ccsi.columbia.edu/files/2018/04/07-Columbia-IIA-investor-policy-briefing-ENG-mr.pdf).



reform attempt risks achieving only piecemeal change and potentially creating new forms of fragmentation and uncertainty.”<sup>9</sup>

In this context of growing discontent with the current regime, fewer new agreements are being reached, and a few reforms are even being implemented. According to UNCTAD, in 2017 only 18 IIAs were concluded, the lowest number since 1983. For the first time, the number of treaty terminations overtook the number of new IIAs. Meanwhile, since 2012, more than 150 countries have devised measures for a new generation of IIAs that provide specific protection or carve-outs for policies and decisions that favor the environment.<sup>10</sup>

There is also strong evidence of rising discontent with the International Center for the Settlement of Investment Disputes (ICSID), the most commonly used arbitration forum for handling ISDS cases.<sup>11</sup> At least three countries have withdrawn from the ICSID Convention (Ecuador, Bolivia, and Venezuela).<sup>12</sup> These same countries, in addition to India, Indonesia, South Africa and Tanzania, have terminated several bilateral investment treaties (BITs), mostly with European countries.<sup>13</sup> Several countries are also developing alternative BIT models, including Brazil,<sup>14</sup> India,<sup>15</sup> Indonesia,<sup>16</sup> and Tanzania.<sup>17</sup> Regionally, the South African Development Council has developed an alternative Model Bilateral Investment Treaty Template, which advises member states to consider state-to-state arbitration before allowing claims to be filed with international tribunals.<sup>18</sup> The government of El Salvador, after being sued by

<sup>9</sup> UNCTAD, “Improving Investment Dispute Settlement: UNCTAD Policy Tools.” IIA Issues Note, Issue 4, November 2017. Available at: [unctad.org/En/Publicationslibrary/Diaepcb2017d8\\_En.Pdf](http://unctad.org/En/Publicationslibrary/Diaepcb2017d8_En.Pdf).

<sup>10</sup> UNCTAD, Investment Policy Hub. Available at: [investmentpolicyhubold.unctad.org](http://investmentpolicyhubold.unctad.org).

<sup>11</sup> Dr. Robin Broad, “Corporate Bias in the World Bank Group’s International Centre for Settlement of Investment Disputes: A Case Study of a Global Mining Corporation Suing El Salvador.” University of Pennsylvania Journal of International Law, 2015. Available at: [scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1898&context=jil](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1898&context=jil).

<sup>12</sup> Magdalena Bas Vilizzio, “Algunas Reflexiones en Torno al Retiro de Bolivia, Ecuador y Venezuela del CIADI.” *Densidades*, No. 17, Buenos Aires, May 2015.

<sup>13</sup> See UNCTAD’s Investment Policy Hub, cited above.

<sup>14</sup> José Enrique Viera Martins, “Brazil’s Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments.” *Investment Treaty News*, IISD, June 2017.

<sup>15</sup> Amiti Sen, “India’s Bilateral Investment Pacts Under Cloud.” *The Hindu Business Cloud*. New Delhi, April 2018. Available at: [thehindubusinessline.com/economy/indias-bilateral-investment-pacts-under-cloud/article9625580.ece](http://thehindubusinessline.com/economy/indias-bilateral-investment-pacts-under-cloud/article9625580.ece).

<sup>16</sup> Rachmi Hertanti and Rika Febriani, “Update on Indonesia BITs Review.” *IGJ News*, February 18, 2015. Available at: [isds.bilaterals.org/?update-on-indonesia-bits-review](http://isds.bilaterals.org/?update-on-indonesia-bits-review).

<sup>17</sup> Luke Eric Peterson And Zoe Williams, “As Tanzania Seeks To Overhaul Mining Regime, The Government Reportedly Moves To Terminate A Bilateral Investment Treaty That Was Up For Renewal.” *Investment Arbitration Reporter*, October 2018. Available at: [iareporter.com/articles/as-tanzania-seeks-to-overhaul-mining-regime-the-government-reportedly-moves-to-terminate-a-bilateral-investment-treaty-that-was-up-for-renewal/](http://iareporter.com/articles/as-tanzania-seeks-to-overhaul-mining-regime-the-government-reportedly-moves-to-terminate-a-bilateral-investment-treaty-that-was-up-for-renewal/).

<sup>18</sup> Southern African Development Community, “SADC Model Bilateral Investment Treaty Template with Commentary.” July 2012. Available at: [iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf](http://iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf).

Commerce Group and Pacific Rim Mining, reformed its national investment law in order to prevent claims from being taken directly to ICSID.

## Investor Rights in the New NAFTA

The renegotiation of NAFTA resulted in seismic changes in terms of ISDS among North American countries. If the resulting USCMA is ratified, the region would have not one but three distinct investment protection regimes. In terms of arbitration, there would be a system for the United States and Canada, in which ISDS no longer exists and dispute settlement is instead limited to national or local courts, or to state-to-state mechanisms (though it is important to note that many substantive investment protection rules would remain in place); another for Mexico and the United States, in which ISDS persists, notably for Covered Government Contracts, which remain subject to the full protections of NAFTA Chapter 11; and third between Canada and Mexico, under the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) which is largely based on NAFTA's pre-existing Chapter 11 model.

While Annex 14-D of the USCMA (applicable only to Mexico and the United States) puts new limitations on investor claims (confining them to matters of direct expropriation and post-establishment national treatment), Annex 14-E preserves NAFTA protections (including Minimum Standard of Treatment, Transfers, Performance Requirements, Senior Management and Board of Directors, and Indirect Expropriation) for disputes related to government contracts. These provisions specifically relate to contract disputes connected to the oil and gas, power generation, telecommunications, transportation, and infrastructure sectors. Meanwhile, Annex 14-E does not include the requirement to exhaust domestic remedies that applies to US and Mexican claimants under Annex 14-D.

While the elimination of ISDS between the US and Canada is clearly positive for those countries, the USMCA's fragmented investment provisions otherwise represent a step backwards, toward the originally asymmetrical, post-colonial investor protection system, in which ISDS was established primarily between developed and developing countries. Indeed, developed countries are increasingly withdrawing from or rejecting ISDS amongst themselves. For example, the European Union and Australia and New Zealand have reportedly dropped ISDS from their mandate for negotiations of a Free Trade Agreement,<sup>19</sup> while there have been strong indications that a new TTIP would not require ISDS given the "highly evolved" rule of law,

<sup>19</sup> Australian Fair Trade & Investment Network, "EU-Australia trade talks quietly dump foreign investor rights to sue governments." Available at: [aftinet.org.au/cms/node/1581](http://aftinet.org.au/cms/node/1581).

legal systems, and robust courts on both sides of the Atlantic.<sup>20</sup> Meanwhile, the European Union countries have begun phasing out Bilateral Investment Treaties among themselves.<sup>21</sup>

In all cases, it is clear that these developed countries intend to preserve mechanisms for the protection of investments in non-developed countries, continuing a tradition of predictably uneven practical effects. To give but one example, no Mexican company has ever won a case versus the United States or a European country.

## Progressive Alternatives for International Investment Regimes

As a result of growing awareness and concern around the globe, proposed alternatives to the current investment regime have multiplied in recent times. One example is a prominent document developed by dozens of organizations and experts proposing an alternative model for international investment to address corporate impunity and develop new investment rules oriented around the public interest.<sup>22</sup> This and similar proposals outline a set of rules that would govern investment so as to facilitate national and regional public policies that advance national development and employment strategies as well as social and environmental rights. This chapter draws from these proposals designed over the course of the last decades and modestly puts forth the following set of proposals:<sup>23</sup>

**20** Brooke Skartvedt Güven, “Inclusion of ISDS Arbitration or an Investment Court in the TTIP: Unresolved Concerns.” Columbia Center on Sustainable Investment, April 28, 2016. Available at: [ccsi.columbia.edu/files/2016/04/160428-TTIP-Stakeholder-Session-The-Investment-Chapter-Unresolved-Concerns-FINAL.pdf](https://ccsi.columbia.edu/files/2016/04/160428-TTIP-Stakeholder-Session-The-Investment-Chapter-Unresolved-Concerns-FINAL.pdf).

**21** European Commission — Press Release, “Capital Markets Union: Commission provides guidance on protection of cross-border EU investments.” Brussels, July 19, 2018. Available at: [europa.eu/rapid/press-release\\_IP-18-4528\\_en.htm](https://europa.eu/rapid/press-release_IP-18-4528_en.htm).

**22** Working Group on Investment in the Americas, “A Call for the Building of an Alternative Legal Framework to the International Investment Treaties,” May 2014. Available at: [ips-dc.org/call-building-alternative-legal-framework-international-investment-treaties-favoring-public-interest-away-transnational-corporate-impunity/](https://ips-dc.org/call-building-alternative-legal-framework-international-investment-treaties-favoring-public-interest-away-transnational-corporate-impunity/).

**23** The first such proposals arise in North America in the heat of the fight against NAFTA and are retaken in the chapter on investments of the document of the Hemispheric Social Alliance entitled “Alternatives for the Americas.” The fifth and final version was published in October 2005 in both Spanish and English. Available at: [rimalc.org/historico/libros.htm](https://rimalc.org/historico/libros.htm). The second proposal is the one cited in the previous note. The third proposal is the “International Peoples’ Treaty on the Control of Transnational Corporations,” prepared in 2014 within the framework of the “Global Campaign to Dismantle Corporate Power,” and available, among other places, at: [stopcorporateimpunity.org/wp-content/uploads/2015/02/PeoplesTreaty-EN-dec2014.pdf](https://stopcorporateimpunity.org/wp-content/uploads/2015/02/PeoplesTreaty-EN-dec2014.pdf). The fourth document was prepared as a recommendation within the CAITISA, created in October 2013 by presidential decree in Ecuador and can be found in “Comprehensive citizen audit of reciprocal investment protection treaties and the investment arbitration system in Ecuador.” Available at: [caitisa.org/index.php/home/enlaces-of-interes](https://caitisa.org/index.php/home/enlaces-of-interes).

**1. Proposals to give pre-eminence to human rights over investor rights, and to prioritize the protection of the environment and Indigenous Peoples.** Respect for Indigenous Peoples, human rights, and environmental protection rights should be obligatory in international law and take precedence over other legislation, with binding mechanisms to ensure corporate accountability. This has been the motivation behind organizations engaged in negotiations for an International Binding Treaty on Transnational Corporations and Human Rights, as well as national-level efforts to pursue legal mechanisms for corporate accountability.

- I. It is necessary to enshrine a principle of international law that grant human and environmental rights pre-eminence over any other legislation.
- II. The new international set of rules on investments should include binding measures regarding human rights.
- III. Investors should be held accountable for reporting on their corporate initiatives not only in their country of origin but also in those countries where they invest.
- IV. All transnational investment proposals must be preceded by a socio-environmental and human rights impact assessment. This should involve Indigenous Peoples and other key affected groups, and should be subject to internationally accepted standards for Informed Prior Consent.
- V. Investment impact should continue to be monitored after any new rules have been established.

**2. Proposals for alternative, transparent, two-way dispute settlement solutions.** Current ISDS clauses should be annulled, particularly those that allow investors to challenge and sue host states using supranational arbitration over governmental regulatory actions or related measures that they perceive to be harmful to their particular interests.

- I. Investment disputes should be brought first to national courts, in accordance with the host country's legislation. Only after exhausting national procedures would the investor have the option of appealing to a permanent and *duly constituted* international tribunal to review whether there was any violation of due process, or if the appropriate national legislation was properly applied.

- II. International dispute settlement mechanisms should be two-way. Not only investors but also states, communities, and citizens should be able to initiate a legal challenge, and tribunals should enable access and equitable participation for affected communities, with the process conducted publicly and transparently.
- III. It is necessary to guarantee that any international or regional tribunal allow access and equitable participation for affected communities, conduct proceedings publicly, and afford investors no rights that are stronger or broader than those granted to domestic investors.
- IV. In the case of human rights violations by an investor or company, the investment treaties should explicitly respect the rights of the affected individuals or communities to seek additional recourse at the international level, as outlined in international law governing human rights.

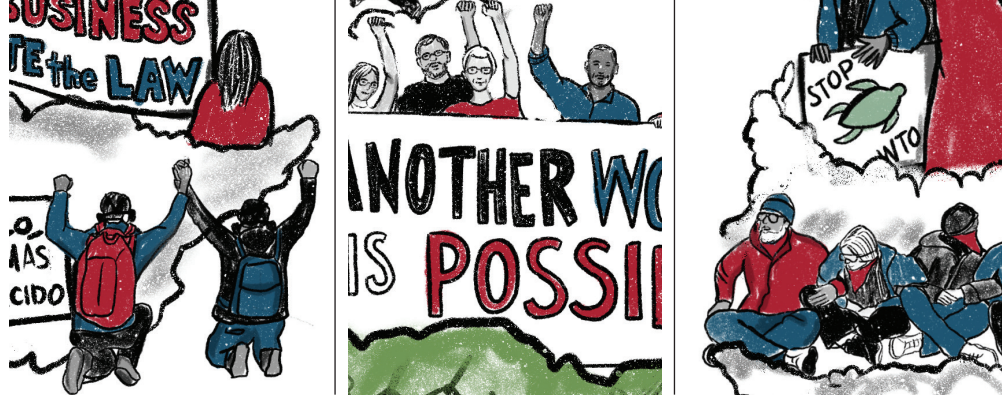
**3. Proposals to abolish the privileges of foreign investors and guarantee sufficient policy space.** The following recommendations would help ensure that governments have the authority to pursue local and national policies that reflect their particular needs, cultures, priorities, and levels of economic development.

- I. Eliminate the concept of indirect expropriation. Whereas expropriation in the past most often applied to the physical seizure of property, many trade and investment agreements now prohibit “indirect” expropriation, interpreted to mean regulations and other government actions that may undermine future profits. The definition of expropriation should be limited to a government act that for reasons of public interest takes over or nationalizes a tangible good from an investor in exchange for economic compensation.
- II. Restrict the definition of investment to “tangible” goods or properties. This would mean excluding government contracts, natural resource concessions, regulatory permits, intellectual property rights, and financial instruments (such as bonds and derivatives). It would also end the dubious claim that to “assume risk” is tantamount to a form of investment.
- III. Eliminate the current arrangements of National Treatment, Minimum Standards Treatment, and Most Favored Nation Treatment. These principles (along with the vaguely worded “just and equitable treatment” obligation) are touted as advancing fairness by leveling



the playing field between domestic and foreign investors. In reality, they undermine responsible public policies used in the past by nearly every successful economy, while also inhibiting regional integration.

- IV. Exempt sectors linked to human rights such as water, health, essential public services, and culture. This should also include sectors indispensable for guaranteeing food sovereignty and security, as well as the preservation of ecosystems and natural resources. These should remain under strong public control while guaranteeing Special and Differentiated Treatment among parties with different levels of economic development.
- V. Allow capital controls to prevent or mitigate financial crises. Trade and investment agreements typically restrict controls on the flows of capital, even though many governments have used such controls effectively to prevent and mitigate financial volatility. Governments should also be allowed to use taxes and other policy tools to encourage productive, sustainable investment and discourage short-term speculation.
- VI. Allow performance requirements on investors. Many trade and investment agreements force governments to surrender the authority to place conditions on foreign investors, such as using a certain percentage of local inputs in production and transferring new technologies. Such requirements have often been used in the past as responsible economic development tools.



# Intellectual Property Rights and Access to Affordable Medicines

By Scott Sinclair

BEGINNING IN THE mid-1990s, major corporations and their lobbyists seized on free trade agreements as tools to expand intellectual property rights (IPRs). The original NAFTA and the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) were the first FTAs to enshrine intellectual property rights.<sup>24</sup> TRIPS required all WTO member countries to adopt exacting protections for intellectual property, including twenty-year patent terms.

But the governments of key developed countries and *Big Pharma* were not satisfied with their gains. They objected, for example, to the fact that TRIPS provided certain policy flexibilities that “can be used to mitigate the detrimental impact of the Agreement's provisions on market dynamics and access to medicines.”<sup>25</sup> Over the next two decades, the US government and corporate lobbyists, turned to bilateral and regional FTAs to advance their agenda, contributing to what a 2011 joint declaration by policymakers, experts

<sup>24</sup> The NAFTA IP chapter and the WTO TRIPS were negotiated concurrently and are very similar in their basic provisions. TRIPS provides for twenty years of patent protection versus seventeen under NAFTA. The seventeen years under NAFTA is from the time the patent is granted. The twenty years under TRIPS is from the time the patent is applied for. Since, in practice, it usually takes less than three years to get a patent granted, the TRIPS effectively provides a longer term of monopoly protection.

