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Divided WTO membership miss Doha Round deadline

Deep differences among member states continue to dog the Doha Round trade talks at the WTO, as negotiators missed a 31 July deadline to draw up a work programme for concluding the Round. Developing countries have called for a credible development-oriented outcome from the Round, with many rejecting moves to readjust ambition levels in a way that would unduly advantage the developed countries.

- No progress on delivering DDA work plan, report DG and chairs – *p2*
- South stress on developmental outcomes for Nairobi MC10 – *p4*
- Azevedo rebuffed at TNC by Brazil, India, G33 and LDCs – *p7*
- Azevedo pursuing his controversial ideas to help US, other ICs – *p9*

Also in this issue:

Consensus on post-2015 development agenda struck behind closed doors *p12*

No aid, no tax, no development *p23*

UN committee adopts sovereign debt restructuring principles *p17*

Public agenda, private players *p26*

Contents

CURRENT REPORTS

- 2 No progress on delivering DDA work plan, report DG and chairs
- 4 South stress on developmental outcomes for Nairobi MC10
- 7 Azevedo rebuffed at TNC by Brazil, India, G33 and LDCs
- 9 Azevedo pursuing his controversial ideas to help US, other ICs
- 10 ITA-II tentative accord not commercially meaningful
- 12 Consensus on post-2015 development agenda struck behind closed doors
- 17 UN committee adopts sovereign debt restructuring principles
- 19 States asked to effectively control culture fund activities

OPINION

- 23 No aid, no tax, no development
- 24 Argentina and the ISDS system

ANALYSIS

- 26 Public agenda, private players

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No progress on delivering DDA work plan, report DG and chairs

WTO member states, which remain far apart on many areas of the Doha Round trade negotiations, were unable to meet a 31 July deadline to forge a work programme for concluding the Round.

by Kanaga Raja

GENEVA: There is a continued lack of convergence among the membership, resulting in missing the 31 July deadline on delivering on the post-Bali work programme, the Director-General of the World Trade Organization (WTO) and the chairpersons of the various Doha Round negotiating bodies reported at a formal meeting of the WTO's Trade Negotiations Committee (TNC).

A November 2014 WTO General Council decision had mandated that the deadline for agreeing on a "clearly defined" work programme on the remaining Doha Development Agenda (DDA) issues shall be July 2015.

According to trade officials, at the formal TNC meeting held on 31 July, the chairs of the negotiating bodies reported that they were not in a position to say that members have achieved the necessary convergence. While the level of engagement had improved, there remained profound differences among the membership.

The chairs and Director-General Roberto Azevedo told members that if they do not shift gears and move towards more textual-based negotiations, not much will be achieved at the 10th Ministerial Conference (MC10) of the WTO to be held in Nairobi this December, trade officials added.

In statements after the reports of the DG and chairs of the negotiating groups, developing countries continued to stress that the Rev. 4 draft agriculture modalities text and the Rev. 3 draft NAMA (non-agricultural market access) text should be the basis for the negotiations. They also underlined that the issues of Special Products (SP) and Special Safeguard Mechanism (SSM) are "must-haves" for MC10, and that the LDC (least developed country) package, cotton and development outcomes are also essential for a successful outcome at MC10. (The following two articles report on member states' statements at the TNC meeting.)

Earlier, in his report as Chair of the TNC, DG Azevedo told the formal TNC

meeting that "we have not seen the progress we need to deliver a work programme, as mandated, by today's deadline."

The tough political calls have not been made, and "we have not seen sufficient flexibility in members' positions," he added.

Referring to the reports of the chairs (see below), the DG said that as of today, "we do not have a proposed work programme on the table."

"So members must now face the reality of the situation. We will not be able to deliver on the instructions given to us by Ministers to deliver a 'clearly defined' work programme on the remaining DDA issues by July 2015."

The "mandate to deliver the work programme" will lapse at midnight of 31 July, Azevedo said, adding that, while this was a very disappointing result, it should not become an obstacle to achieving outcomes in Nairobi in December.

(Since the launch of the Doha Development Round negotiations in November 2001, the WTO has missed several deadlines, but Azevedo's statement about the mandate lapsing, echoing the views of the United States, was the first time perhaps that such a claim has been advanced by the WTO DG, trade observers noted.)

"This missed deadline does not represent a barrier to delivering in Nairobi – but it should be a wake-up call about our prospects for success," he said.

