Reconceptualizing FREE TRADE AGREEMENTS through a Sustainable Development Lens

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Introduction

• COVID-19 pandemic has highlighted the inefficiencies and gaps in the international legal framework.

• International trade law has not been designed to accommodate the magnitude of exogenous shocks posed by the pandemic, and the stalemate at the WTO means that the possibilities for a multilateral solution are slim.

• Governments are increasingly relying on FTAs/RTAs to reshape the rules of international trade.

• Hackathon submission by New Markets Lab (NML) “Reconceptualizing Free Trade Agreements Through a Sustainable Development Lens” responds to this context.
FTAs, Crisis Mitigation and Building Back Better

• FTAs can allow governments to mitigate the immediate trade impacts of COVID-19 by addressing critical issues and incorporating regulatory flexibilities in the investment, intellectual property and trade facilitation rules, while also promoting an inclusive and sustainable path for economic recovery by incorporating provisions on gender, small and medium-sized enterprises (SMEs) and circular economy.

• Some existing FTAs are designed to respond to changing circumstances. The New Zealand – Singapore Closer Economic Partnership Agreement expedites clearance of perishable goods and provides flexibilities for their release.

• FTAs also provide a channel for building back better by reshaping the rules of trade to be more inclusive and sustainable. Both the African Continental Free Trade Area (AfCFTA) and the Agreement on Climate Change, Trade and Sustainability (ACCTS, under negotiation) provide alternative approaches.
For an FTA to be effective in mitigating the impact of a crisis, **flexibilities need to be considered**. Tailored provisions could respond to the food insecurity caused by trade restrictions and disruption of cross border supply chains, address concerns regarding lack of access to present and future medical supplies, and relieve governments from being over-burdened by a proliferation of ISDS claims.

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<tr>
<th>FTA Chapter</th>
<th>Issues Identified</th>
<th>Good Practices</th>
<th>Recommendations</th>
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<td>Trade Facilitation</td>
<td>• Inefficiency and duplication in customs processes</td>
<td>• TFA-consistent commitments on express shipments and perishable goods</td>
<td>• Expedited clearance for an expanded list of priority goods (OECD 2020, World Bank, 2020)</td>
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<td>• Lack of infrastructure to facilitate digital clearance</td>
<td>• Reduced physical touch points through digitized clearance</td>
<td>• Investment in digitization at the border (Sachs, 2020)</td>
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<td>(UNCTAD Automated System for Customs Data)</td>
<td>• Enhanced digital inclusivity through capacity building initiatives</td>
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<td>Intellectual Property</td>
<td>• Insufficient access to pharmaceuticals, medical technologies, data and know-how</td>
<td>• Collaborative research models based on IP sharing (WHO &amp; Costa Rica’s solidarity call)</td>
<td>• Streamlined compulsory licensing mechanisms, coupled with more liberal exhaustion policies, could help expand access to medical products</td>
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<td>• Proposals for limited waivers of intellectual property protection (India-South Africa proposal)</td>
<td>• Alternative incentive frameworks including IP pooling, grants and prizes could also be helpful (Lester &amp; Mercurio, 2020)</td>
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<td>Investment</td>
<td>• Limitations on states’ right to regulate Threat of multiple and/or frivolous claims</td>
<td>• Shift from international arbitration to domestic fora (USMCA)</td>
<td>• Moratorium on ISDS claims arising from emergency measures (CCIS, 2020)</td>
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<td>• Consolidation of related claims</td>
<td>• Consolidated ISDS claims in domestic fora</td>
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The trade fallout from COVID-19 has disproportionately affected marginalized stakeholders in the global economy. The pandemic has heightened women’s economic vulnerability (Zhu & Kuriyama, 2016; UN, 2020), increased gender-based violence (Godin, 2020), and limited their access to adequate healthcare (Boniol et al., 2019; UN Population Fund, 2020).

On the other hand, SMEs have borne the brunt of the economic slowdown due to a widened information gap and low levels of digitalization (UK Trade Policy Observatory, 2020). In building back better, FTAs should include provisions targeted to meet the needs of these groups to pave an inclusive road to recovery.