<sup>25</sup> Carlos M. Correa, “Flexibilities provided by the Agreement on Trade-Related Aspects of Intellectual Property Rights,” *Bulletin of the World Health Organisation*, March 1, 2018.

and advocates from 35 countries termed an “unprecedented expansion of the concentrated legal authority exercised by intellectual property rights holders.”<sup>26</sup>

In the area of medicine, the brand-name pharmaceutical industry systematically pressured for broadening the scope of what could be patented (including new uses for existing drugs or chemicals, a process known as *evergreening*); limiting governments’ flexibility to promote competition with patented medicines (for example, through compulsory licensing); extending patent terms by compensating for alleged regulatory delays (known as patent term extensions or patent term restoration); requiring health regulators to confirm that patents were not contested before giving marketing approval to a medicine (patent linkage); and extending the term of monopoly protection and secrecy for clinical data demonstrating the safety and efficacy of a new medicine (data protection).

FTAs not only locked in highly restrictive intellectual property regimes in developed countries, they exported these TRIPS-plus regimes to developing countries.<sup>27</sup> Each new agreement served as a template and floor for the next, resulting in “a progression of increasingly intrusive provisions designed to protect and further the interests of transnational corporations at the expense of population health and affordable access to medicines.”<sup>28</sup>

The impact of this aggressive expansion of IPRs on access to medicines was deliberate and foreseeable. Drug costs rose as public and health providers’ access to less expensive, equally effective generic medicines was delayed or denied. Every extra year that brand-name companies can charge monopoly prices boosts their profits. By delaying access to more affordable generic versions of brand-name drugs, longer patent terms increase costs to consumers and health care systems, and deny the poor and needy, particularly in developing countries, access to essential medicines.

## The New NAFTA and Access to Medicines

The proposed United States-Mexico-Canada Agreement is a clear example of the threats posed by trade agreements to affordable access to essential medicines. If implemented unchanged, USMCA would expand monopoly protections for multinational brand-name drug firms, boosting industry

<sup>26</sup> Global Congress on Intellectual Property and the Public Interest, “The Washington Declaration on Intellectual Property and the Public Interest.” August 25–27, 2011. Available at: [infojustice.org/wp-content/uploads/2011/09/Washington-Declaration.pdf](http://infojustice.org/wp-content/uploads/2011/09/Washington-Declaration.pdf).

<sup>27</sup> See “The Washington Declaration on Intellectual Property and the Public Interest,” cited above.

<sup>28</sup> Ruth Lopert and Deborah Gleeson, “The High Price of “Free” Trade: US Trade Agreements and Access to Medicines,” *Global Health and the Law*, Spring 2013, p. 200. Available at: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2257382](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257382).

profits at the expense of consumers and public health systems. The deal sets new high-water marks for industry-friendly IPRs in several key areas: data protection for biological medicines (drugs derived from living organisms such as human or animal cells); more restrictive patent term extensions and adjustments; and restrictions on governments' authority to use price controls and progressive purchasing practices to curb drug costs.

*Data protection* refers to the ability of brand-name companies to deny competitors access to the results of the clinical and test data that companies must provide to health regulators in order to gain marketing approval. Such provisions delay the entry of generic medicines (or biosimilars, as drugs “demonstrated to be highly similar” to brand-name biologic drugs are known) into the market, keeping prices higher longer.<sup>29</sup>

USMCA provides for a minimum of ten years of data protection for biologic medicines. This was a key demand of *Big Pharma* and their US Congressional allies. Biological medicines are among the fastest growing, most expensive and most profitable class of medicines.

Ten years is a longer term of data protection than required under previous FTAs. Canada currently provides eight years of data protection, while Mexico has no data protection regime specifically for biologics.<sup>30</sup> Currently, the US has a twelve-year term of data protection for biologics, but USMCA would preclude future reductions, as proposed by progressive legislators and US public health advocates.<sup>31</sup> Concerns have also been expressed that USMCA may broaden the scope of data protections to biological medical treatments such as gene and cell therapies that are not currently fully protected under trade treaties or US domestic law.<sup>32</sup>

It is difficult to quantify the precise financial impacts, although they will certainly increase overall drug expenditures. Canada's Parliamentary Budget Office has released the first study that forecasts the financial impacts of these longer data protection provisions for Canada. It conservatively estimates extra costs to Canadian consumers and drug plans of “at least \$169 million in 2029, increasing annually thereafter.”<sup>33</sup>

<sup>29</sup> Health Canada, “Fact Sheet: Biosimilars,” Available at: <https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/applications-submissions/guidance-documents/fact-sheet-biosimilars.html>.

<sup>30</sup> Canadian regulations provide for an extra six months of data protection for pediatric medicines. Canada's 8-year (+six month) regime was locked in under CETA, which entered into force in Sept. 2017.

<sup>31</sup> For example, “H.R.1776: Improving Access To Affordable Prescription Drugs Act,” <https://www.congress.gov/bill/115th-congress/house-bill/1776/text>.

<sup>32</sup> Pre-Hearing Statement of Knowledge Ecology International (KEI) on the United States-Mexico-Canada Agreement. United States International Trade Commission, Investigation (No.TPA-105-003).

<sup>33</sup> Parliamentary Budget Office, “The impact of the Canada–United States–Mexico Agreement on prescription drug expenditures in Canada,” April 2, 2019.

Biologic drugs are already eating up an increasing share of national health budgets.<sup>34</sup> Because patent terms are longer than those for data protection, the price impacts will be felt where new medicines are either not protected by patents or their patent protection expires in less than ten years from market approval. The negative impacts are likely to be worse in Mexico, where the change from the status quo will be greatest and the population is less able to afford higher drug prices, denying the poor affordable access to medicines. In the US, locking in the world's highest drug costs would place a serious obstacle in the way of achieving a universal and affordable "Medicare for All" healthcare system, which currently enjoys 70 percent of US public support.<sup>35</sup>

*Patent term extensions* require governments to provide longer periods of monopoly protection in order to compensate for alleged delays in granting patents or delays in the marketing approval process. USMCA requires that each party adjust the term of a patent to compensate for patent office delays in issuing patents. Patent terms must be extended if the patent is granted more than five years after the date the application is filed, or three years after an applicant requests that the patent office examine their claim, whichever is later. The US has had patent term adjustment for many years, but this process is new under Canadian and Mexican patent law.

USMCA also requires parties to implement patent term adjustments to compensate pharmaceutical patent owners for "unreasonable curtailment of the effective patent term as a result of the marketing approval process." Unreasonable curtailment is not defined. Under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), Canada adopted patent term extensions of up to two years for delays in marketing authorization.<sup>36</sup> Mexico does not currently provide for patent term adjustments to compensate for delays in marketing approval, so this obligation will result in longer periods of monopoly pricing and higher drug costs.

A third area of concern involves the new obligations regarding "Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices (the transparency annex)."<sup>37</sup> The thrust of these novel provisions is to curb the ability of governments to lower the costs of medicines and medical

<sup>34</sup> According to a recent report on Canadian public spending on prescription drugs, "Biologics to treat conditions such as rheumatoid arthritis and Crohn's disease continue to account for the highest proportion of drug spending (21.6% of total spending)." Canadian Institute of Health Information, "Prescribed Drug Spending in Canada, 2018: A Focus on Public Drug Programs," November 2018.

<sup>35</sup> Letitia Stein, Susan Cornwell, and Joseph Tanfani, *Inside the progressive movement roiling the Democratic Party*. August 23, 2018. Available at: [reuters.com/investigates/special-report/usa-election-progressives/](https://www.reuters.com/investigates/special-report/usa-election-progressives/).

<sup>36</sup> The Canadian government asserts that the CETA arrangements for pharmaceuticals will satisfy the USMCA requirements. CETA allows the minister to deny "supplementary protection certificates" under certain circumstances and the extra term is capped at 2 years.

<sup>37</sup> Similar obligations were included in the original TPP, but these were suspended in the so-called Comprehensive and Progressive Trans-Pacific Partnership Agreement after the US withdrew from the TPP.



devices listed for reimbursement under public drug plans. Properly managing such lists, or formularies, can save significant amounts of public money by requiring the use of lower-priced generics or by negotiating product-listing agreements with pharmaceutical manufacturers.<sup>38</sup> The so-called “transparency annex” enhances drug companies’ negotiating clout by, for example, giving them rights to written reasons for listing decisions and to demand a review when they object to listing decisions.

These USMCA transparency provisions are limited in scope (applying only to federal government agencies) and are much weaker than those originally sought by the multinational drug industry.<sup>39</sup> Yet they represent another incremental step in corporate efforts to use trade deals to restrict governments’ authority to control rising drug costs and ensure affordable access to medicines through price regulation and innovative purchasing practices. That these obligations, which were opposed by both Canada and Mexico, ended up in the final agreement sets a worrisome precedent. As in the past, corporate lobbyists will invoke these trail-blazing provisions as a foothold to gain more intrusive obligations in future deals.

## Progressive Alternatives for Intellectual Property Rights and Access to Affordable Medicines

By severely restricting the production, sale, and trade of goods and services, intellectual property rights represent the antithesis of free trade and competitive markets.<sup>40</sup> Yet this hypocrisy has done little to slow the expansion of IPRs through bilateral and regional FTAs. By creating and expanding monopolies, IPRs boost rightsholders’ profits and market dominance. But the corporate gains come at the expense of consumers and the public interest, for example by reducing access to affordable medicines.

There is little compelling evidence of increased innovation as the result of these costly restrictions. Promises made by the brand-name pharmaceutical

**38** US Medicare, for example, overpays for drugs because the Medicare Modernization Act of 2003 forbids the plan from directly negotiating lower prices with pharmaceutical manufacturers. Mark Miller, “Remedy for high drug costs: Let Medicare negotiate,” Reuters, May 17, 2018.

**39** Deborah Gleeson, “Preliminary analysis of the final TPP Healthcare Transparency Annex: Annex 26-A: Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices,” School of Psychology and Public Health, La Trobe University, 12 December 2015.

**40** Joel Lexchin, *Private Profits versus Public Policy: The Pharmaceutical Industry and the Canadian State*. University of Toronto Press, 2016, p. 155.

industry to increase research and development investment in countries that go along with excessive IP demands have thus far proven hollow.<sup>41</sup>

1. A progressive trade policy would remove IPRs from trade agreements, leaving the regulation of intellectual property to national governments and more representative international organizations that are better equipped to balance commercial and public interests.

2. Until this goal can be achieved, progressive governments should take full advantage of the flexibilities that exist under the current rules. One of the most important of these flexibilities is compulsory licensing.

3. A compulsory license allows a competitor to produce generic versions of patented medicine, upon payment of reasonable royalties to the rights holder. In the case of compulsory licensing, a competing company can either manufacture or import a generic version of the medicine for sale, normally at a much-reduced price.<sup>42</sup> This public policy option can be very effective in lowering drug costs and promoting access to essential medicines.

4. For example, prior to the first free trade agreement between Canada and the US, Canada passed legislation in 1969 allowing compulsory licensing for medicines, after an average of five-seven years of market exclusivity. Generic competition increased, reducing Canadian drug prices, which up until then had been among the highest in the world.<sup>43</sup> This legislation was weakened and ultimately abolished when Canada joined the Canada-US FTA (1989) and NAFTA (1994).

5. Governments have so far preserved their right to issue compulsory licenses on patents in order to promote the public interest, including affordable access to medicines. Although compulsory licensing is strongly opposed by the brand-name pharmaceutical industry and the US government, it is still permissible under international law, including the World Intellectual

<sup>41</sup> For example, in Canada, the brand-name pharmaceutical industry has consistently failed to meet previous pledges to invest ten percent of their sales revenues in researching and developing new products. According to the latest data from the Patented Medicine Prices Review Board (PMPRB), the research and development-to-sales ratio of pharmaceutical patentees in Canada fell to 4.1 percent its lowest level since the PMPRB began collecting data in 1988. Available at: [pmprb-cepmb.gc.ca/view.asp?ccid=1380&lang=en](http://pmprb-cepmb.gc.ca/view.asp?ccid=1380&lang=en).

<sup>42</sup> Often, the mere threat of allowing a competitor entering the market is enough to get brand-name manufacturers to lower their prices.

<sup>43</sup> Lexchin (2016), cited above, pp. 138–143.

Property Organization treaties and TRIPS.<sup>44</sup> This policy flexibility was affirmed in the WTO Declaration on the TRIPS Agreement and Public Health.

6. Price controls are another form of effective cost containment that are broadly consistent with existing trade agreements. Formal price regulation of prescription drugs exists in most developed countries, with the US being a notable exception. The pharmaceutical industry is well aware of this threat to its profitability and has been pushing for trade agreements to restrict price regulation and the ability of public buyers to bargain for better prices. While the USMCA transparency provisions are an unwelcome step in that direction, currently there are no insurmountable trade treaty obstacles to an effective system of price regulation of essential medicines.

7. A more radical solution, advocated by progressive economists such as Dean Baker, is to scale back or abolish patents for medicines, while mandating the public sector to take a lead role in financing research and rewarding innovation.<sup>45</sup> Greatly expanded public funding of research is an attractive alternative to our current costly and dysfunctional system of excessive patents and other forms of monopoly protection. As a condition of receiving public funding, scientists and developers would agree to make their data publicly available and governments would retain their right to issue compulsory or humanitarian licenses for medicines developed with public funding.<sup>46</sup> Leading public health experts have also called for public-sector manufacturing of medicines when no reasonably priced option is available, or in the case of shortages or emergencies.<sup>47</sup>

8. Such options can be pursued without having to reform FTAs first, since putting publicly funded research in the public domain would not violate intellectual property rights. It would of course invoke fierce opposition from multinational pharmaceutical firms and their government allies, but the public interest gains would be worth the fight. The primary obstacles to achieving these and the many other creative proposals for ensuring access to safe, innovative, and affordable medicines, are more political than legal in nature.

<sup>44</sup> When Colombia recently moved to license the cancer medicine Glivec/*imatinib*, the Swiss drug company Novartis, which held the patent, objected and the US government responded with threats to cut aid to the Colombian government. Ultimately, the stand-off was ended when Colombia made the drug available at reduced prices. A compulsory license was never issued.

<sup>45</sup> Dean Baker, *Rigged: How the Rules of Globalization and the Modern Economy were Structured to Make the Rich Richer*, Chapter 5, Center for Economic and Policy Research, Washington, 2016.

<sup>46</sup> Italy's Mario Negri Institute "offers an alternative way for doing pharmacological research. ... [T]he Institute declines to take out any patents or to demand any other form of IPRs and makes all data freely available. Finally, it rejects any [corporate] funding when its scientists conclude that the results will not further the interest of public health." Joel Lexchin, "The Pharmaceutical Industry in Contemporary Capitalism," *Monthly Review*, Mar 1, 2018.

<sup>47</sup> Adam Gaffney and Joel Lexchin, "Healing an ailing pharmaceutical system: prescription for reform for United States and Canada," *theBMJ*, May 18, 2018.



# Digital Trade

By Hadrian Mertins-Kirkwood

ONE OF THE key drivers of economic growth in North America and around the world is the emergence of the digital economy, which includes both goods and services delivered through new technologies. Firms and industries associated with the digital economy are growing significantly faster than the rest of the economy.<sup>48</sup> However, many of these technologies are fundamentally transforming the relationships between corporations, citizens, and states, which poses challenges for traditional understandings of international trade. Issues such as weak consumer data protection rules and the inadequate taxation of electronic commerce cannot and should not be addressed with traditional trade policy tools. In the case of internet-based technologies like cloud computing, even sovereignty over our own data and personal information is being complicated by the free movement of information across borders.

The rapid pace of technological change poses challenges for national regulators, who are often pressured into adopting policies that inhibit the potential benefits of digital trade or magnify its shortcomings (or both). In order to bypass the domestic legislative process, industry lobbyists are increasingly turning to trade agreement negotiations to shape digital policy issues, from copyright terms to online speech regulation to network neutrality. Restoring and protecting democratic oversight of digital policy is essential for navigating the fast-changing technological landscape. Nevertheless, some aspects of digital trade — broadly defined as the use of digital technologies

<sup>48</sup> Kevin Barefoot, Dave Curtis, William Jolliff, Jessica R. Nicholson, and Robert Omohundro, “Defining and Measuring the Digital Economy: Working Paper,” US Department of Commerce Bureau of Economic Analysis, March 15, 2018.

to facilitate international business — are inherently international and must therefore be a consideration for forward-looking trade policy.

In the absence of strong government leadership, the major corporate players of the digital economy — a small but powerful group led by Alphabet (Google), Amazon, Apple, Facebook, and Microsoft — will continue to set their own rules at the expense of citizens and states. The international nature of internet-based technologies demands international cooperation to develop and enforce a public interest framework for digital trade.

## The USMCA and Digital Trade

Unlike its predecessor, which came into force before the popularization and commercialization of the internet, the USMCA includes a dedicated chapter on digital trade (Chapter 19). Related provisions are included in chapters covering cross-border trade in services (Chapter 15), telecommunications (Chapter 18), and intellectual property rights (Chapter 20).

Unfortunately, the USMCA's digital trade provisions are designed primarily to protect major US telecommunications, entertainment, and technology companies at the expense of consumers and competitors and to the exclusion of government oversight. These industries have different and often competing priorities (e.g., legacy media companies demand stronger intellectual property protections while internet giants demand the free movement of personal data); however, in general, the agreement restricts the capacity of states to regulate the digital economy and, by extension, to protect their citizens and economic interests against corporate profiteering.

