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- Mining companies, unjust profits and trade agreements
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LOVE YOUR NEIGHBOUR AS YOURSELF Vaccine without exclusion

Proposal to suspend some trade rules

On October 2 this year, India and South Africa requested that the World Trade Organisation (WTO) Council concerned with the agreement, *Trade-related aspects of Intellectual Property Rights (TRIPS)*, consider suspending all obligations that applied to medical products needed to control the COVID-19 pandemic. This suspension of intellectual property rights¹ would apply only to drugs, vaccines, treatments, diagnostics, medical supplies and test data related to control of the COVID-19 pandemic. It would also be time-limited, ending when enough people have been vaccinated to create global 'herd immunity'² to the virus. None of the other TRIPS rules would be affected.

Most developing countries supported the proposal. Most wealthy countries opposed it. A final decision is expected by the end of December or early January.

The Intellectual Property (IP) system enshrined in TRIPS guarantees companies a time-limited monopoly on the marketing of their products. It is argued that companies need to recover their investments in research and development. However, this arrangement can clash with protection of public health and the human right to health. Controversies persist over how much profit is

reasonable to support new research and development and how long patents should last. As well, monopoly patents mean higher prices and extended trade secrecy. Finally there is the question: Are patents even appropriate in the context of a global pandemic?

Approving the suspension of established rules needs the consensus of all WTO members, or three-quarters of members if a vote is taken. If agreed, this would empower member states to neither grant nor enforce patents or other TRIPS rules related to COVID-19 and it would allow all member states to engage in research, manufacturing, scaling up and supplying COVID-19 tools without fear of a trade dispute.

Arguments for and against

Developed countries opposing the request of South Africa and India argue that the WTO TRIPS agreement already contains sufficient flexibilities for this purpose. One exemption is a country's right to issue **compulsory licences**³ for less expensive, generic equivalents when facing a public health emergency. The Agreement allows this, provided certain procedures and conditions are fulfilled. The second flexibility allows countries lacking manufacturing capacity to import generics from other countries.

¹ Intellectual property rights in this context refer most particularly to patents and trade secrets.

² Herd immunity, or community immunity, is when a large number of the people in an area is immune to a disease, enough to give the whole community protection.

³ Compulsory licensing means that companies or individuals other than the patent owner are authorised to make, use, sell or import a product under patent without the permission of the patent owner.

However, according to TRIPS rules, compulsory licensing may apply only on a case-by-case and product-by-product basis, which slows production. Developing countries using compulsory licensing have been criticised and subjected to trade-bargaining pressures from the European Union and the United States, where companies holding most of the world's drug and medical-supply patents are located

An alternative to compulsory licensing is **voluntary licensing**, ie. licensing granted voluntarily by a patent holder. For example, COVID-19 vaccines produced by Moderna, a drug research company in the USA, and by the Oxford Vaccine Group will be available, when ready, on a cost basis until 31 July, 2021. Eli Lilly and Co. (USA), in an agreement with the Gates Foundation, will forego royalties from low- and middle-income countries for its (still-experimental) COVID-19 antibody treatment. Opponents to the suspension proposal argue that voluntary licences should be enough. 'But these are all one-off arrangements with an aura of charity rather than of obligation', writes Ronald Labonte, L'Université d'Ottawa. And, as of 15 October, not a single drug company has joined the World Health Organisation's *COVID-19 Technology Access Pool (C-TAP)*, which encourages industry-wide contributions of intellectual property.

The proposal to temporarily suspend the intellectual property rules in the TRIPS agreement as they relate to COVID-19 is important because it overturns any backroom bargaining for one-off deals between governments and pharmaceutical companies. It asserts simply and openly that intellectual property rules concerning COVID-19 are off limits until the World Health Organisation (WHO) confirms that the pandemic is over.