While there had been excellent engagement on the DDA issues, "still we have not made sufficient progress to deliver a work programme."

Substantive progress towards convergence has remained very limited. There are still huge differences in expectations. The red lines don't overlap, he said.

"We will need to see a step-change in members' flexibility and political engagement if we are to make progress."

Azevedo said that when members return in September (after the summer recess in August), they will need to move on from questions of process and instead put an intense, relentless focus on substance.

The DG said he can see potential outcomes in a number of areas, particularly on the LDC issues, but it will depend on how fast members can move in the second half of the year.

"I think the most important thing we can do today is send a united message that we are all committed to delivering real outcomes in Nairobi – and that this is our number one priority."

Referring to a number of papers that have been put forward in recent days, including from the African, Caribbean and Pacific (ACP) Group and the G90, the DG said, "We will need to see more such initiatives after the summer. Putting clear proposals on the table will be essential in spurring meaningful discussions on substance, narrowing down the gaps and starting to shape the outline of the final outcomes."

"So, while we have missed a deadline today, this is not the end of our discussions on what we can achieve in Nairobi, or on the DDA issues more broadly. Rather, this is where the really tough work starts."

Azevedo urged the membership to come back in September with ideas on substance, but better still, to come back with proposals.

"In addition, we must be prepared to tackle all of the issues on the table. We simply won't have the time to sequence our work. We will need to engage on all fronts immediately – and particularly the LDC issues," he said, adding that there is still a real chance of delivering meaningful outcomes in Nairobi.

Little substantive progress

The DG's statement was preceded by the reports of the chairs of the various Doha Round negotiating bodies.

According to trade officials, the Chair of the Special Session of the Committee on Agriculture, Ambassador John Adank of New Zealand, said that overall there has been little substantive progress to report.

The consequence of this was that he was not in a position to advise members of any agreement on a clearly defined post-Bali work programme. This was a reality check and a wake-up call.

On the Blue Box, he could see some potential convergence because there are no limits on the Blue Box. But there are no signs of a breakthrough in domestic support. There is this whole issue of contributions by all major subsidizers versus the need to have exceptions among certain players.

There is also the question of whether a country which does not have the Amber Box should have to cut *de minimis* support. This is a hugely divisive issue. Political doability in this area remains challenging particularly for larger members.

The Chair said progress in domestic support is fundamental for unlocking wider progress.

On the issue of market access in agriculture, Adank said there is a willingness to explore alternative tariff reduction approaches. There is a big question among members in terms of what the relationship is between tariff cuts in NAMA and those in agriculture.

When you look at alternative approaches, are you talking about cuts in average or average cuts? Are you talking about targets? How do you ensure less than full reciprocity, he asked.

According to the Chair, many members say that although there is a reduced level of ambition, there must be a substantive outcome vis-a-vis the status quo if it is going to be politically viable.

On export competition, Adank said that everybody agrees on the importance of eliminating all forms of export subsidies. He pointed out that this was an agreement that was already reached by Ministers 10 years ago in Hong Kong. But the consensus about export credits and in-kind monetization (of food aid) are areas where an agreement is elusive.

Some members are now renewing calls for disciplines on export restrictions or export prohibitions, said the Chair.

He also said that cotton needs to be part of any outcome. The link to the broader agricultural situation is no longer viable. Members cannot wait for wider developments but need to engage on this now, he said.

The Chair said that there is no evidence of any substantive progress on the issue of public stockholding for food security purposes. There has been a general willingness though to recognize the need to build consensus.

The Chair of the NAMA negotiat-

ing group, Ambassador Remigi Winzap of Switzerland, said that while there has been engagement, there has been a lack of concrete proposals.

There is less of members operating in silos, and they do look at things more horizontally, at least in terms of agriculture and NAMA, and members are much more open to alternative approaches to the Swiss formula. However, there is significant divergence among the key players, particularly on conceptual issues, like how the market access negotiations fit into the context of a development round.

There are big differences in terms of the level of expected contributions from others, and in terms of the value of cutting "water" versus new tariff bindings. So what he has seen in 2015 is only very limited progress on NAMA, and not very much convergence.

The challenge is to identify the level of ambition, and to do that, more numbers-based proposals are needed.

Members need to decide whether or not to use the Rev. 3 NAMA text. But this argument of whether to use Rev. 3 or not is hindering progress. Members need to be encouraged and not deterred from putting forward proposals, he said.