Article 19.3 prohibits any customs duties, fees, or other charges on imported digital goods (e.g., e-books, digital music). In practice, this provision makes permanent the temporary WTO Moratorium on Customs Duties on Electronic Transmissions, which first came into force in 1998. However, the moratorium has been criticized by countries such as India and South Africa because digital products are increasingly replacing traditional goods and services, with a corresponding loss of government revenue from customs duties, among other implications.<sup>49</sup> By enshrining the principle in the USMCA, Canada, Mexico, and the United States have tied their hands in one of the fastest-growing sectors of the consumer economy. The agreement does allow internal taxes (e.g., sales taxes on digital goods sold within a country), but

<sup>49</sup> World Trade Organization Work Programme on Electronic Commerce, "Moratorium on customs duties on electronic transmissions: Need for a rethink," World Trade Organization, proposal WT/GC/W/747, July 13, 2018.



in practice such charges are more difficult to implement and collect where foreign products enter duty-free.

The parties also agreed to prohibit duties on physical goods purchased online from international suppliers up to a certain threshold. The so-called *de minimis* limit has been set at US\$800 for the United States, US\$170 (plus US\$50 in taxes) for Mexico, and C\$150 (plus C\$40 in taxes) for Canada. Raising the thresholds for duty-free imports in Canada and Mexico will further erode government revenues by displacing sales taxes. It could also have significant economic and employment impacts in the Canadian and Mexican domestic retail sectors.<sup>50</sup>

Several provisions, such as Article 19.12 (location of computing facilities), place clear restrictions on the government regulation of its own citizens' data. Prohibiting data localization means foreign companies cannot be required to store personal information collected from the citizens of a country within that country. Article 19.11 further enshrines the right of corporations to transfer data, including personal information, across borders. Data collected by the likes of Facebook and Amazon can therefore flow through US servers where it may be subject to government surveillance. Once corporations are free to transfer and store personal information outside the country where it was collected, it also becomes more difficult for governments to enforce regulations protecting privacy and user rights. This approach stands in stark contrast to the European Union's recently-adopted privacy rules that place strong limits on data transfers in the interest of consumer protection.<sup>51</sup>

The USMCA also includes expanded protections for copyrighted materials — Article 20.63 extends copyright terms to life of the author plus 70 years — and harsher punishments for copyright infringement. Article 20.67 requires criminal penalties for the willful and commercial circumvention of technological protection measures on digital goods. These “digital locks” not only curtail how legitimate consumers can enjoy copyrighted content such as music and movies, but may also prevent legitimate owners of technology (e.g., tractor-owning farmers) from repairing or modifying their equipment.<sup>52</sup>

<sup>50</sup> Research commissioned by the Canadian retail industry predicted hundreds of thousands of job losses if Canada's *de minimis* limit was raised to US\$800 as initially proposed. Since the final *de minimis* figure was much lower, the expected losses are also significantly reduced. See Michael Dobner et al., *Rise in Canada's de minimis threshold: Economic Impact Assessment*, PricewaterhouseCoopers, December 2017. Available at: [retailcouncil.org/wp-content/uploads/2018/08/Rise\\_in\\_Canada\\_de\\_minimis\\_threshold.pdf](http://retailcouncil.org/wp-content/uploads/2018/08/Rise_in_Canada_de_minimis_threshold.pdf).

<sup>51</sup> European Commission, “2018 reform of EU data protection rules,” 2018. Available at: [ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules\\_en](http://ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules_en).

<sup>52</sup> Carlo Dade, “USMCA IP provisions make for uneven playing field for Canadian, US farmers,” *The Hill Times*, December 5, 2018. Available at: [hilltimes.com/2018/12/05/usmca-ip-provisions-make-uneven-playing-field-canadian-u-s-farmers/178982](http://hilltimes.com/2018/12/05/usmca-ip-provisions-make-uneven-playing-field-canadian-u-s-farmers/178982).

The agreement's strong provisions limiting government intervention in the digital economy and protecting dominant corporate interests are not matched by the provisions protecting technology users. Article 19.7 (online consumer protection) and Article 19.8 (personal information protection) include only vague commitments to maintain existing consumer protection laws and to pursue international regulatory cooperation without imposing any firm requirements on the parties to strengthen their regulatory frameworks in these areas.

The USMCA also fails to enshrine the fundamental principle of net neutrality, particularly a long-established Canadian telecommunications law that requires internet service providers (ISPs) to transmit all of their customers' data equally, without showing preference or discrimination based on the type of online content a customer sends or receives. Article 19.10 only acknowledges user access to the internet as "beneficial," while opening the door to potentially discriminatory network management practices. North American public interest groups have been fighting for decades to have net neutrality more strongly enforced, with mixed results. The USMCA pushes the needle of this political question in favor of the powerful telecommunications corporations that stand to benefit from new business models that exploit discriminatory pricing.

Few of the USMCA's digital trade provisions are without precedent. Most have featured in other recent trade agreements (or were tabled in negotiations), including the Trans-Pacific Partnership prior to the United States' withdrawal. Nevertheless, the USMCA's comprehensive suite of protections for telecommunications, entertainment, and technology giants, coupled with limits on government oversight of the digital economy and citizens' digital rights, together represent a thorough concession to private commercial interests.

## Progressive Alternatives for Digital Trade

Overall, the greatest problem with the USMCA's digital trade provisions, according to experts in digital rights law and policy, is the precedent it sets for domestic policy and future international negotiations.<sup>53</sup> The digital economy is relatively new, and its future trajectory is uncertain. Governments need the policy flexibility to respond to an evolving technology landscape according

**53** Michael Geist, "Setting the Standard?: How the USMCA Quietly Reshapes Global Digital Trade Agreements," Michael Geist Blog, October 4, 2018, [michaelgeist.ca/2018/10/setting-the-standard-how-the-usmca-quietly-reshapes-global-digital-trade-agreements](http://michaelgeist.ca/2018/10/setting-the-standard-how-the-usmca-quietly-reshapes-global-digital-trade-agreements); see also Teresa Scassa, "The USMCA locks Canada in on digital trade — and at a worrying time," Maclean's, October 3, 2018. Available at: [macleans.ca/opinion/the-usmca-locks-canada-in-on-digital-trade-and-at-a-worrying-time](http://macleans.ca/opinion/the-usmca-locks-canada-in-on-digital-trade-and-at-a-worrying-time).

to their own citizens' priorities and values, so as to ensure the continued protection of the public interest. Deals like the USMCA tie our hands before we even understand what public policies may be needed. New approaches are urgently needed, including through the following proposed alternatives:

1. Above all, trade agreements must recognize and address the exorbitant power of the mostly-US technology companies that dominate the digital economy.<sup>54</sup> The digital trade provisions in any trade agreement must actively counter-balance the playing field to ensure users, consumers, and regulators have an equal say in the international digital economy. In other words, a "balanced" trade agreement only serves to reinforce a fundamentally unbalanced digital economy.

2. Trade agreements must enshrine the sovereign right of governments to regulate in the public interest in the fast-changing area of digital trade. States must retain the flexibility to adjust and adopt policies as the evolving technological landscape and their citizen's priorities and values demand. For example, there should be no prohibitions on data localization requirements, and rules governing duties on digital goods should be time-bound. At the very least, agreements must include clear exceptions for governments acting in the public interest to protect their citizens or safeguard their human rights and interests. The provisions of a trade agreement must yield to domestic law and policy, particularly with respect to privacy, consumer protection, intellectual property, and cybersecurity concerns.

3. Trade agreements must include clear and strong protections for personal information and other private data collected by multinational corporations. Requiring parties to merely uphold existing consumer protection laws is inadequate given the inherently international nature of the digital economy. The European Union's General Data Protection Regulation, which elevates the rights of users above the demands of the tech industry, offers a potential model for North America.

4. A progressive trade policy should remove intellectual property rights from trade agreements, leaving the regulation of intellectual property to national governments and international organizations that are better equipped to balance commercial interests and the public's rights to knowledge, access to information, and freedom of expression (see chapter on "Intellectual Property Rights and Access to Affordable Medicines"). Where trade agreements still include intellectual property rights, they must be genuinely balanced

<sup>54</sup> Jeff Desjardins, "These are the world's largest tech giants," World Economic Forum, July 16, 2018, Available at: [weforum.org/agenda/2018/07/visualizing-the-world-s-20-largest-tech-giants](https://www.weforum.org/agenda/2018/07/visualizing-the-world-s-20-largest-tech-giants).

between protections for commercial rights holders (such as enforcement of copyright terms) and the broader public interest (such as recognizing that the fair use of copyrighted or protected materials is a vital aspect of copyright law itself). Although existing trade agreements such as the USMCA claim to strike such a balance, the protections afforded to consumers and the public domain in these deals are weaker, vaguer, and less enforceable than those granted to private commercial interests.



# Labor Standards

By Scott Sinclair

EVEN THE MOST ardent neoliberal economists admit there will be winners and losers resulting from liberalized international trade. Since NAFTA was signed in the mid-1990s, and especially after China joined the WTO in 2001, workers in all three North American countries have lost better-paid manufacturing jobs. Many of these losses were due to import competition from low-wage, offshore production.<sup>55</sup> According to mainstream economic models, these displaced workers would effortlessly find jobs in more productive, internationally competitive sectors, while consumers would reap the benefits of cheaper imports. Everyone would be better off.<sup>56</sup>

Unfortunately, reality has crushed that pipedream. Affected blue-collar workers and their families have experienced long periods of unemployment and economic hardship. If they can find work, they often end up in lower-paid, more precarious service sector jobs.<sup>57</sup> During an era of austerity and tax cuts, labor adjustment and retraining policies have been inadequate

<sup>55</sup> See, for example, Robert E. Scott, “The effects of NAFTA on US trade, jobs, and investment, 1993–2013.” *Review of Keynesian Economics*, Vol. 2 No. 4, Winter 2014, pp 429–441.

<sup>56</sup> For a critique of these econometric models see Jim Stanford, “Economic Models and Economic Reality: North American Free Trade and the Predictions of Economists.” *International Journal of Political Economy* Fall 2003., pp 28–49.

<sup>57</sup> David H. Autor, David Dorn, Gordon H. Hanson, “The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade,” NBER Working Paper No. 21906, January 2016. Available at: [mathematica-mpr.com/our-publications-and-findings/projects/trade-adjustment-assistance-evaluation](http://mathematica-mpr.com/our-publications-and-findings/projects/trade-adjustment-assistance-evaluation).



or non-existent, especially within North America.<sup>58</sup> Many working-class communities and regions that were once economically viable have been decimated, and the predictable political backlash has helped demagogues such as Donald Trump win power.<sup>59</sup>

Meanwhile, the biggest winners from globalization have been internationally mobile professionals, upper management, and large corporate shareholders. This skewed distribution of the benefits from trade and productivity growth has worsened inequality, especially when measured between individuals and households rather than between countries.<sup>60</sup> The most significant decline in well-being has been experienced by the working class in developed countries.<sup>61</sup>

Advocates for corporate-led globalization also tend to ignore or minimize the problem of “social dumping,” whereby footloose corporations put downward pressure on wages, environmental standards, and public protections. The threat that multinational companies will shift production to lower-wage, more loosely regulated jurisdictions has significantly weakened the negotiating power of workers and unions, suppressing wages and worsening conditions of work.

This situation has also left workers worse off in many developing countries, such as Mexico, where successive governments uncritically embraced free trade agreements and neoliberal globalization.<sup>62</sup> Since NAFTA, the labor share of income has fallen in all three North American countries, but most sharply in Mexico.<sup>63</sup> As one assessment of Mexico’s lagging economic performance under NAFTA noted: “real (inflation-adjusted) wages for Mexico were almost the same in 2014 as in 1994, up just 4.1 percent over 20 years, and barely above their level of 1980.”<sup>64</sup> The nation’s poverty rate is also higher than in 1994 when NAFTA came into effect, while the purchasing power of

<sup>58</sup> James Kwak, *Economism: Bad Economics and the Rise of Inequality*, Chapter 8, 2017. US Department of Labor research indicates that even those displaced workers who received training and reemployment services ended up significantly worse off in terms of employment and earnings. US Department of Labor, “Trade Adjustment Assistance Evaluation (TAA),” 2011–12.

<sup>59</sup> Jed Kolko, “Trump Was Stronger Where the Economy Is Weaker,” *fivethirtyeight.com*, November 10, 2016.

<sup>60</sup> Branko Milanovich, *Worlds Apart: Measuring International and Global Inequality*. Princeton, 2005.

<sup>61</sup> See Paul Krugman referring to the research of Branko Milanovich, “Recent history in one chart.” Available at: [krugman.blogs.nytimes.com/2015/01/01/recent-history-in-one-chart/](http://krugman.blogs.nytimes.com/2015/01/01/recent-history-in-one-chart/).

<sup>62</sup> See, for example, United Nations Conference on Trade and Development (UNCTAD), “Trade and Development Report 2018: Power, Platforms and The Free Trade Delusion.” Available at: [unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2227](http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2227).

<sup>63</sup> Canadian Centre for Policy Alternatives, “Submission to Global Affairs Canada on the Renegotiation and Modernization of the North American Free Trade Agreement,” Figure 2, p. 8, July 2017. Available at: [policyalternatives.ca/publications/reports/renegotiating-nafta](http://policyalternatives.ca/publications/reports/renegotiating-nafta).

<sup>64</sup> Mark Weisbrot, Lara Merling, Vitor Mello, Stephan Lefebvre, and Joseph Sammut, “Did NAFTA Help Mexico? An Update After 23 Years,” Center for Economic and Policy Research, p. 2, updated March 2017.

the minimum wage has fallen by 30 percent and union density is lower.<sup>65</sup> It is not Mexican workers, but multinational corporations — most of them foreign-owned — that have benefitted.

As Mexican labor activist Héctor de la Cueva expresses it, North American free trade has involved a form of transnational blackmail. In the Global North, workers face the threat, whether spoken or implied, that their jobs can be moved to Mexico if they do not submit to employer concessions. Meanwhile, living and working standards in Mexico are driven down by employers who claim that investment and jobs will dry up otherwise. In a classic race to the bottom, workers' rights and labor conditions are eroded in all three countries.<sup>66</sup>

It is unrealistic to expect the insertion of labor rights in FTAs to totally correct such fundamental power imbalances. But including high-quality, enforceable labor rights and standards in trade agreements is nonetheless essential to achieving a fairer international trading system. This has been a key focal point of labor and trade union advocacy around trade and globalization.

## The USMCA and Labor Standards

The USMCA labor provisions represent an improvement over previous FTAs, but those agreements set a low bar. The original NAFTA, for example, contained no binding provisions protecting labor rights or standards. NAFTA's labor side agreement, negotiated by the Clinton administration to secure congressional approval of the trade deal, was toothless and ineffective.

The USMCA labor chapter is largely modeled on the discredited Trans-Pacific Partnership, but with a few significant changes. Like the TPP, the USMCA refers to the International Labour Organization's Declaration on Rights at Work, rather than the more robust ILO core conventions. This is not surprising since the US has ratified only two of the eight core conventions, but it significantly limits the potential impact of the USMCA labor provisions.

The USMCA strengthens TPP provisions "to prohibit the importation of goods produced by forced labor (Art. 23.6)." It also includes provisions that address violence against workers (Art. 23.7) and provide that migrant workers are protected under labor laws (Art. 23.8). New, TPP-plus footnotes

<sup>65</sup> "According to Mexican national statistics, Mexico's poverty rate of 55.1 percent in 2014 was higher than the poverty rate of 1994. As a result, there were about 20.5 million more Mexicans living below the poverty line as of 2014 than in 1994." Mark Weisbrot, Lara Merling, Vitor Mello, Stephan Lefebvre, and Joseph Sammut, "Did NAFTA Help Mexico? An Update After 23 Years," Center for Economic and Policy Research, p. 2, updated March 2017.

<sup>66</sup> The author wishes to thank Héctor de la Cueva for his insightful comments on a previous draft.

define “acceptable conditions of work with respect to minimum wages” to include wage-related benefits such as health care, retirement, and bonuses and, more importantly, recognize that “the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike.” Prior to USMCA’s signature, new obligations that aimed to protect against discrimination based on sex, sexual orientation, and gender identity (Art. 23.9) were gutted, after a group of 40 Congressional Republicans threatened to vote against the deal unless these progressive anti-discrimination provisions were removed.<sup>67</sup>

While the core USMCA labor provisions are subject to dispute settlement, their enforceability remains highly problematic. The rules contain hurdles that ensure a complaint will be time-consuming, expensive, and unlikely to succeed. While the USMCA arguably makes it easier for a complainant to demonstrate that a labor rights issue is trade-related, it is troublesome that the provisions still compel a complaining party to demonstrate that alleged violations result from a government’s “sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.”

This means, for instance, that a single, isolated violation of labor rights, however atrocious, is beyond challenge. It also leaves public sector workers and most workers in non-tradable sectors including health, education, retail, and construction without meaningful protection. The inclusion of such hurdles in previous labor chapters has meant there has never been a single successful labor complaint under any trade agreement signed by the US, Canada, or Mexico.