Development aid needed to strengthen health and procurement systems in poor countries

UNAIDS, recalling 'the painful lessons from the early years of the AIDS crisis', The Elders - former national and United Nations leaders founded by Nelson Mandela - and over 400 civil society groups support the proposal. Opponents point to inefficient and under-funded health and procurement systems in

many poor countries. And they are right in this—in many poor countries the gap between what they need and what they can finance themselves is unethically vast. All the more reason for wealthy countries to support the TRIPS suspension and contribute far more generously to health and development assistance for countries that lack the resources to recover from crises as wealthier nations can/

Gilead Sciences Inc., a USA biotechnology corporation, holds the patent on *remdesivir*, the only drug so far approved specifically to treat COVID-19. Its licensing arrangements exclude nearly half of the world's population from benefiting from price-lowering generic competition on the drug. In June, Gilead announced that in most countries *remdesivir* would be priced at US\$2,340 for a five-day course of treatment. Pricing research shows that it can be manufactured for less than US\$9 per course of treatment. Gilead's licensing and pricing policies must be further judged in the light of the fact that the corporation received more than US\$70 million in public funding to develop the drug.

Over US\$70 billion of public funding has gone to support COVID-19 research and development, often with no conditions attached. Candice Sehoma, Medicines Sans Frontiers Access Campaign's Advocacy Officer in South Africa, says, 'Nobody can afford to let corporations that have been supported by billions in publicly-funded research money simply pursue their profit interests while neglecting global COVID-19 needs. This pandemic will not be over until it is over for everyone'.

Please urge your politicians to support universal access to the vaccine. It's a matter of life and death. We believe the COVID-19 vaccine should be provided free to all people of the world, starting with the most vulnerable. Love your neighbour as yourself.

Sources: Mary Boyd compiled this report from the following resources: Ronald Labonte, Distinguished Research Chair, Globalization and Health Equity, University of Ottawa; and Mira Johri, Professeure titulaire, Ecole de Sante Publique, Universite de Montreal in The Conversation, November 5, 2020.

MINING COMPANIES, UNJUST PROFITS AND TRADE AGREEMENTS

When **Thailand** refused to extend the Chatree mine's licence, the Australian company that owns the mine, Kingsgate Consolidated, sued Thailand using provisions in the Thailand-Australia Free Trade Agreement. The company is reportedly claiming billions of dollars from Thailand in lost future profits.

Another Australian mining company, Tethyan Copper Company Ltd, had an exploration licence with the intention of opening a mine in **Pakistan**. The Pakistan federal government refused to grant a mining licence because of flaws in the way the provincial government had granted the initial exploration licence. Using provisions in an Australia-Pakistan investment treaty, Tethyan Copper took legal action against Pakistan in 2012. Last year, an international investment tribunal ruled that Pakistan should pay Tethyan Copper US\$5.8 billion in compensation. This award made world headlines because the compensation payout was more than 25 times what the company had invested in the project and included an unknown payout for 'lost future profits'. It is almost equivalent to the US\$6 billion emergency loan the International Monetary Fund (IMF) had just granted Pakistan to deal with its economic crisis. It almost cancels out any benefit from the IMF loan.

The reasons these mining companies could take legal action against national governments is because of **Investor-State Dispute Settlement (ISDS) clauses in trade and investment agreements**. These clauses enable foreign (but not local) investors to bypass national courts and sue governments for compensation in international tribunals. They need to be able to argue that a change in a domestic law or policy has reduced the value of their investment, or that they were not consulted about the change. The tribunal processes are seriously flawed. The arbitrators are not independent judges but practising advocates with potential, or actual, conflicts of interest. There is a lack of transparency, of precedents and of appeals as well as high legal costs and astronomical awards. international corporations already have enormous market power. ISDS provisions in

trade agreements give them extraordinary additional rights; yet with no obligations to abide by human rights or environmental standards. There are now 1023 reported ISDS cases globally.