No convergence

The Chair of the Council for Trade in Services in Special Session, Ambassador Gabriel Duque of Colombia, reported that despite best efforts, it has not proven possible to come up with a work programme. There is no convergence towards any text on a work programme.

He however said that even without a work programme, it should be possible to continue to advance towards a significant result in Nairobi.

The request-offer approach is the principal negotiating method for services, so revised offers will be necessary. This needs to be done as soon as possible, if services are not to hold up agreement in Nairobi.

The Chair of the Negotiating Group on Rules, Ambassador Wayne McCook of Jamaica, said there are some participants who have been reluctant to engage on rules until they understand and know better the extent of progress in agriculture and NAMA. Others say that the sequencing approach does not work because it will mean running out of time.

He noted that a number of papers have been put forward which seek to identify "recalibration". There has been very limited movement, but it is very important to advance these negotiations ahead of Nairobi.

Some delegations say that it is indispensable to have an outcome on rules, otherwise it is impossible to envisage any kind of substantive outcome. Papers are needed that outline what is doable by Nairobi, he said.

The Chair of the Trade and Development Committee in Special Session, Ambassador Yee Woan Tan of Singapore, highlighted the G90's proposal which details textual suggestions on special and differential (S&D) treatment for developing countries.

The Chair of the Committee on Trade and Environment in Special Session, Ambassador Wiboonlasana Ruamraksak of Thailand, reported that delegations are willing to contribute constructively once they have a better understanding of the way forward in other areas. Sequencing is very much at work here.

The question of an agreement on environmental goods and services has been impacted by the fact that a subset of members are negotiating an environmental goods agreement, she said.

The Chair of the Dispute Settlement Body in Special Session, Ambassador Ronald Saborio of Costa Rica, said that members have explored a universe of issues that could lead to an ambitious package of results. Possible contours of a successful outcome have emerged. The time has come to reap the benefits of this work by concluding these negotiations.

The number and complexity of cases that have been submitted reveals the need to enhance the efficiency of the dispute settlement procedures, he said.

The Chair of the TRIPS Council in Special Session, Ambassador Dacio Castillo of Honduras, said delegations remain hesitant to engage because of a lack of clarity in the overall picture.

The issue that divides the membership is that a group (proponents of proposal TN/C/W/W52, comprising both developed and developing countries) is calling for negotiations to extend geographical indications (GI) of origin to products other than wines and spirits, and to broaden the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to take into account the progress that has been made in the Convention on Biological Diver-

sity (CBD, on issues such as genetic resources, traditional knowledge and benefit sharing).

There are others that say there is no mandate to negotiate the GI extension or the CBD elements. And they are

not ready to engage as long as the "W52" group keeps putting forward these proposals. So, there seems to be a difficult time in getting any kind of substantive reengagement, said the Chair. (SUNS8075) □

South stress on developmental outcomes for Nairobi MC10

In their statements at the 31 July Trade Negotiations Committee meeting, developing countries underscored the need for the forthcoming WTO Ministerial Conference in Nairobi to yield development-friendly results.

by Kanaga Raja

GENEVA: A number of developing countries at the formal meeting of the WTO Trade Negotiations Committee on 31 July underlined that the upcoming 10th Ministerial Conference (MC10), taking place for the first time on the African continent, must deliver on development outcomes, in particular for the African and least developed countries.

In statements following the reports by the Chair of the TNC and the chairs of the various Doha Round negotiating bodies, the African Group, for instance, said that the Nairobi Ministerial, taking place on the most marginalized continent, presents an opportunity for the WTO to deliver development outcomes.

The African, Caribbean and Pacific (ACP) Group said that any final development outcome at the Nairobi MC must be of benefit to developing countries, in particular Africa.

Developing countries who spoke at the TNC, either in group statements or on their own, generally continued to stress that the Rev. 4 draft agriculture modalities text and the Rev. 3 draft NAMA text should be the basis for the negotiations.

They underlined that the issues of Special Products (SP) and Special Safeguard Mechanism (SSM) are "must-haves" for MC10, and that the LDC package, cotton and development outcomes are also essential for a successful outcome at MC10.

The issues of special and differential (S&D) treatment and less than full reciprocity were also highlighted by the developing countries. They stressed that all mandates including the 2001 Doha Ministerial Declaration, the July

2004 Framework Agreement, the 2005 Hong Kong Ministerial Declaration and the 2013 Bali Ministerial Declaration remain valid.