In one notorious example, a challenge to Guatemalan labor practices — led by the US government, US unions, and Guatemalan workers — failed after nine years of litigation. Although the complainants proved that the Guatemalan authorities were failing to enforce their own labor laws, the dispute panel ruled that there was insufficient evidence that these violations affected international trade.<sup>68</sup> Guatemala has been sanctioned as one of the most dangerous and inhospitable jurisdictions in the world for labor unions and worker advocates.<sup>69</sup> Unfortunately, the USMCA labor provisions are not sufficiently improved to prevent the repeat of such a miscarriage of justice.

<sup>67</sup> “House conservatives protest LGBT protection in Mexico-Canada trade deal.” Nov. 16, 2018. *Politico*. Available at: [politico.com/story/2018/11/16/house-conservatives-lgbt-protection-trade-pact-977288](https://www.politico.com/story/2018/11/16/house-conservatives-lgbt-protection-trade-pact-977288).

<sup>68</sup> USMCA arguably makes it easier than previous FTAs to establish that violations of labor rights are trade-related. For example, workers employed in the territory of one USMCA party by a firm owned by an investor from another party would be covered by the chapter. Also included are “a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party.” Article 23.3(1) note 4.

<sup>69</sup> International Labour Organization, “Country Profiles: Guatemala,” Available at: [ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID:3084277](https://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3084277).

The most innovative and potentially beneficial part of the USMCA labor chapter is a new *Annex on Worker Representation in Collective Bargaining in Mexico*. This commits the Mexican government to specific legislative changes to guarantee workers' rights to bargain collectively. Specifically, the annex restricts the use of protection contracts. These contracts, widespread in Mexico, allow corrupt unions to sign long-term collective agreements without workers' input or approval.

In 2017, as a result of pressure from the International Labour Organization, and related to the Trans-Pacific Partnership negotiations, the Peña Nieto government undertook a profound, potentially progressive constitutional reform of Mexican labor laws and conditions. This initiative stalled but was taken up again, in 2019, by the newly elected Congress and administration of Andrés Manuel López Obrador (AMLO). The new government has enacted legislation that aims to finally realize effective freedom of association and genuine collective bargaining in Mexico.

While these long-overdue reforms are obviously meant to comply with the USMCA labor chapter and the agreement's new annex on collective bargaining, the AMLO government and the independent labor movement deserve much of the credit for finally resolving to eradicate Mexico's notorious, deeply embedded system of protection agreements. The government has also, on its own initiative, proposed an ambitious program of labor measures and programs that include: an increase in minimum wages, especially along the US border; scholarships for training youth and other highly unemployed groups to encourage them to enter the workforce; and certification for decent workplaces, which could be a condition for securing government procurement contracts.<sup>70</sup>

The USMCA annex could provide welcome support for the Mexican government in implementing its labor reforms. But the hoped-for success of efforts to eliminate protection agreements depends largely on the ability of the new Mexican government to overcome entrenched domestic and foreign business opposition, as well as the strengthening of authentic trade unionism. As Héctor de la Cueva emphasizes, "the most serious problem in Mexico has always been not so much the formal labor laws, but the entrenched practices that impede their application in reality." In addition, he points out, there are worrisome budgetary shortfalls for financing the transition to this new labor system.

<sup>70</sup> Maquila Solidarity Network, "Will Mexico's New Government Make Advances on Labour Justice?" September 2018.

## Progressive Alternatives for Labor Standards

While the USMCA labor provisions represent fragmentary progress in certain areas, they fall well short of the high-quality, enforceable labor rights and standards that labor and civil society groups have long advocated. A truly progressive trade agenda designed to strengthen labor standards would include the following measures:

1. A necessary first step is to include strong, fully enforceable labor standards in all trade and investment agreements. Such rights should be based, at a minimum, on the eight core ILO labor standards, requiring all parties to ratify and implement these core conventions and adhere to the ILO's Decent Work Agenda as a pre-condition to tariff-free trade in all agreements.
2. Trade agreements should recognize worker rights as universal human rights enjoyed by all workers. Such recognition would mean eliminating onerous requirements to establish a direct causal link between rights violations and trade or investment. It would also protect all workers in all circumstances without having to establish that violations of rights are systematic or part of a recurring pattern.
3. Reformed labor provisions in any agreement must also provide for an independent secretariat to proactively investigate and prosecute complaints. The procedures should provide clear non-discretionary deadlines requiring authorities to investigate and adjudicate complaints from workers and their representatives, while providing for binding enforcement and meaningful penalties for non-compliance.
4. The penalties for non-compliance could be fines or trade sanctions, or a combination of the two. Fines provide greater flexibility and allow the targeting of violators (both corporate and government) to fund effective remedies and to direct resources to victims.
5. In the North American context, Mexican workers, whose real wages have stagnated under NAFTA and who are rarely free to join independent unions, would be the primary beneficiaries of such high standards. But higher wages, improved working conditions, and freedom of association in Mexico — and, for that matter, in many US anti-union, “right-to-work” states — would also benefit workers in the rest of North America by reducing the downward pressures arising from social dumping.
6. Stronger, enforceable labor provisions could provide a boost to the new Mexican government, which has pledged to reform Mexico's repressive and corrupt system of labor relations. The US and Canadian governments

should be required to provide financial resources and technical assistance. Outside support will be needed to overcome fierce, and potentially violent, resistance from the current employer-controlled unions and companies that benefit from this worker-hostile labor system. These companies include US and other foreign multinationals.





# Women's Rights and Gender Equity

By María Atilano, Lucía Bárcena, Nadia Ibrahim, and Cristina Pina

CORPORATE POWER AND profits depend on the dispossession of natural resources and labor exploitation, including care work carried out largely by women in an unpaid or precarious manner.<sup>71</sup> The commodification of labor is intrinsic to trade and investment treaties, rather than a secondary effect. One could not exist without the other.

Free trade policies have differentiated gender impacts. Eliminating trade “barriers” causes a change in the mix of exports and imports that, in turn, triggers a significant transformation in labor markets. Economic activities that are enhanced by international trade and investment do not necessarily create more jobs for women. This is mainly due to low levels of female employment in economic activities dedicated to the export of goods, such as agriculture and industry.

Increased competitiveness in trade and investment treaties is mostly based on costs (prices) and access to natural resources. In some cases, competitiveness can be achieved through technological advancements, but in most cases, corporations seek a competitive edge by reducing labor costs. There is a global trend to increase labor “flexibility” at the regulatory, institutional and labor policy levels to facilitate profit generation for corporate

<sup>71</sup> Care work can be found in a variety of settings across formal and informal economies. For an explanation of the care economy by the International Labour Organization: [ilo.org/global/topics/care-economy/lang-en/index.htm](http://ilo.org/global/topics/care-economy/lang-en/index.htm).

interests. This has affected a great number of workers who have seen a decline in the quality of their jobs, with an increase in informal work (without work contracts) and precarious work (unstable hours, with no pension or health benefits). Women make up the majority of people working in precarious, informal and unstable jobs.

Women have long been overrepresented in less-secure, informal and part-time work,<sup>72</sup> but are impacted by rising economic insecurity. This is pronounced in the services sector. An International Gender and Trade Network study found that through the 1990s in Latin America and the Caribbean, an expansion of the services sector increased female employment but left many of those women workers in more precarious positions. It is crucial to interrogate not only whether trade liberalization creates jobs, but also the quality of those jobs.

In general, the female labor force faces more severe exploitation. On average, women receive lower wages than men, face constraints (sometimes legal) in accessing certain jobs, mostly work in small- and medium-sized enterprises (SMEs), and face more and greater obstacles in efforts to secure their rights.<sup>73</sup>

Numerous studies show that trade liberalization contributes to the rollback and liberalization of public services.<sup>74</sup> The liberalization (and privatization) of public services reduces access and contributes to a decline in quality. This trend disproportionately impacts women and marginalized communities, as both users and providers of public services.<sup>75</sup>

To compensate for this loss, women are providing more and more unpaid care work. Women from vulnerable economic situations, in particular, have increased their care workload.<sup>76</sup> It is worth mentioning that families that can afford to employ domestic workers typically hire women for these jobs.

**72** Melissa Moyser, “Women and Paid Work.” In *Women in Canada: A Gender-based Statistical Report*, Statistics Canada, March 2017. Available at: [www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/14694-eng.htm](http://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/14694-eng.htm).

**73** Alma Espino (Coord.); Paola Azar; Soledad Salvador; and Nicole Bidegain. *América Latina: equidad de género, comercio internacional y desarrollo*. Ministerio de Igualdad, Federación Mujeres Progresistas, IGTN. Available at: [20.iadb.org/intal/catalogo/PE/2009/03902.pdf](http://20.iadb.org/intal/catalogo/PE/2009/03902.pdf).

**74** UN Special Rapporteur on violence against women, “Political economy of women’s human rights.” Human Rights Council, 11th session, May 2009. Available at: [ohchr.org/EN/Issues/Women/SRWomen/Pages/AnnualReports.aspx](http://ohchr.org/EN/Issues/Women/SRWomen/Pages/AnnualReports.aspx)

**75** For example, see: Alexandra Spieldoch, “A Row to Hoe: The Gender Impact of Trade Liberalization on our Food System, Agricultural Markets and Women’s Human Rights.” Institute for Agriculture and Trade Policy (IATP) and the International Gender and Trade Network (IGTN), Geneva: Friedrich-Ebert-Stiftung, 2007.

**76** Nicole Bidegain, *Comercio y desarrollo en América Latina: el orden de los factores altera el producto. Propuestas de políticas públicas para encauzar el comercio internacional hacia la equidad social y de género*. Centro Interdisciplinario de Estudios sobre el Desarrollo, Uruguay, 2007. Available at: [www20.iadb.org/intal/catalogo/PE/2009/03197.pdf](http://www20.iadb.org/intal/catalogo/PE/2009/03197.pdf).

Women entrepreneurs and women-owned businesses, particularly SMEs, face barriers to accessing trade and export opportunities.<sup>77</sup> As a result, with intervention by government, civil society and/or the corporate sector, trade benefits go disproportionately to men.

The relationship between economic growth and gender equality is unbalanced.<sup>78</sup> While gender equality, especially in education and employment, contributes to economic growth, the reverse is not true; economic growth does not contribute to gender equality nor to improvements in health, welfare or basic rights.

## The Impacts of NAFTA on Gender Equity

It is imperative to understand that the asymmetries that exist between Mexico, the United States, and Canada lead to different economic, social, cultural, environmental and political impacts for women. In Mexico, living conditions including precarious work and the exploitation of women have generated a crisis of enforced disappearances and femicides; and the dismantling of the countryside and destruction of land. The dispossession of the territories of the Indigenous Peoples of Mexico has led to the establishment of transnational agro-industrial companies that keep entire families living in dangerously unhealthy conditions with similarities to slavery.

At the same time, the loss of security and food sovereignty in Mexico has led to migratory flows both internally and to the United States. The result is that women are often forced to live difficult and perilous lives; either left behind in their communities as heads of family, taking care of housework or working in the fields for subsistence; or employed in cities as domestic workers; and/or forced to migrate, leaving their children with relatives or neighbors or bringing them along, with all the risk that entails.

## The USMCA and Gender Equity

Despite the gendered nature of free trade, the USMCA contains limited reference to gender or gender equity. Those references are largely voluntary and focused on cooperation, but fall short on enforcement.

<sup>77</sup> Arancha González, “How Gender Affects SMEs’ Participation in International Trade.” Institute for Research on Public Policy, November 2016. Available at: [irpp.org/research-studies/how-gender-affects-smes-participation-in-international-trade/](http://irpp.org/research-studies/how-gender-affects-smes-participation-in-international-trade/).

<sup>78</sup> Naila Kabeer and Luisa Natali, *Gender Equality and Economic Growth: Is there a win-win?* IDS Working Paper 417. Brighton (Regne Unit): Institute of Development Studies, 2013. Available at: [ids.ac.uk/files/dmfile/Wp417.pdf](http://ids.ac.uk/files/dmfile/Wp417.pdf).

In its preamble, the USMCA pledges to “facilitate women’s and men’s equal access to and ability to benefit from the opportunities created by this Agreement and to support the conditions for women’s full participation in domestic, regional, and international trade and investment.” In the chapter on small- and medium-sized enterprises, parties agree to collaborate on promoting SMEs owned by underrepresented groups, including women, indigenous peoples, youth and minorities (Article 25.2). While facilitating (or reducing barriers to) women’s participation in trade opportunities is important, we know that further action must be taken to ameliorate the negative effects of free trade on women.

The USCMA contains positive language with respect to women’s labor rights, but falls short on enforcement. Foremost, the labor chapter is included in the main text of the agreement, rather than as a side-accord as it was in NAFTA. This is a notable improvement, as it means the contents of the chapter are subject to the agreement’s dispute settlement mechanism. However, the process to bring forward a complaint is onerous and requires political will, and thus enforcement of labor provisions is unlikely (see section on labor and labor standards).

The chapter reaffirms the countries’ commitment to the International Labour Organization’s fundamental rights, including the “elimination of discrimination in respect of employment and occupation” (Article 23.3.1).

The labor chapter also identifies areas for cooperation to address gender-related issues in the field of labor and employment, including eliminating wage discrimination; promoting equal pay for equal work; building capacity and skills of women workers; considering gender issues related to workplace health and safety and other activities, such as child care and nursing mothers; and preventing gender-based workplace violence and harassment (Article 23.12.5).

The USMCA also recognizes the goal of eliminating discrimination in the workplace and support for “promoting equality of women in the workplace” (Article 23.9). The original proposed text in Article 23.9 included a commitment to implement “policies that protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving responsibilities.” This would have been an important binding commitment to advance gender equity.

However, this provision provoked an angry reaction from some US Republicans, who promised to block the deal in its present form. The text was then revised to read: “each Party shall implement policies that it considers appropriate to protect workers against employment discrimination on the basis of sex...” (Article 23.9), effectively gutting the article. A footnote was

also added to indicate that existing US federal agency hiring policies “are sufficient to fulfill the obligations set forth in this Article,” thereby absolving the US from any further action.

It is worth noting that at the outset of the renegotiation, the Canadian government committed to negotiating gender equity provisions in a standalone gender chapter.<sup>79</sup> While the Canadian government’s approach, under the umbrella of a “progressive trade agenda,” and existing gender chapters have been critiqued,<sup>80</sup> the Canadian negotiators seemingly abandoned even these goals to reach a deal.

## Progressive Alternatives for Women’s Rights and Gender Equity

If we take into account some of the issues presented above we should ask ourselves how we could build an economy that does not perpetuate power asymmetries.

The answer can be found in feminist economics, which focuses on sustaining human life without power structures that subordinate women in a patriarchal system; and in ecological economics, which proposes a system in which the economy is a component of the biosphere and not the other way around.

For researcher Amaia Pérez Orozco, women are not only at the center of most conflicts, but also at the center of alternatives.<sup>81</sup> In fact, a multitude of existing alternatives from social and solidarity economies, like cooperatives, are led by women. Building from these alternatives and drawing on international norms, we can establish a framework to create an alternative model.

Listed below are a few concrete steps to advance gender equity through trade policy. Together, these strategies will narrow the existing gaps and support an alternative trade model that puts life and the planet at the center of decisions.

**79** Global Affairs Canada, “Address by the Canadian Foreign Affairs Minister on the modernization of the North American Free Trade Agreement (NAFTA).” Ottawa, August 14, 2017. Available at: [canada.ca/en/global-affairs/news/2017/08/address\\_by\\_foreignaffairsministeronthemodernizationofthenorthame.html](http://canada.ca/en/global-affairs/news/2017/08/address_by_foreignaffairsministeronthemodernizationofthenorthame.html)

**80** Laura Macdonald, Nadia Ibrahim, and Scott Sinclair. “Gendered Impacts of Trade and Austerity: Canada’s ‘Progressive’ Trade Agenda.” Presentation to Austerity and Its Alternatives Workshop, Ottawa, March 2018. Available at: [altausterity.mcmaster.ca/documents/w44-june-26-2018-macdonald-et-al-gender-trade-austerity.pdf](http://altausterity.mcmaster.ca/documents/w44-june-26-2018-macdonald-et-al-gender-trade-austerity.pdf).

**81** Amaia Pérez Orozco, *Aprendizajes de las resistencias feministas latinoamericanas a los tratados de comercio e inversión: Del no al ALCA al cuestionamiento del capitalismo patriarcal*. Paz con Dignidad and El Observatorio de Multinacionales en América Latina, June 2017. Available at: [omal.info/IMG/pdf/resistencias\\_feministas\\_latinoamericanas\\_frente\\_tratados\\_comercio.pdf](http://omal.info/IMG/pdf/resistencias_feministas_latinoamericanas_frente_tratados_comercio.pdf).