'Forum shopping'

A comparatively new concept in international relations theory is 'forum shopping' – another piece of jargon to learn! It refers to how a nation state will choose to negotiate in a forum that it believes will stack the odds in its favour. The proliferation of trade agreements around the world (bilateral, regional and multilateral) enables corporations to act ('shop around') in this way also. For example, US-based Philip Morris, tobacco manufacturer, wanted to sue the Australian Government because of its laws mandating plain packaging of cigarettes. Because the Australia-USA trade agreement did not include ISDS provisions, Philip Morris decided to use its Hong Kong subsidiary to take Australia to court on the basis of a 1993 Australia-Hong Kong treaty. It took 5 years for the tribunal to decide that Phillip Morris was not a Hong Kong company.

Australia was involved in a similar exercise with Tethyan Copper Company in relation to Pakistan (see above). Tethyan is owned by the giant Canadian Barrick Gold Corporation and Chilean Antofagasta PLC. Neither Canada nor Chile has an investment treaty with Pakistan, so Tethyan used its Australian subsidiary to lodge the claim under the Australia-Pakistan investment treaty.

Papua New Guinea in line of fire

There is more to tell of Barrick Gold and ISDS. On 10 July, the Canadian company announced that its Australian subsidiary, Barrick (PD) Australia Pty Ltd, was using the ISDS in a bilateral investment treaty between Papua New Guinea (PNG) and Australia to claim compensation when the PNG government refused to grant an extension of the company's expired 30-year lease at the controversial Porgera gold mine. Canada does not have an investment treaty with PNG.

The Porgera gold mine has a documented record of decades of environmental and human

rights abuses. Yet despite its record, Barrick is seeking compensation because its lease has not been extended.

Growing criticism of ISDS has triggered attempts at multilateral reform, with reviews of ISDS put in place by the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for Settlement of Investment Disputes (ICSID), which oversee the international tribunals. The Australian Department of Foreign Affairs and Trade (DFAT) is also conducting a review. Submissions from community organisations have argued that the use of ISDS to obtain huge awards contradict Australia's commitments to human rights, undermine its aid and

development programs and harm Australia's reputation and relationships with developing countries. PNG is our nearest Pacific Island neighbour.

ISDS is excluded from the Australia-European Union trade negotiations and currently from the giant Regional Comprehensive Economic Partnership (RCEP) agreement with China, Japan, South Korea, New Zealand and the 10 ASEAN countries. Community organisations argue that ISDS should also be excluded from all Australia's trade and investment treaties.

Source: Dr Patricia Ranald, Australian Trade and Investment Network (AFTINET) in Michael West Media, 27 Oct. 2020. Edited A Healey.

IN BRIEF

Regional Comprehensive Economic Partnership (RCEP)

This so-called free trade agreement was signed on 15th November by the 15 participating countries in Asia and the Pacific. It was only then made public. It will come into force when it is ratified by the governments of Australia, China, Japan, New Zealand and South Korea, together with the 10 members of the Association of South-East Asian Nations (ASEAN) - Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. Originally RCEP included India also but India withdrew

when it judged that it would not benefit from entering into this agreement. It was particularly concerned about its harmful impact on India's agricultural sector.

In terms of populations and economies, RCEP is the largest trading bloc in the world, with over 30% of the world's people and just under 30% of global Gross Domestic Product (GDP).

There will be a summary analysis of RCEP in the next Bulletin.

What our network members are engaged in

Nest year we will report on the range of involvements of network members, based on responses to Mary's inquiry in September-October. For those who have not yet replied to her, now there is time for you to remedy that! She wrote:

1. Please list and explain briefly what you do

to advance justice in our world.

2. Do the Bulletins and Network resource papers help your work?
3. How else can the Network assist you in your work?
4. We welcome any other comments you would like to make.

Contributions to Bulletin and responses to its content are welcomed.

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The Bulletin is currently produced by two networks: *Justice and Trade Agreements* and *Human Trafficking*.

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