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<td>Gender</td>
<td>Lack of representaion of women in trade negotiations and insufficient focus on trade-related gender issues</td>
<td>Inclusion of gender chapters in the Chile-Uruguay, Canada-Chile, Argentina-Chile, and Canada-Israel FTAs</td>
<td>Enhanced gender chapters</td>
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<td>Availability of dispute settlement for gender issues in the Canada-Israel FTA</td>
<td>Minimum legal standards mandated by FTAs/RTAs (see, e.g., recent work by the ITC)</td>
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<td>Greater participation of women in trade negotiations</td>
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<td>SMEs</td>
<td>Barriers to information surrounding FTA/RTA terms and standards</td>
<td>Provision of SME-specific information on publicly accessible websites (e.g., CPTPP, EU-Japan Economic Partnership Agreement)</td>
<td>Communication channels to convey SME-specific information on FTAs and applicable standards in plain terms</td>
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<td>Low digitalization uptake</td>
<td>Emphasis on digital inclusion (e.g., Digital Economy Partnership Agreement (DEPA))</td>
<td>Investment in ICT infrastructure and capacity building to improve digital literacy skills (DEPA, Art. 10.2)</td>
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<td>Lack of digital inclusivity</td>
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<td>Digital inclusion provision in FTAs/RTAs</td>
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The disruptions to global supply chains posed by COVID-19 illustrate the fragility of the linear economic model. The 'take-make-dispose' concept is inherently unsustainable, as exemplified by the massive increase in food waste and the limited supply of single-use medical goods as a result of pandemic-related demand shocks (Garcés-Ayerbe et al., 2019). FTAs need to engage in setting the rules for more sustainable forms of trade, especially as related to the circular economy, in order to build back better.

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| Circular Economy  | • Lack of regulatory standards on circular trade and movement of environmental goods and services  
• Non-tariff measures hindering adoption of circular economy policies | • Ongoing negotiations on liberalization of trade in environmental goods and services (Kettunen et al, 2019)  
• Efforts to eliminate fossil fuel subsidies (Agreement on Climate Change, Trade and Sustainability (ACCTS), under negotiation) | • Standardized rules for trade in environmental goods and waste (Yamaguchi, 2018; Kettunen et al, 2019)  
• Staged implementation of commitments on circularity  
• Resolution of discrepancies between the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal and the World Customs Organization’s Harmonized System (Kettunen et al, 2019) |
Conclusion

• For FTAs to be functional in times of crises, such as the COVID-19 pandemic, regulatory flexibilities must be integrated into their structural framework.

• Additionally, FTAs must be made more inclusive and sustainable if they are to provide a way for countries to build back better.

• NML has an ongoing project on trade and SDGs to examine, more broadly, how the substantive chapters in FTAs can be better aligned with the SDGs. We plan to publish a book with more of our research in Spring 2021.

• NML is also in the process of developing a digital repository of regulatory flexibilities in international agreements and domestic regulations, which can act as a knowledge database for policymakers seeking to address today's myriad challenges.
References


• Call for ISDS Moratorium During COVID-19 Crisis and Response, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT (May 6, 2020), http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/.


• Communication from India and South Africa, Waiver from Certain Provisions Of The Trips Agreement For The Prevention, Containment And Treatment Of Covid-19, WTO IP/C/W/669 (Oct 2020)

• Katrin Kuhlmann & Akinyi Lisa Agutu, Coherence for Sustainable Development, INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY (Jul. 8 2020), http://ccs.columbia.edu/2020/05/05/isds-
moratorium-during-covid-19/

• UN Global Survey on Digital and Sustainable Trade Facilitation, UNITED NATIONS, https://unisurvey.org/.


• UK TRADE POLICY OBSERVATORY, THE REPRESENTATION OF SME INTERESTS IN FREE TRADE AGREEMENTS: RECOMMENDATIONS FOR BEST PRACTICE (2020).


• UNITED NATIONS POPULATION FUND (UNFPA), LATIN AMERICA AND CARIBBEAN REGIONAL OFFICE, OUT-OF-POCKET SPENDING FOR CONTRACEPTIVES IN LATIN AMERICA (2020).