1. There must be an integration of a gender/feminist analysis in the process of trade negotiation and the crafting of trade policy.
2. Trade agreements should not supersede international norms, covenants, and human rights agreements, such as the UN Convention to Eliminate All Forms of Discrimination Against Women (CEDAW), the UN Platform for Action from the UN Fourth Conference on Women, and the UN Declaration of Human Rights.
3. Within trade agreements, gender provisions must be enforceable. Gender mainstreaming throughout agreements, rather than a standalone gender chapter, would involve the application of a gender lens to all elements of an agreement. Areas such as public services, procurement, labor rights, agriculture, intellectual property and environment are particularly important for advancing gender equity.
4. Governments should establish domestic laws and policies that support gender equity, including affordable child care, strong public services, affordable access to medicines, and food sovereignty. Labor rights, including addressing workplace sexual harassment and wage discrimination, is a crucial component of gender rights.
5. Governments should implement the UN 20/20 initiative to allocate 20 percent of budgets to social programs.
6. States should ensure women's participation in policy-making.
7. Other proposals will arise from local initiatives. In all women should have equal access to credit, education and other resources.
8. It is necessary to encourage the provision of relevant information to women's and feminist organizations so that they can place the topic of FTAs on their agendas.
9. It is necessary to work together among organizations that are in resistance in defense of rights to land, to decent work, to food, against social and sexual inequality; and for democracy, human rights and the defense of life.





# Alternative Agricultural Systems

By Karen Hansen-Kuhn, Leticia López,  
and Enrique Pérez

CURRENT FREE TRADE policies and agreements are specifically designed to facilitate flows of goods, services and investments, often to the detriment of family farmers and consumers. This is true of US-led trade agreements such as the North American Free Trade Agreement and its successors, as well as trade deals led by the EU and multilateral rules enshrined in the World Trade Organization. The fact that these agreements have increased corporate concentration, environmental degradation and economic and social erosion of rural communities is no accident; it is the result of specific policy choices embodied in the trade deals. Other choices are not just possible but necessary.

In many countries, especially in the United States, agriculture and trade policies are mutually reinforcing. Farmers are encouraged to increase production to make up for volatile, and mostly low, prices, and to rely on expanding export markets for sales. This has created a vicious cycle of dumping farm goods at below the cost of production that has hurt family farmers and increased corporate concentration along supply chains.

IATP has documented the extent of dumping since the early 1990s. Since NAFTA's inception, dumping rates have ranged as high as 33 percent for corn, 44 percent for wheat and 34 percent for rice. After temporary reversals in the wake of the 2008 food price crisis and the 2012 drought, recent figures show a trend toward the resumption of dumping. Our calculations show that as of 2017, dumping rates were 9 percent for corn, 38 percent for wheat, and

3 percent for rice.<sup>82</sup> According to studies, some 4.9 million Mexican family farmers were displaced between 1991 and 2007, with about 3 million becoming seasonal workers in agro-export industries.<sup>83</sup> In the United States, more than 250,000 family farms have disappeared since NAFTA's inception.<sup>84</sup>

At the beginning of the talks to renegotiate NAFTA, family farm groups from the three countries set a series of benchmarks that would start to tilt the playing field toward food sovereignty. While some organizations, led by the global network La Via Campesina, insist that agriculture be excluded from any trade agreement, others demanded wholesale changes in trade agreements to rebalance power within the food system.

Instead, the new NAFTA takes several steps to lock in corporate power in agriculture and to prevent changes in food and agriculture policies. The US Trade Representative (USTR) lists as a key achievement of the new NAFTA that it prohibits the use of WTO agricultural safeguards. This would eliminate a policy tool used by all three countries to defend against unfair and unstable markets. Article 3.6.1. creates new pressure to ensure that domestic support to agriculture not distort trade. Restrictions on agricultural support programs to make them trade compliant would expose programs to strengthen local markets — including Mexico's bold new initiative for food security — to potential trade challenges.

Canada's dairy supply management system has been a ray of hope for US dairy farmers confronting unstable markets, overproduction, and low prices. The Wisconsin Farmers Union, for example, uses the Canadian experience in its own advocacy and grassroots education efforts on dairy policy. But that good example has also been the target of several trade agreements. Under USMCA, Canada agreed to open its dairy (and poultry) markets to 3.6 percent more imports from the US. This seems like a small opening, certainly less than the total dismantling of supply management the US had been demanding, but it comes on top of commitments under other trade deals. Canada also ceded portions of its markets to imports under TPP, CETA, and USMCA. These openings will not significantly reduce the vast oversupply of raw milk, or increase prices paid to US, European, or New Zealand dairy farmers. The Canadian market is simply too small. But it will weaken this

**82** Sophia Murphy and Karen Hansen-Kuhn, The true cost of US agricultural dumping, *Renewable Agriculture and Food Systems* 1–15, 2019.

**83** John Scott, "Agricultural Subsidies in Mexico: Who Gets What?" In *Subsidizing Inequality, Mexican Corn Policy Since NAFTA*, Jonathan Fox and Libby Haight, eds., Wilson Center, 2010, Table 1, p. 76. Based on Mexican Agricultural Census data from 1991 and 2007. Available at: [wilsoncenter.org/sites/default/files/Subsidizing%20Inequality\\_o.pdf](http://wilsoncenter.org/sites/default/files/Subsidizing%20Inequality_o.pdf).

**84** USDA, The Number of Midsize Farms Declined From 1992 to 2012, But Their Household Finances Remain Strong, December 2016. Available at: [ers.usda.gov/amber-waves/2016/december/the-number-of-midsize-farms-declined-from-1992-to-2012-but-their-household-finances-remain-strong/](http://ers.usda.gov/amber-waves/2016/december/the-number-of-midsize-farms-declined-from-1992-to-2012-but-their-household-finances-remain-strong/).

important program. The US has also challenged similar programs at the WTO as a restraint on trade.

USMCA includes several new provisions that limit the information consumers, regulators, and farmers need to make decisions about where and how food is produced. Negotiators ignored demands to restore Country of Origin Labeling (COOL) for meat and took several more steps to weaken transparency in the food system. New food labeling restrictions in USMCA, replicating TPP provisions, would allow companies to hide food additives and ingredients in processed foods as “proprietary” trade secrets. In addition, provisions in USMCA pave the way to loosen restrictions on dubious chemicals or agricultural biotechnology before all impacts can be known. The chapter on Sanitary and Phytosanitary Standards includes rules that allow companies to withhold testing data and studies for agricultural chemicals and food safety as Confidential Business Information, despite peer-reviewed evidence of damage to public and environmental health and to commerce. This includes, for example, data pertaining to the Environmental Protection Agency’s commercial authorization of Dicamba™, a pesticide so volatile that it cannot be applied without damage, except to crops engineered to resist it. USMCA’s annex on agricultural biotechnology compels regulators to allow for low level presence of biotechnology contaminants not allowed in the importing country.

New provisions on intellectual property require that all countries ratify the 1991 version of the International Convention for the Protection of New Varieties of Plants (UPOV 1991), which prohibits farmers from saving and sharing protected seeds. Since Canada and the United States have already ratified UPOV 91, this requirement is directed squarely at Mexico and would likely undermine efforts to restore food self-sufficiency in grains. It is bad enough that Mexico has ratified this agreement as part of the TPP, but including it in USMCA will undoubtedly result in challenges by the US government and corporations.

## Progressive Alternatives for Agricultural Systems

One of the political factors driving the push to ratify USMCA is the fear that Trump will withdraw from NAFTA, potentially disrupting the tangled meat and feed supply chains in North America. Agribusiness exporters may be breathing a sigh of relief that they can continue with business as usual, but for rural communities confronting falling incomes, rising debt and an increasingly unstable climate, USMCA is a lost opportunity for the change we

need, one that ensures that farmers, their families and their organizations are at the center of national and international policies.

Indeed, there exists a broad consensus that the resulting USMCA represents a missed opportunity to support equitable and sustainable food systems. An entirely different approach is needed, one that would start with very different goals and priorities:

**1. Prioritize local markets and local consumers over international markets.** A key element of food sovereignty, this does not mean that no trade will take place, only that the priority will be on local communities. Under NAFTA, Mexico is importing nearly half of its grains. The new agriculture plans under the López Obrador administration seek to achieve self-sufficiency in corn, wheat, rice, beans, and milk. A supportive trade policy would allow countries to protect Special Products: goods that are key to food security and rural livelihoods. A coalition of developing countries has been demanding such protections at the WTO for Special Products, along with a Special Safeguard Mechanism for temporary protections against import surges, for more than a decade.

**2. Ensure economic viability and resilience in rural communities.** Trade deals must support farmers being paid fair prices. Mexico's new plans establish a floor price for production of basic grains and dairy by small-scale farmers, providing a minimum price on a limited quantity of production (along with credit, technical assistance, and other necessary public services) that will allow farmers to increase production and strengthen their communities. Trade agreements should allow for restrictions on imports and authorize domestic support programs for efforts to enhance rural incomes and food security.

**3. Shelter domestic markets from price or supply volatility.** Governments must maintain the ability to manage their food supplies. This will likely become even more important as climate change destabilizes food production. Under Canada's dairy supply management program, most dairy farms are family owned and operated, and the program helps them stay in business without reliance on public subsidies. This careful effort includes the ability to restrict imports so that they don't overwhelm the market. Canada's dairy program was excluded from the original NAFTA. Trade rules should explicitly authorize national supply management programs and foster dialogues on mechanisms to reduce global oversupply of agricultural goods.

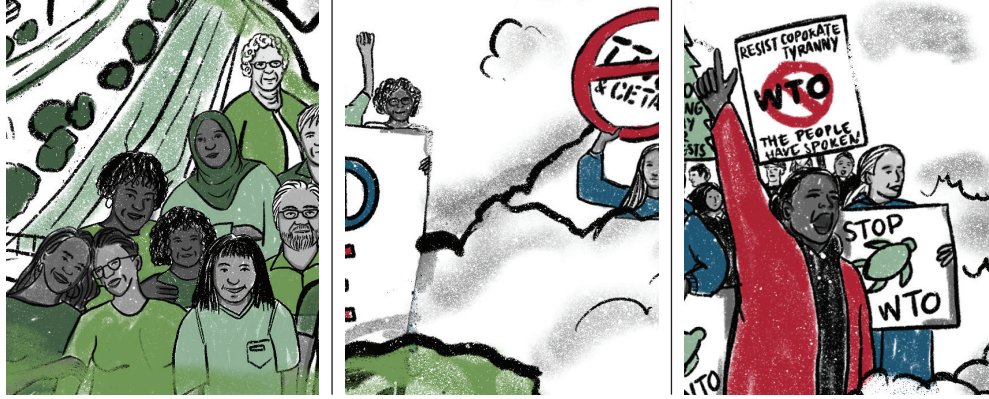
**4. Protect consumers right to know about how and where their food is produced.** Canada and Mexico successfully challenged US rules on mandatory Country of Origin Labeling (COOL) for meat at the WTO. Food and farm advocates asked trade negotiators to insist that those complaints

be dropped so that an equitable solution could be achieved. Food labels indicating nutritional value, whether goods are produced with GMOs or other agricultural biotechnology, and the country of origin should be explicitly authorized in trade agreements.

**5. Reduce corporate concentration and control in agriculture.** While real changes would require significant new antitrust legislation, trade agreements could pave the way. As in other sectors, investor-state dispute settlement mechanisms that give corporations rights to sue governments over public interest laws should be removed from trade agreements.

**6. Authorize rulemaking based on the Precautionary Principle.** Too much of current trade policy stems from the imperative to remove constraints to new technologies or cheaper production methods without clear and complete information about their risks to human, animal or environmental health. Trade rules should enshrine reliance on the precautionary principle (as included in the EU's foundational Treaty of Lisbon), which provides authority for regulators to act where harm is scientifically plausible but uncertain.

**7. Promote new forms of sustainable food production.** It is clear that the model of industrial agriculture production controlled by corporations and spurred by the green revolution has not and will not generate the alternatives we need. It is imperative to push new alternative models of agroecological production. We must pass from an agriculture of inputs to an integrated agriculture of knowledge.



# Indigenous Rights

By Paulina Acevedo Menanteau

FREE TRADE AND international investment agreements pose serious threats to Indigenous Peoples' individual and collective rights. These threats include the direct and systemic effects on their rights to self-determination; threats to their lands, territories, and resources; and threats to their participation as well as their free, prior, and informed consent.<sup>85</sup> The United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, documented these impacts in two reports for the UN's General Assembly and its Human Rights Council (HRC).<sup>86</sup>

In general terms, the opening of markets to foreign investors under these investment agreements has led to an increase in large-scale extractive activity (including minerals, metals, oil, gas, timber, water, agriculture, and fisheries) on ancestral territories, independently of whether they are recognized by the state, without prior consultation and consent, and without consideration of Indigenous People's development priorities and life plans. This constitutes a serious threat to their traditional and subsistence ways

<sup>85</sup> According to the International Labour Organization (2013) indigenous and tribal people represent a population estimated at 370 million people, distributed in more than 5,000 townships in 70 countries.

<sup>86</sup> Victoria Tauli-Corpuz. Report of the Special Rapporteur of the Human Rights Council on the rights of Indigenous Peoples on the impact of international investment and free trade on the human rights of Indigenous Peoples. Presented to the General Assembly of the United Nations. August 7, 2015. Available at: [unsr.vtaulicorpuz.org/site/images/docs/annual/2015-annual-ga-a-70-301-en.pdf](https://unsr.vtaulicorpuz.org/site/images/docs/annual/2015-annual-ga-a-70-301-en.pdf). and Report of the Special Rapporteur on the rights of indigenous peoples on the impacts of international investment agreements, including bilateral investment treaties and investment chapters of free trade agreements, on the rights of Indigenous Peoples. August 11, 2016. Available at: [unsr.vtaulicorpuz.org/site/images/docs/annual/2016-a-hrc-33-42-en.pdf](https://unsr.vtaulicorpuz.org/site/images/docs/annual/2016-a-hrc-33-42-en.pdf).



of life, as well as limiting or foreclosing other development options, and increasing environmental degradation and social conflict in their territories.<sup>87</sup>

Among these direct effects on Indigenous lands and territories, the Special Rapporteur highlights the non-discrimination clauses, which oblige states to guarantee foreign investors treatment equal to that received both by nationals of the receiving state and third-country nationals. As a result, if Indigenous rights are not expressly included as exceptions to these provisions, any special protection of their lands, whether based on customary law or specific laws, may be considered obsolete in the investment field. Likewise, expropriation clauses restrict the authority of states to expropriate foreign-owned property, even for a legitimate public purpose or to remedy an undue dispossession of Indigenous Peoples' lands and territories, forcing governments to compensate foreign investors according to their property's market value.<sup>88</sup>

Both clauses produce a "deterrent effect" of a systemic nature in the domestic regulatory environment. Governments are inhibited from adopting laws or measures in favor of Indigenous Peoples because of the possibility that such actions could lead to lawsuits from foreign companies before ISDS arbitration tribunals, which in some cases have awarded compensation amounting to as much as several billion dollars. These arbitration rulings cannot be appealed. In the last twenty years, countries with large Indigenous populations in Latin America, Central America, and the Caribbean have faced a large share of these lawsuits. Today, there are 817 suits just in the International Centre for Settlement of Investment Disputes; 234 of these are against South and Central American and Caribbean countries.<sup>89</sup>

Another direct effect of the investment regime on Indigenous Peoples is the violation of their rights to participation, consultation, and free, prior, and informed consent, guaranteed in the United Nations Declaration on the Rights of Indigenous Peoples (2007)<sup>90</sup> and International Labour Organization Convention 169 (1989).<sup>91</sup> In effect, investment agreements are adopted without

<sup>87</sup> OIT, Convention 169. Article 7(1): "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development."

<sup>88</sup> Margaret Devaney, "Remedies in Investor-State Arbitration: A Public Interest Perspective." *Investment Treaty News*, International Institute for Sustainable Development, March 2013. Available at: [iisd.org/itn/2013/03/22/remedies-in-investor-state-arbitration-a-public-interest-perspective/](http://iisd.org/itn/2013/03/22/remedies-in-investor-state-arbitration-a-public-interest-perspective/).

<sup>89</sup> Available at: [ids-americalatina.org/en-numeros/](http://ids-americalatina.org/en-numeros/).

<sup>90</sup> Available at: [un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](http://un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf).

<sup>91</sup> 23 countries have ratified the International Labour Organization's 169 covenant (15 in Latin America and the Caribbean, five in Europe, one in Africa, one in Asia and one in Oceania). Available at: [ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169).

the participation of Indigenous Peoples and are not subject to Indigenous consultation processes during negotiations or the legislative process, in spite of the impacts on their rights.

In this regard, it should be noted that in the framework of a special hearing granted by the Inter-American Commission on Human Rights concerning the violation of Indigenous Peoples' human rights under the proposed TPP, the commissioners considered that Indigenous consultation for these agreements would proceed upon submission of their final texts for approval by national Congresses.<sup>92</sup> In countries that have ratified ILO Convention 169, trade unions can demand such consultations through ILO claims or complaint mechanisms.

Principle 9 of the United Nations Guiding Principles on Business and Human Rights states that "States must maintain an adequate national regulatory framework to ensure compliance with their human rights obligations when they conclude political agreements with other States or companies, for example, through investment contracts." This implies that states must conduct reports measuring the impacts on human rights, including Indigenous Peoples' rights, before signing investment agreements.<sup>93</sup> As a general rule, however, investment agreements are not in fact subject to such impact assessments or related measurements.

Although there are cases in which trade and investment agreements expressly mention Indigenous Peoples, these are merely declarative references. They do not identify the rights recognized to Indigenous Peoples under current international standards or provide sufficient guaranty of enforcement, especially since they would be subject to ISDS arbitration.<sup>94</sup>

In NAFTA 2.0, there is no dedicated Indigenous Rights chapter. The agreement's most important provision for Indigenous Peoples is the very clear general exception which states: "Nothing in this Agreement shall preclude a Party from adopting or maintaining a measure it deems neces-

<sup>92</sup> Special Audience in the framework of the 159 Ordinary Period of Sessions of Inter-American Human Rights Commission. Panama City, December 7, 2016.

<sup>93</sup> Olivier De Schutter, Report of the Special Rapporteur on the right to food, Addendum: "Guiding principles on human rights impact assessments of trade and investment agreements." Available at: [ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5\\_en.pdf](http://ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf).

<sup>94</sup> As an example: "The Parties recognise the importance of respecting, preserving and maintaining knowledge and practices of indigenous and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity. (TPP, art. 20.13.3); "Indigenous Peoples Rights Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, 32-8 services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples. (USMCA, Article 32.5 on Indigenous Peoples Rights). In the latter case, notwithstanding that the indigenous rights are mentioned, the reference to "legal obligations" is weak and ambivalent and do not refer to the international obligations contained in the international rights recognized to indigenous peoples.

sary to fulfill its legal obligations to Indigenous peoples (Chapter 32).” This general exception should mean that nothing in the agreement prevents North American governments from fulfilling their legal, social, economic, cultural and moral obligations to Indigenous Peoples.<sup>95</sup>

While a step forward from NAFTA, this language will likely nonetheless prove insufficient, since it is left to the parties to voluntarily adopt all its obligations to Indigenous Peoples instead of making them mandatory. Moreover, it does not recognize the impacts and disproportionate burden of the global effects of free trade on Indigenous Peoples.

## Progressive Alternatives for Indigenous Rights

The following alternatives would more adequately guarantee the rights of Indigenous Peoples within the current trade and investment regime:

1. Ensure that representative bodies of Indigenous Peoples implicated in investment agreements are part of negotiations, should they desire to do so, and that the rights of Indigenous Peoples are expressly included in investment agreements, in all the relevant chapters and among the exceptions established as international obligations of states. These rights must take precedence over the rights granted to companies. In particular, investment agreements must recognize Indigenous rights to land, territories, and resources; participation; consultation; and free, prior, and informed consent.
2. Ensure that investment agreements do not restrict states’ authority to use expropriation or any other mechanisms to uphold their duty to protect Indigenous rights and to recognize Indigenous Peoples’ self-determination, including lands and territories.
3. Ensure that intellectual property chapters do not violate Indigenous Peoples’ traditional knowledge and cultural rights, for example, concerning the use of seeds, as defined under the International Convention for the Protection of New Varieties of Plants (UPOV 91).
4. Guarantee Indigenous Peoples’ access to arbitration systems and different mechanisms for disputes involving their territories or resources.
5. Ensure that states, together with Indigenous Peoples, agree on “participatory mechanisms that will allow them to take part in the negotiation and drafting of all relevant investment and free trade agreements. That should

<sup>95</sup> Available at: [canadianlabour.ca/uncategorized/13-facts-you-need-know-about-united-states-mexico-canada-agreement-usmca/](http://canadianlabour.ca/uncategorized/13-facts-you-need-know-about-united-states-mexico-canada-agreement-usmca/).

be included as part of broader efforts to increase the level of social dialogue involved in the negotiation and drafting of such agreements.”<sup>96</sup>

6. Guarantee free, prior, and informed consent of Indigenous Peoples prior to ratification or adoption of any investment agreement. In those cases where these rights are not being guaranteed, strategies should be studied for ensuring these rights for all investment agreements currently under negotiation. One example of such strategies could be establishing alliances with trade union actors to demand Indigenous consultation by way of ILO control mechanisms (complaint and claim). Efforts should be carried out to ensure that these consultation processes have participation of representatives established by Indigenous Peoples themselves, are conducted in a culturally appropriate manner, and that information and texts are provided in relevant languages.

7. Demand reports on the human rights impact of all investment agreements, both in negotiation and those ratified and in force, with special consideration for the impacts on Indigenous Peoples. Such impact assessment must include Indigenous Peoples’ effective participation and directly influence the negotiation and ratification process of such agreements. Declare a moratorium on all investment agreements that lack any impact measurement.



# Environmental Protection and Climate Change

By Manuel Pérez-Rocha

*“The operations of many Transnational Corporations and other business enterprises cause the devastation of livelihoods, territories and the environment of the communities where they operate; they pursue the commodification of essential services and of nature itself. Many TNCs and other business enterprises also violate or are complicit in violations of human rights and labour rights, erode the basis of food sovereignty, pollute water sources and lands, and plunder natural resources.”<sup>97</sup>*

In the search for alternatives to free trade agreements and international investment agreements (IIAs), it is important to focus on how these agreements accelerate climate change and enable many transnational corporations to destroy livelihoods, territories, and the environment of the communities in which they operate.<sup>98</sup>

FTAs and IIAs are a driving force behind the growth of energy-intensive manufacturing and agricultural industries — fossil fuel-dependent activities that generate ever-greater carbon emissions. These activities, and the equally carbon-hungry air and road transport networks required to ship industrial

<sup>97</sup> Statement to the Human Rights Council in support of the initiative of a group of states for a legally binding instrument on transnational corporations. Available at: [cihrs.org/statement-to-the-human-rights-council-in-support-of-the-initiative-of-a-group-of-states-for-a-legally-binding-instrument-on-transnational-corporations/?lang=en](http://cihrs.org/statement-to-the-human-rights-council-in-support-of-the-initiative-of-a-group-of-states-for-a-legally-binding-instrument-on-transnational-corporations/?lang=en).

<sup>98</sup> Sierra Club, “Discussion Paper: A New, Climate-Friendly Approach to Trade,” cited above.

and agricultural goods around the world, contribute to the relentless destruction of the climate.<sup>99</sup>

The proposed USMCA denies the rising climate threats faced by communities across North America. Instead of reducing these problems, the USCMA seems poised to exacerbate them, replicating the same harmful provisions in the TPP.<sup>100</sup> According to environmental organizations, the USCMA supports further outsourcing of toxic pollution and jobs to countries and regions where environmental enforcement is weak. It rolls back the environmental standards of past trade deals, encourages fracking, and offers dangerous hand-outs to oil companies and other polluters.<sup>101</sup> The environmental terms that are included in the deal are weak and the enforcement system is the same failed mechanisms in other agreements.

The USMCA is not an exception. The environmental language in nearly all FTAs and IIAs is largely meaningless, since generally it provides protections only for government actions that are “otherwise consistent” with the agreement.<sup>102</sup> These agreements seek to tie the hands of future governments officials who may be much more committed to bold action on climate than those who negotiated the original agreements.

## Alternative Visions for Trade

During the negotiations over the Free Trade Area of the Americas (which were abandoned in 2005), civil society groups of the hemisphere published their own vision in a document called “Alternatives for the Americas.”<sup>103</sup> The document laid out general principles for a sustainable alternative, including the following:

- I. Governments should subordinate trade and investment to policies that prioritize sustainability and environmental protection. They should also have the power to channel investment to environment-

**99** Transnational Institute, “Trade: time for a new vision: The Alternative Trade Mandate.” Available at: [tni.org/files/download/trade-time\\_for\\_a\\_new\\_vision.pdf](https://tni.org/files/download/trade-time_for_a_new_vision.pdf).

**100** The Council of Canadians, “Getting it Right: A people’s guide to renegotiating NAFTA.” Available at: [canadians.org/nafta-guide](https://canadians.org/nafta-guide).

**101** Sierra Club, “Trump’s Climate-Denying NAFTA Proposal Would Perpetuate Outsourcing of Pollution and Jobs, Sierra Club Opposes Deal Given Failure to Meet Basic Environmental Criteria.” October 1, 2018. Available at: [sierraclub.org/press-releases/2018/10/trump-s-climate-denying-nafta-proposal-would-perpetuate-outsourcing-pollution](https://sierraclub.org/press-releases/2018/10/trump-s-climate-denying-nafta-proposal-would-perpetuate-outsourcing-pollution)

**102** Earth Justice, Friends of the Earth, Institute for Policy Studies, Public Citizen and Sierra Club, “Investment Rules in Trade Agreements Top 10 Changes to Build a Pro-Labor, Pro-Community and Pro-Environment Trans-Pacific Partnership.” Available at: [citizen.org/documents/InvestmentPacketFINAL.pdf](https://citizen.org/documents/InvestmentPacketFINAL.pdf).

**103** Hemispheric Social Alliance, “Alternatives for the Americas.” Available at: [web.ca/~comfront/alts4americas/eng/eng.pdf](https://web.ca/~comfront/alts4americas/eng/eng.pdf).



ally sustainable activities, reject privatization of natural resources, eliminate policies that subsidize or encourage the use of fossil fuel energy, and use the precautionary principle in setting public policies. Natural resources must be used to serve people's basic needs, not simply as an object of market transactions.

- II. Models for sustainable development should require the incorporation of the principle and objective of sustainability in all of the subjects addressed. These issues should be negotiated with the objective of resolving — with the support of national policies — [the] region's grave social problems, including inequality, unemployment, and environmental degradation. The agreements must commit the member countries to comply with international treaties and conventions designed to protect the environment. They should also provide practical measures designed to make those agreements effective at a national level.

Civil society groups have further developed alternative principles, for example in 2017 during the Encounter of Social Organizations of Canada, the United States, and Mexico, in response to the renegotiation of NAFTA:<sup>104</sup>

- I. Include strong binding and enforceable obligations to address climate change, deforestation, contamination of air and water, emissions of greenhouse gasses, and to preserve the social property of forests, lands, biodiversity and water. Each country must be required to fulfill its nationally determined contribution to the Paris Climate Agreement. North American civil society organizations will not accept a toxic NAFTA and will cooperate across borders to monitor, mobilize, educate and advocate to demand these objectives are achieved;
- II. Add strong environmental rules with swift and certain enforcement; require the adoption of and compliance with key multilateral environmental agreements; prohibit illegal trade of timber and wildlife; promote responsible fisheries; and ensure countries cannot gain an unfair trade advantage by allowing highly polluting practices.

Other climate-friendly principles found in the "Alternative Trade Mandate"<sup>105</sup> include:

**104** Political Declaration of the Encounter of Social Organizations of Canada, United States and Mexico. Mexico City, May 26–27, 2017. Available at: [tradejustice.ca/wp-content/uploads/2017/06/Tri-national-Declaration-English-French-Spanish.pdf](https://tradejustice.ca/wp-content/uploads/2017/06/Tri-national-Declaration-English-French-Spanish.pdf).

**105** See "Trade: time for a new vision: The Alternative Trade Mandate," cited above.

- I. increasing investment in new processes and technologies that reduce emissions and create jobs;
- II. requiring developed countries to begin to pay their “climate debt” to developing countries, initiating voluntary bilateral climate change agreements, and supporting countries’ climate change adaptation and mitigation programs with real, new and additional funds from public sources;
- III. supporting the creation of local and sustainable supply chains in the Global South in order to guarantee the development of a solid ecological economy, able to support local communities. This can be assured by a direct transfer of funds based on the climate debt to be paid;
- IV. making energy intensive imports more expensive and/or offer rebates to energy-efficient exporters;
- V. setting up funding mechanisms where wealthy countries fund Global South to reduce the intensiveness of energy exports;
- VI. supporting an alternative framework on intellectual property rules that fosters local green technologies and encourages (rather than prevents) the transfer of low-carbon technologies to developing countries, while also supporting the development of climate-friendly crops by small farmers.

## Progressive Alternatives for Environmental Protection and Climate Change

Ultimately, to replace FTAs and IIAs with deals that protect people, negotiators should listen to the workers and communities on the frontlines of climate change, not the corporations that are fueling the problem. In this spirit, the Sierra Club—the largest U.S. environmental organization—proposed “A New, Climate-Friendly Approach to Trade” in 2016 after collecting input from more than 50 trade and climate specialists across the world.<sup>106</sup> The climate-friendly trade model outlines 15 core ways that status quo trade policy must be changed to support, not undermine, our efforts to tackle climate

**106** Ben Beachy, “Discussion Paper: A New, Climate-Friendly Approach to Trade,” Sierra Club, 2016. Available at: <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/NAFTA%20and%20Climate%20Report%202018.pdf>.

change. Here is a summary of the proposals, borrowed with permission from Sierra Club's paper.

**1. Changing trade rules to protect climate policies.** Trade rules that conflict with climate action should be eliminated to allow communities and governments to advance bold climate protections without fear of being challenged in trade tribunals. Agreements should:

- I. include a broad carve-out for public interest policies. This must include the provision of a strong deterrent and an early defense against challenges to climate policies ensuring that *no* rules in a given pact could be used against strong climate policies, rather than only applying to a select set of rules;
- II. exclude investor-state dispute settlement. As detailed in our section on investment, private foreign investors have used this system to undermine environmental protections by suing governments in international tribunals, demanding compensation for laws and regulations that allegedly reduce the value of their investments;
- III. allow creation of local renewable energy jobs. To halt the brewing trade war over “buy local” provisions in renewable energy programs, WTO members should adopt an indefinite “peace clause” that bars such disputes;
- IV. require the adoption of climate labels to inform consumers about the climate impact of products (considering factors such as distance transported and fuel use in production);
- V. protect restrictions on pollution, allowing policies that limit the number or size of firms providing fossil fuel “services.”

**2. Using trade rules to increase climate protections.** To align trade policies with climate objectives, trade pacts should include enforceable commitments to implement international climate accords and to make climate-protecting policy changes, from eliminating fossil fuel subsidies to financing renewable energy investments. Trade rules must:

- I. require meaningful climate commitments. Climate-friendly trade deals should require signatory countries to “adopt, maintain, and implement” policies to fulfill their Paris Climate Agreement commitments. Trade pacts also should require signatory countries with high historical greenhouse emissions to help finance mitigation and adaptation efforts in low-emissions signatory countries, building on

the finance commitments in the Paris climate agreement and ratify the 2016 Montreal Protocol amendment to control climate-polluting hydrofluorocarbons;

- II. prohibit fossil fuel subsidies;
- III. encourage procurement as a climate-friendly tool, including a preference for goods and services with low life-cycle greenhouse gas emissions in procurement decisions;
- IV. create pathways for green technology. New trade agreements should explicitly allow for compulsory licenses (which let firms produce cheaper versions of patented products) and other policy tools that enable diffusion of green technology, and could require governments to establish public financing for research and development on renewable energy and energy efficiency;
- V. prioritize policies that minimize climate pollution. Instead of “trade impact tests,” new deals should establish public interest criteria for policymaking, including a “climate impact test;”
- VI. refuse to facilitate trade in products that could undercut established climate or other public interest policies. This means excluding “mutual recognition” or “equivalence” requirements from trade deals;
- VII. use an independent, binding enforcement system. These climate-related obligations should be subject to a new dispute settlement system. An independent investigation body, governments, affected communities, and civil society should be able to challenge governmental non-compliance with the above climate requirements, as well as challenge the activities of specific corporations.

**3. Mitigating the climate impacts of trade.** While trade agreements should encourage trade in goods that meet public interest criteria, they should discourage trade in climate-polluting fossil fuels, in addition to tackling the climate emissions that result from shipping and international shifts in production. To do so, these agreements should:

- I. use tariffs to incentivize climate-friendly trade. A new trade model should increase tariffs on fossil fuels and employ a “public interest screen” that includes climate-friendly criteria to determine which goods should be subject to potential tariff reductions;
- II. restrict fossil fuels trade. Climate friendly deals should *require* export and import controls on fossil fuels so that domestic efforts to stop

climate pollution do not result in greater pollution abroad. Trade agreements also should exclude “national treatment” for trade in gas;

- III. limit shipping and aviation emissions;
- IV. create incentives to tackle emissions. Trade deals should include a “border adjustment” mechanism with a “climate duty” that should be imposed on imports of goods whose embodied greenhouse gas content exceeds a stipulated threshold, which calculation should be done by an independent panel of climate scientists and economists.

Additional proposals that complement the Sierra Club recommendations include:<sup>107</sup>

- I. create incentives to tackle emissions. Trade deals should include a “border adjustment” mechanism with a “climate duty” that should be imposed on imports of goods whose embodied greenhouse gas content exceeds a stipulated threshold, which calculation should be done by an independent panel of climate scientists and economists; and
- II. establish mandatory multilateral funding mechanisms that provide Global South countries assistance to reduce emissions in their export sectors and help them to diversify their economies. This assistance should take into consideration the project cycle of industry emissions in such a way that the more a high-income country imports carbon-intensive goods, the more it has to invest on projects that help low-income countries to decarbonize.

<sup>107</sup> Thank you to Basav Sen for his comments and advice.



# Regulatory Cooperation and “Good Regulatory Practices”

By Scott Sinclair and Stuart Trew

REGULATORY COOPERATION, REGULATORY coherence, or “good regulatory practices” chapters are relatively new features in modern free trade agreements. Examples of pacts in which negotiators have inserted such provisions include the Comprehensive Economic and Trade Agreement between Canada and the European Union, the Trans-Pacific Partnership, and the US-Mexico-Canada Agreement.

Typically, these chapters require governments to institutionalize arrangements through which public officials in different countries may work together, usually in close collaboration with industry, to reduce or eliminate differences in domestic laws, policies or regulations — including health, environmental and consumer protections — that are said to impede trade. The intended goal of these new regulatory chapters, however, is far broader: to expunge the precautionary principle from the list of available policy responses to protect humans, animals, or the planet from corporate excess. This principle allows governments to justify environmental protection measures on the basis of reasonable precaution rather than on established scientific knowledge, which is not always available.

We should therefore understand regulatory cooperation as serving a deregulatory function that complements and builds on existing public policy



constraints in the WTO and other free trade agreements that are hostile to higher standards of public protection.<sup>108</sup>

When global tariffs came down drastically after the founding of the WTO in 1995, one category of non-tariff measures, or NTM in WTO lingo, called “regulatory barriers to trade” rose to the top of the priority list for multinational corporations. Developed countries, on behalf of their larger industries and exporters, began to complain more loudly that food and product safety standards, public health measures and environmental protections that were stricter in some countries than in others were creating market inefficiencies and unjustifiably limiting trade.

The WTO agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Standards (SPS) require member states to adopt international standards wherever possible, avoid discrimination between domestic and imported like products, and make sure technical regulations are not “more trade-restrictive than necessary to fulfill a legitimate objective” (Art. 2.2). Under these rules, WTO member states have successfully challenged European bans on the use of hormones in pig and cattle rearing, country-of-origin labeling (COOL) of meat products in the United States, and EU policies that restrict the importation of genetically modified crops.

In practice, therefore, the WTO agreements have facilitated deregulation affecting food, consumer products, and environmental protections. At the same time, complainants would obviously prefer not to spend so much time and money fighting foreign government regulations through the WTO, where even a “win” does not necessarily result in the repeal of the policy. In a small, but welcome, reprieve for consumer rights, for example, the EU chose to ignore WTO dispute settlement decisions (in the late-1990s and early-2000s) against its GMO (Genetically Modified Organism) and hormone policies.

In response, international business lobbies have increased their advocacy of regulatory *coherence* and *cooperation*, including a right to intervene in the regulatory process as early and as often as possible. What they would like most is a means — preferably an enforceable one — of derailing or weakening pro-consumer or pro-environment policies and regulations *before they are ever implemented*, avoiding the need to later challenge them at the WTO as burdensome trade barriers. Many governments have embraced this project

**108** At a Canada-US Regulatory Cooperation Council stakeholders event in Washington, DC on December 4, Mick Mulvaney, Director of the Office of Management and Budget (OMB), highlighted how the Canada-US project would complement the “deregulatory efforts” of the Trump administration (author’s notes). In December 2017, the Australian government changed the name of its Regulatory Reform Agenda — an effort to apply OECD (Organization for Economic Cooperation and Development)-established “good regulatory practices” to all domestic regulators — to the Deregulation Agenda, which is designed to “assist in keeping the Australian economy as efficient, flexible and responsive as possible.” Available at: [jobs.gov.au/deregulation-agenda](http://jobs.gov.au/deregulation-agenda).

by elaborating on the TBT and SPS agreements' transparency, notification and non-discrimination provisions in new trade deals while strengthening institutions of international regulatory cooperation.

For example, both the CETA and TPP grant "persons" of one party the same rights as WTO members to participate as equal players in the regulatory processes of another party. These WTO-plus regulatory provisions sometimes establish ad hoc or permanent technical working groups that may directly include industry in the regulatory cooperation process, but they always prioritize the avoidance of new or divergent rules in one party that might affect trade benefits in the other. In the case of CETA, a new Regulatory Cooperation Forum is co-chaired by trade officials (not regulators) in Canada and the EU.

Almost always, chapters on regulatory cooperation eschew the precautionary principle and in some cases mandate, "science-based" or "risk-based" regulatory policy, the use of regulatory impact assessments (RIAs) that put top consideration on the economic "burden" of public protection measures, and the importance of regulating in a way that promotes business innovation.<sup>109</sup> No chapter goes further in this regard than the Good Regulatory Practices (GRPs) chapter of the proposed USMCA, which for the first time locks in a very specific, pro-business type of regulation into a binding legal treaty.

## The Good Regulatory Practices Chapter in the New NAFTA

The Good Regulatory Practices chapter of the USMCA, far from being a minor addition to NAFTA, is arguably central to understanding whose interests the agreement sets out to protect. Its article 28.2.1 explains that the goal of government-wide GRP is to "facilitate trade, investment and economic growth." Health, safety and environmental goals are bracketed (i.e., an afterthought) as examples of legitimate public policy objectives that GRP can contribute to but are not meant to enhance.

Rather, USMCA urges governments to adopt good regulatory practices as a foundation for regulatory cooperation to "support the development of compatible regulatory approaches among the Parties, and reduce or eliminate unnecessarily burdensome, duplicative, or divergent regulatory requirements." Article 28.2 notes that the guidelines for GRP in the chapter are "obligations" on the parties (i.e. binding), which are reinforced by the applicability of the agreement's dispute resolution process "to address a

**109** The "good regulatory practices" or GRP agenda emerged from discussions at the Organization for Economic Cooperation and Development and in committees of the World Trade Organization in the mid- to late-1990s.

sustained or recurring course of action that is inconsistent with a provision of this chapter” (Art. 28.20).

Article 28.4 asks Canada, the US, and Mexico to retain centralized regulation-setting agencies to enforce GRP across all federal departments so that new public protections “avoid unnecessary restrictions on competition in the marketplace,” do not create burdens on small business, and comply with international trade and investment obligations, including requirements to adopt international standards rather than developing stronger ones.

In Canada, for example, this clause appears to lock into place the role that the Treasury Board currently plays as a regulator of last resort. The Cabinet Directive on Regulation, which came into force in September 2018, already enshrines in law many business-friendly “good regulatory practices.” These include the “one-for-one” rule, which requires regulators to kill one old regulation for each new one they want to introduce, and a requirement that government agencies annually estimate how much they have reduced the “cost of administrative burden” on corporations.<sup>110</sup> Under the USMCA, a move to regulate in a more protective or pro-consumer way than this directive mandates could conceivably be disputed by the US or Mexico.

Article 28.6 of the USMCA obliges parties to publish annually a list of regulations they plan on implementing or introducing over the next year. Further transparency requirements are outlined in Article 28.9, such as the obligation to justify the need for a new regulation, publish all scientific and other data consulted, and to treat input from any person in the NAFTA region equally in the regulation’s final development. Regulators are to “take into account the comments received and, as appropriate, make revisions to the text of the regulation published.”

In theory, these transparency clauses could be used to force regulators to better account for the positions of environmental organizations, food safety advocates and consumer groups in new product approvals, reviews of existing chemicals known to be harmful to humans, or other policy changes of public importance. However, the primary objective of the GRP chapter is to reduce the burden on business. Presumably, recommendations to make national public protections stronger will be discarded as less facilitative of commerce.

Parties are not obliged to perform regulatory impact assessments of new rules, but if they do (as in the US and Canada), Article 28.11 requires the RIA to include: an explanation of why the new rule is needed and what problem it is meant to address; a list of all feasible regulatory and non-regulatory

**110** Treasury Board of Canada, Cabinet Directive on Regulation, 2018. Available at: [canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools/cabinet-directive-regulation.html](https://canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools/cabinet-directive-regulation.html).

alternatives (including an assessment of doing nothing) that could also address the same problem; the costs and benefits of each of these scenarios; and the grounds for choosing one option over the other. This is an absurd amount of work to put public officials through each and every time they want to add, amend, or remove a public protection, which happens quite frequently in all countries.

Adding to the burden on public regulators, Article 28.13 requires all USMCA parties to create procedures to retroactively review regulations to “determine whether modifications or repeal is appropriate,” while Article 28.14 says any “interested person” (usually corporations and their lobbyists) must be given the means to submit written suggestions for “the issuance, modification, or repeal of a regulation” when it has: “become more burdensome than necessary to achieve its objective (including with respect to its impact on trade), fails to take into account changed circumstances (such as fundamental changes in technology, or relevant scientific and technical developments), or relies on incorrect or outdated information.”

There is significant potential here for multinational companies to abuse this notice and review process. Global producers of chemicals, pesticides, pharmaceuticals, genetically modified food products, cosmetics, and food additives are forever disputing good science showing risks to human health or the environment. Delays in removing known toxics, carcinogens, bioaccumulative products, and endocrine disruptors from consumer products can be blamed in part on regulatory capture, but also result from pressure to harmonize measures across borders so as not to interrupt profitable supply chains and trade flows.

## Progressive Alternatives for Regulatory Cooperation and Good Regulatory Practices

Requirements to adopt international standards, or to adopt the national equivalent standards, or regulations of a trading partner, tend to benefit exporters in the dominant market while weakening the regulatory capacity and technical expertise of all countries, and in particular developing countries. The trade focus of the so-called good regulatory practices on which cooperation is based undermines and may even permanently replace the precautionary principle, with major implications for public health and environmental protection.

Regulatory cooperation has been, in practice, much less transparent and accessible to NGOs and academics, or even elected officials, than it has for industry lobbyists, which further skews the results. Finally, enshrining GRP

and regulatory cooperation institutions in legally binding trade agreements benefits producers and exporters first and foremost, with marginal and even negative results for consumers, the environment, and human health.

1. The rules and recommendations of the TBT and SPS agreements at the WTO are already limiting enough on governments; no country should seek or be required to incorporate GRP or regulatory cooperation provisions into binding international treaties.

2. Regulatory cooperation should take place on an ad hoc basis and be based on fundamentally different principles than those included in the “good regulatory practices” agenda.

3. Proposals from domestic and transnational civil society actors for states to adopt stricter standards (e.g., on food or consumer product safety, animal welfare, environmental policy) should be given as much, if not more, weight in the consideration of areas for regulatory cooperation. Governments may also consider subsidizing NGO participation in international standards setting bodies, including the Codex Commission on Food Standards at the World Health Organization.

4. Regulatory variation can be beneficial to everyone, including business, in the long-term by providing a testing ground for multiple approaches to dealing with the same or similar regulatory issues. For example, where a stronger ban on neonicotinoid pesticides has beneficial impacts on pollinators, water systems, and health, this should serve as a benchmark for other countries to follow.

5. Duplicative testing in multiple jurisdictions also has benefits, notably by increasing technical knowledge (in particular in developing countries) and engendering more trust in products on the market. Where “good regulatory practices” seeks harmonization in the types of data required for marketing approvals (and how much of the data can remain confidential), the risk management process for assessing new products or their ingredients, and the outcomes of regulatory processes, a progressive regulatory cooperation agenda would create space for political, ethical or moral considerations in the rule-making process, emphasize open access to all scientific data, and prioritize precaution over rapid commercialization.



# Public Services

By Scott Sinclair

SINCE THE MID-1990S, FTAs have included obligations to liberalize trade in services. As a former Director General of the WTO correctly noted, this extended treaty rights “into areas never before recognized as trade policy.”<sup>111</sup> Such obligations are not limited to cross-border trade (where the buyer and seller are in different countries) but extend to every possible means of providing a service internationally, including through foreign direct investment.

Because there are no tariffs on cross-border services, the main obstacles to increased services trade are differing, or what multinational services corporations often view as burdensome, national and local regulations. For example, multinational services firms such as Airbnb and Uber complain that local government restrictions on short-term rentals designed to keep housing affordable, or municipal regulation of ride-sharing apps to ensure decent labor standards and customer safety, can negatively affect their commercial interests. This focus on restricting or removing non-tariff policy measures gives services liberalization a decidedly deregulatory bent.

The drive to liberalize services also generates conflict with both the public and the not-for-profit service sectors. Obviously, international trade in services can only occur where sectors are open to competition and services are commercial in character, such as private express courier services, mass transit, and banking and other financial services. Because many public services (e.g., single-payer health insurance or public water utilities) deliberately

<sup>111</sup> Address given by Mr. Renato Ruggiero, Director-General of the World Trade Organization, in Brussels, to the Conference on Trade in Services, organized by the European Commission, June 2, 1998.



limit or exclude the private sector, they can readily be construed as barriers to increased services trade.

In fact, advanced public services are hallmarks of economic and social progress and an important goal of development. They play an essential role in meeting universal basic needs, as well as redistributing wealth, equalizing opportunity, and reducing inequality. Opening them to profit-making — simply for the sake of boosting international trade in services — threatens social well-being and the public interest.

Moreover, many essential services such as electricity, water, public transit, education, social services, and health care are best provided publicly or on a not-for-profit basis. Among the many reasons why that is so are: the higher financing costs associated with private, for-profit investment, and the demand for higher returns for private company shareholders. Commercial services firms also face greater pressure to restrict services (e.g., Wi-Fi coverage or inter-city bus service) to profitable regions, erode labor standards, and reduce the quality of services in order to lower costs and boost profits. In an extreme US example, the private, for-profit prison industry has transported thousands of prisoners to out-of-state prisons — far from their homes, families, and community support networks — simply to fill available beds at the lowest cost.<sup>112</sup>

Despite the many benefits of public services, services liberalization and investment agreements treat them as market impediments that must be carefully excluded from a country's treaty obligations, usually, at a cost, in the form of negotiating concessions. Indeed, the right of governments to reverse privatizations, to expand existing public services and to create new ones, has long been a flashpoint in trade negotiations and debates. Public sector unions have been at the forefront of campaigns to resist further services trade liberalization, including through the now-stalled Trade in Services Agreement (TiSA).<sup>113</sup>

Faced with failing privatization schemes, municipal and local governments worldwide have also pushed back against expanded services agreements and insisted that their rights to re-municipalize privatized services — bringing

**112** “Private prison corporations profit from every individual incarcerated in their facilities, usually at a negotiated per diem rate in which government agencies pay a specified amount per prisoner per day. Simply stated, for private for-profit prison corporations, the more people behind bars the better the business.” Holly Kirby, “Locked Up and Shipped Away: Interstate Prisoner Transfers and the Private Prison Industry,” Grassroots Leadership, November 2013. Available at: [grassrootsleadership.org/sites/default/files/uploads/locked\\_up\\_shipped\\_away.pdf](http://grassrootsleadership.org/sites/default/files/uploads/locked_up_shipped_away.pdf).

**113** See Public Services International, “Trade in Services Agreement,” [world-psi.org/en/issue/TISA](http://world-psi.org/en/issue/TISA); and Scott Sinclair “TiSA Troubles: Services, democracy and corporate rule in the Trump era,” Rosa Luxemburg Foundation and Canadian Centre for Policy Alternatives, July 2017. Available at: [policyalternatives.ca/publications/reports/tisa-troubles](http://policyalternatives.ca/publications/reports/tisa-troubles).

them back under public control — should be fully protected under free trade and investment pacts.<sup>114</sup>

## USMCA and Public Services

Like most previous FTAs, USMCA does not compel governments to privatize public services. But by giving new legal rights to multinational services corporations, it would facilitate commercialization and, in many cases, lock in privatization. Contrary to official assurances, it will also interfere with the ability of future governments, at all levels, to expand or create new public services.

Following the example of the WTO's General Agreement on Trade in Services (GATS), USMCA's cross-border trade in services chapter doesn't apply "to services provided in the exercise of governmental authority." But like the GATS, the chapter goes on to define such services as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."<sup>115</sup>

Unfortunately, as has been repeatedly pointed out by experts and analysts from across the political spectrum, this exclusion is extremely narrow and for practical purposes useless in protecting public services.<sup>116</sup> The problem is that *public services* are rarely delivered exclusively by government on a strictly non-commercial basis. Public service systems typically consist of a complex, continually shifting, mix of governmental and private funding, and public, private not-for-profit, and private for-profit delivery.

Governments have supplemented this weak general exclusion through country-specific exemptions, which are also of limited effectiveness. Like the original NAFTA, USMCA covers all services except for those listed in a country's Annex I and Annex II reservations (carveouts) — a negotiating process known in trade circles as the negative list approach. Annex I reservations protect *existing* measures (e.g., laws or policies related to services, or the privileges of public monopolies and state-owned enterprises) from certain trade and investment obligations; Annex II reservations are stronger by providing a degree of future policy flexibility related to measures or sectors carved out in that annex.

<sup>114</sup> Satoko Kishimoto and Olivier Petitjean, eds. "Reclaiming Public Services: How cities and citizens are turning back privatisation", Transnational Institute, June 2017. Available at: [tni.org/en/collection/remunicipalisation](http://tni.org/en/collection/remunicipalisation).

<sup>115</sup> USMCA, Cross-Border Trade in Services, Chapter 15 Definitions and Article 15.2 (3) (c).

<sup>116</sup> Werner Raza, "Politics of scale and strategic selectivity in the liberalisation of public services — the role of trade in services," *New Political Economy*, 2016, vol. 21, no. 2, p. 210.

Most existing public services at the state, provincial and local government levels are excluded by the softer Annex I reservations. Some key sectors such as health, public education, and social services have been protected by stronger Annex II reservations. Yet even these Annex II reservations are flawed, because governments, and, where there is an investor–state dispute settlement process in place, companies, can still claim violations of the agreement’s protections against indirect expropriation (of assets, investments or market share) and minimum standards of treatment.

In areas where only the weaker Annex I protection applies, such as wastewater or waste management services, once a sector is opened up to competition, USMCA makes it difficult or even impossible for future governments to restore public services. The reason is that the USMCA services chapter includes “market access” rules that prohibit monopolies, including public monopolies, in any committed sector. Once a services sector is committed, it is meant to remain permanently open to foreign competition. Worryingly, all three USMCA countries have committed wastewater, sanitation, transit and public education.

The elimination of investor-state dispute settlement between Canada and the US in the USMCA, and its scaling-back between the US and Mexico, greatly reduces the threat of corporations bringing services-related investor–state lawsuits directly.<sup>117</sup> This is important because national governments are generally more reluctant than private investors to bring disputes in politically contentious areas such as public services. But USMCA’s investment and services rules, which are enforceable through state-to-state dispute settlement, will continue to pose problems for public services by locking in privatization and interfering with public regulation of publicly subsidized, privately delivered, services.

In addition, USMCA contains intrusive new provisions on state-owned enterprises (SOEs) and monopolies that are more restrictive than those found in previous agreements. These new provisions, ostensibly aimed at China and other “socialist-market economies,” could also interfere with the ability of government enterprises such as the US Postal Service or Canada Post to fulfill their public service roles.

The general thrust of these SOE and monopoly provisions is to compel publicly-owned enterprises to act strictly “in accordance with commercial considerations.” Such a requirement tends to defeat their public purpose. While USMCA rules acknowledge that an SOE can have a “public service mandate,” this is defined in the agreement as “a government mandate pursu-

**117** The threat of ISDS challenges is not eliminated entirely because of the persistence of a limited version of ISDS between the US and Mexico and the possibility of forum shopping under other investment protection treaties.

ant to which a state-owned enterprise makes available a service, directly or indirectly, to the general public in its territory.”

Even when fulfilling their “public service mandate,” an SOE would be prohibited in its supply of services from treating its own citizens more favorably than “persons of another Party or of any non-Party.”<sup>118</sup> It is hard to understand why a publicly-funded and mandated enterprise, whether providing postal, energy, social, or other services, should be barred from supporting the citizens, taxpayers, and communities who created and sustain it. Such provisions reinforce a general trend in the neoliberal era to corporatize state-owned entities and the services they provide so that they are increasingly run on a commercial, profit-driven basis, becoming “more private than public in their orientation.”<sup>119</sup>

These ill-conceived and intrusive SOE and monopoly provisions do not yet apply to state, provincial, and local governments. But the USMCA calls for further negotiations, beginning within six months after ratification, to apply these restrictions to SOEs owned or controlled by state and local governments, and to any public monopolies designated by subnational governments (Annex 22-C).

## Progressive Alternatives for Public Services

Expanding universal, high-quality public services should be one of the main goals of economic development and international cooperation. Yet, for decades, FTAs have encouraged commercialization, privatization, and corporate encroachment on the public sector. Truly progressive trade rules must not merely accommodate public services but positively empower democratically elected governments to strengthen and improve them.

1. The first step in realizing this goal is to include an effective, unequivocal carveout for public services in all trade and investment agreements. Such a carveout should ensure that all levels of government can create new public services, expand existing ones, and reverse privatization without incurring any liabilities or facing repercussions under trade and investment treaties.

In work done for the European Federation of Public Service Unions (EPSU), German legal scholar Markus Krajewski has proposed wording for such a model clause that reads: “This agreement (this chapter) does not apply to public services and to measures regulating, providing or financing public services. Public services are activities which are subject to special regulatory

<sup>118</sup> “Persons” here includes both natural and legal persons, i.e. corporations.

<sup>119</sup> McDonald and Ruiters, eds., *Alternatives to Privatization: Public Options for Essential Services in the Global South*, Introduction, 2012.

regimes or special obligations imposed on services or service suppliers by the competent national, regional or local authority in the general interest.”<sup>120</sup>

2. Progressive trade rules must also recognize the critical role that state-owned enterprises can play in national and regional economic development. It is precisely the ability to consider more than narrow commercial interests that enables state enterprises to fulfill this goal. As long as any developmental criteria are applied in a transparent manner, without corruption, or cronyism, SOEs should have the ability to favor local goods, services, and suppliers, and to provide their goods and services on preferential terms to citizens and residents — without trade treaty interference.

3. Likewise, trade agreements should in no way impede the expansion of existing, or the establishment of new, public monopolies. Publicly authorized monopolies, such as public postal services, or public health insurance, have proven to be efficient, equitable and vital means to deliver universal services.

4. Abolishing ISDS is an essential first step toward reconciling international trade and investment rules with vital public services. ISDS is by far the worst FTA-related threat to public services. Investor-state challenges related to public services are commonplace, ranging from investor attacks on the reversal of water privatizations in Argentina to the rolling-back of privatized health insurance in Slovakia and Poland.<sup>121</sup> Governments are far more cautious about bringing cases than foreign investors, as public officials must consider the possibility of a challenge against similar practices in their own countries. Foreign investors, on the other hand, have nothing to lose but their legal fees (which may even be covered by third-party funders).

5. Instead of focusing exclusively on facilitating private commercial interests, progressive trade and development agreements should encourage and support new forms of international cooperation on services. Public-public partnerships, for example, are “collaborations between two or more public authorities or organizations, based on solidarity, to improve the capacity and effectiveness of one partner in providing public services.”<sup>122</sup> These collaborative partnerships hold great potential. Much of the most promising innovation and experimentation in new models of public service expansion

**120** See Markus Krajewski. “Public Services in Bilateral Free Trade Agreements of the EU.” November 2011. Available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1964288](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1964288).

**121** Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010; Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13, Final Award, December 7, 2012 and Eureko B.V. v. Republic of Poland, Partial Award, August 19, 2005.

**122** See Transnational Institute, “Public-Public Partnerships.” Available at: [tni.org/en/collection/public-public-partnerships](http://tni.org/en/collection/public-public-partnerships).

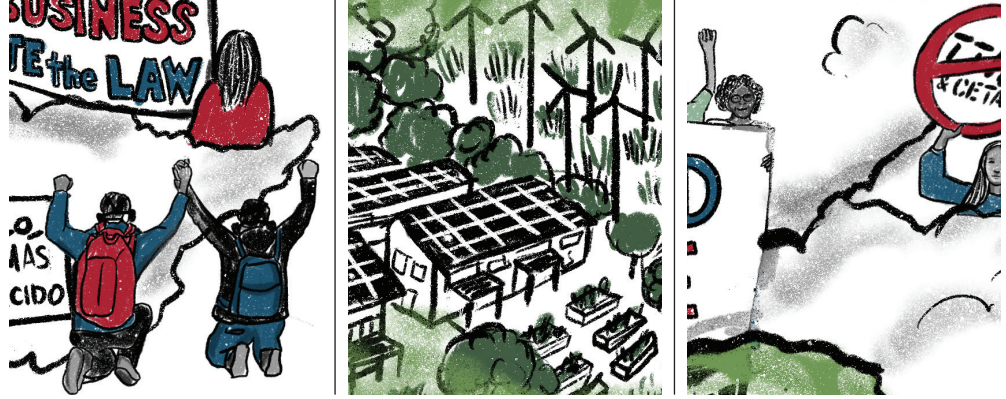
and delivery from public transit to renewable energies is occurring at the municipal level.

Progressive international trade and development agreements could provide encouragement and support in other ways as well. It's not hard to imagine dedicated secretariat for public services, shared research, technology transfers, the exchange of workers and professionals, and dedicated funding for public service enhancement. Such initiatives and dedicated resources for development are critically important in agreements between developed and developing countries.

Furthermore, after decades of neglect there are many poor and underserved communities, sectors, and regions within developed countries, including the US and Canada, that could learn and benefit from the experiences of and partnerships with the most innovative jurisdictions in poorer and developing countries.

6. Finally, in the face of continuing trade or investment treaty threats, it is politically vital to vigorously support governments, including at the local level, who are working to reverse privatization or expand public services. Such mobilization grounds the case against intrusive FTAs in practical support for improved and expanded public services, a more compelling and positive argument to win.





# Conclusion: Toward a Progressive Trade Agenda for People and Planet

By the Editors

THE EXTRAORDINARY SURGE in popular support for universal public health care, a Green New Deal, and other progressive policies demonstrates a powerful public appetite for meaningful social change. Decades of neoliberalism have also created pent-up demand to change the rules of globalization and international trade.

Reflecting a diversity of perspectives and making no claim to be comprehensive, the essays in this report address the key question posed in the foreword: what kind of trade, and what kind of trade agreements, do progressives support? The answer, broadly speaking, is that progressives support “fair trade,” by which they mean trade that is equitable in the distribution of its benefits, respectful of the Earth’s limits, and accepting of the development needs of poorer countries.

A consistent thread of the contributions to this report is that a progressive trade agenda cannot be merely additive or simply attach new rhetorical elements — such as non-binding social clauses or gender equity language — to existing agreements. Instead, it must be transformative and fundamentally challenge the status quo. It requires a different starting point and value system.

Progressives seek to preserve the benefits of trade, while at the same time embedding trade agreements in a new legal ecosystem of rights and obligations that looks first to the rights and health of citizens, workers, communities, and the planet. In other words, progressives insist on trade rules that give priority to human rights and the rights of nature over corporate rights.

A reformed international trading system must be inclusive and, through special and differential treatment, accommodate the development aspirations of the Global South. At the same time, it must redress the long-ignored rights of excluded and disadvantaged groups everywhere to participate productively in the global economy. The harmful secrecy surrounding trade and investment treaty negotiations must also end, in favor of an open and transparent treaty-making process that no longer gives the upper hand to corporate lobbyists and other insiders.

Another overarching theme is the demand for a new trade treaty framework that supports, rather than hinders, core progressive policy priorities such as universal health care and strong public services; robust environmental protection and resolute action on climate change; full employment in meaningful work that provides a good standard of living; strengthened labor standards and trade union rights; the primacy of universal human rights, especially the rights of women, Indigenous Peoples, and all those seeking equity; and the greater democratization of economic decision-making.

The realization of this progressive policy vision will mean defying and ultimately dismantling key corporate-biased aspects of existing trade treaties such as investor-state dispute settlement and stifling intellectual property rights. It will also entail organizing politically to thwart corporate-driven efforts to expand the current, deeply flawed model being used to colonize new areas of regulation including digital trade, e-commerce, data privacy, regulatory cooperation, and expanded intellectual property rights.

Trade treaties have for too long been instruments of policy suffocation, a key tool for enforcing a neoliberal policy monoculture. This situation must end. The existential threat of climate change and the corrosive effects of inequality have exposed current trade treaties as counterproductive and dangerously out of sync with 21st century challenges and priorities. It is critical to reverse the prolonged “mission creep” through which FTAs have strayed far from basic trade matters, such as tariff reduction, to instead become instruments of corporate control and privilege in areas only loosely related to trade.

Perhaps the only silver lining of the reckless, irresponsible Trump trade agenda has been to shatter the illusion that current trade agreements and the trading regime must be accepted without question, almost as natural forces. Instead, the naked exercise of US power has exposed these treaties as

contingent and socially constructed. Corporations wrote them and citizens can rewrite them to suit more socially and economically worthy ends.

Alarming, Trump and his fellow travelers have weaponized trade and use it as a wedge issue to inflame xenophobia and promote exclusion. The contributors to this report strongly reject beggar-thy-neighbor protectionist policies that sow divisions between workers in different countries and between organized labor and other progressive social forces. Instead, they favor policies that address structural trade imbalances by stimulating environmentally sustainable growth, while curbing the power of transnational corporations to engage in social dumping.

Despite Trump's populist and anti-establishment rhetoric, it is now clear that US unilateralism is aimed not at undoing but at deepening the pro-corporate biases of the current trade regime. The careful analyses by contributors to this report of the deeply flawed NAFTA 2.0 demonstrate that Trump's challenge to the current trade regime is deeply reactionary: the aim is to reorder the international trading system to reflect perceived US corporate and imperial interests.

The critique elaborated in this report could not be more different. Contributors explore how the current neoliberal trade regime sets back progressive aspirations across the policy spectrum. These include the right to decent work; affordable access to medicines; consumer safety; income equality; healthy ecosystems; financial stability; community economic development; indigenous, gender and other human rights; food sovereignty; universal public services; and other public interest priorities.

The report discusses needed alternatives in each issue area in accordance with the four pillars and principles articulated in the introduction: recognizing the primacy of human rights over corporate rights, respecting the policy space of democratic governments to ensure trade contributes to national and local economic development, safeguarding public interest regulation, and adopting a climate-friendly approach to trade. This positive, progressive trade agenda includes, but is not limited to, the following proposals:

- I. eliminate ISDS and investment protections that undercut the right of duly elected governments to regulate in the interests of their citizens and the environment, and establish binding investor obligations;
- II. replace excessive intellectual property rights with balanced protections that encourage innovation while supporting user rights, data privacy, and access to affordable medicines;
- III. replace non-binding, unenforceable labor provisions with a floor of strong, fully enforceable labor rights and standards that enable citizens

and trade unions to take complaints to independent international secretariats, which should also have the authority to proactively investigate labor rights abuses;

- IV. fully recognize and respect gender and indigenous rights, including prioritizing women's employment and economic well-being, and recognizing indigenous title to land and resources and the right to free, prior, and informed consent;
- V. ensure international trade agreements respect food sovereignty and the livelihoods of small holdings and family farmers by giving priority to local producers and providing a fair return for small-scale agricultural producers;
- VI. enshrine binding, enforceable obligations to reduce and mitigate the effects of climate change in all international commercial agreements and remove the ability of foreign investors and governments to challenge good-faith greenhouse gas reduction initiatives;
- VII. encourage policy flexibility for those industrial and community economic development strategies striving to ensure that trade and foreign investment contribute to good jobs, local economic benefits, healthy communities, and a clean environment;
- VIII. pursue international cooperation that respects regulatory autonomy and aims to harmonize to the highest standards, instead of the current corporate-dominated regulatory cooperation agendas that erode autonomy and harmonize to the lowest common denominator;
- IX. remove the pressure under current services and investment rules to privatize public services and instead fully protect the right to preserve, expand, restore, and create public services without trade treaty interference; and
- X. end the current secrecy in trade negotiations and privileged access for vested interests, and establish procedures that provide full disclosure, transparency, and meaningful public participation.

A final theme in this paper is that while the existing trade and investment regime needs to be transformed, policy alternatives can and must be pursued immediately. Given the destructiveness of runaway climate change and rising inequality, progressives cannot wait until the current international trade system is reformed before acting.

There is a need to seize upon existing flexibilities and to politically challenge the boundaries of unjust or unreasonable trade and investment restrictions.

On-the-ground alternatives are already being pursued and frequently led by women, indigenous peoples, unions, workers' cooperatives, small-scale agricultural producers, and progressive governments at all levels. These must be supported and multiplied. Recognizing the obstacles that current trade and investment rules pose to a just economic and ecological transformation should never imply giving in to their chilling effect.

In closing, this working paper is meant to be a roadmap, not a blueprint. Its purpose is to be a living document, subject to discussion, criticism, and revision, and be a tool for stimulating deeper debate and discussion about trade alternatives in civil society, trade unions and social movements. We invite criticism and feedback by activists, experts, and civil society to better understand the issues raised and spur on the necessary political action.

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## ORGANIZATIONS

### **The Canadian Centre for Policy**

**Alternatives (CCPA)** is an independent, non-partisan research institute concerned with issues of social, economic and environmental justice. Founded in 1980, the CCPA is one of Canada's leading progressive voices in public policy debates.

**The Institute for Policy Studies (IPS)** is a multi-disciplinary research center that works on peace, justice, and the environment. Its vision is that everyone has the right to thrive on a planet where all communities are equitable, democratic, peaceful, and sustainable. Among its work over the last decade, IPS has published several reports documenting the social, environmental, and economic impacts of free trade and investment agreements, especially in the Global South.

### **The Rosa Luxemburg Stiftung (RLS)**

is an internationally operating, progressive non-profit institution for civic education. In cooperation with many organizations around the globe, it works on democratic and social participation, empowerment of disadvantaged groups, alternatives for economic and social development, and peaceful conflict resolution. RLS-NYC serves two major tasks: to work on issues related to the United Nations and to engage in dialogue with North American progressives in universities, unions, social movements, and politics.