The G20 developing-country grouping underlined that agriculture would define the level of ambition for all other areas, and that recalibration cannot compromise the important reforms that were to be made in agriculture under Rev. 4.

India highlighted, amongst others, the centrality of the "development dimension" as enshrined in all the Ministerial Decisions starting with the Doha Declaration, and that "less than full reciprocity" and S&D within and across all negotiating areas are non-negotiable.

India also underlined that a permanent solution on public stockholding for food security purposes is an essential deliverable at Nairobi (see following article for a more detailed report on India's statement).

Bridging differences

According to trade officials, Barbados, on behalf of the ACP Group, said that all mandates including the 2001 Doha Ministerial Declaration, the July 2004 Framework Agreement, the 2005 Hong Kong Ministerial Declaration and the 2013 Bali Ministerial Declaration remain valid.

There is a need for members to continue the work, Barbados said, adding that elements in a paper put forward by the ACP Group could lead to bridging differences. (The ACP paper is on bridging gaps on the remaining DDA issues and development outcomes for MC10.)

Barbados stressed the importance of cotton and underlined that the Rev. 4 draft agriculture modalities text should be the basis for any kind of market access in agriculture. It is very important that flexibilities be preserved for LDCs and the Small and Vulnerable Economies (SVEs).

It also stressed the need for a substantive outcome in domestic support in agriculture. It said that the issues of SP and SSM, tropical products and tariff escalation need to be addressed.

On non-agricultural market access (NAMA), it said that flexibilities made available to LDCs and SVEs in the Rev. 3 draft modalities text need to be preserved. On non-tariff barriers (NTBs), Barbados said it is looking to see perhaps a working group set up, similar to the working groups on trade, debt and finance, and on transfer of technology.

On services, Barbados noted that there are 60 proposals on the table. Annex C of the Hong Kong Ministerial Declaration should be the basis for the negotiations. It would like to see the qualification standards that are being applied to services professionals by many developed countries relaxed or eliminated. This would facilitate greater Mode 4 access.

Since the WTO Ministerial Conference will be taking place in Africa for the first time, any final development outcome must be beneficial for developing countries and Africa in particular. This would mean some kind of firm agreement on cotton, and an outcome on specific proposals on S&D.

With only 14 working weeks left after the summer break, members will need to increase the level of intensity, said Barbados.

Bangladesh, on behalf of the LDCs, said that the ACP and G90 (on textual suggestions on S&D) papers are important contributions. Members cannot shift from the emphasis on the implementation of the Bali decisions, particularly the four that pertain to the LDCs.

The LDCs would like to see substantive reductions in overall trade-distorting domestic support (OTDS) by the major subsidizers in agriculture, with the LDCs exempt from any reduction commitments.

On NAMA, the issue of preference erosion needs to be addressed, as well as NTBs. And there is a need to bind the duty-free, quota-free market access provisions into the schedules of the developed countries.

On services, Bangladesh said that with respect to the LDC services waiver, it needs to see a much larger number of notifications coming from the rich countries.

The LDCs should not be required to make any kind of commitments, and there is a need for trade-related technical assistance.

Bangladesh stressed that an LDC package must emerge from Nairobi. This is essential and the major players need to show leadership to get there, it added.

A meaningful outcome

Lesotho, on behalf of the African Group, stressed the need for a result to emerge in the coming weeks that would enable members to achieve a meaningful outcome in Nairobi. A new mandate for the negotiations is not needed, Lesotho said, noting that the DDA mandate is already there. There are no other guidelines for these negotiations.

The Nairobi Ministerial, taking place on the most marginalized continent, presents an opportunity for the WTO to deliver development outcomes.

There is a need for agreement in agriculture, NAMA and services. There is also a need for all the three pillars in the agriculture negotiations (i.e., market access, domestic support and export competition) to be addressed.

There must be an outcome on domestic support in agriculture, the African Group underlined. The Rev. 4 draft agriculture modalities text is a good basis for the negotiations, it said, highlighting also the importance of SP and SSM.

There must also be a solution for cotton based on the 2004 framework and the 2005 Hong Kong Ministerial Declaration. The needs of net-food importing developing countries must be maintained as well.

On NAMA, the African Group said that the Rev. 3 draft modalities text is the basis for the negotiations. There must be S&D and less than full reciprocity.

Switzerland, on behalf of the Friends of the System group comprising about 50 developed and developing members, said that it shared the concerns about the state of the DDA. There is a need for results for MC10. It was disappointed at not being able to agree on a work programme.

It is determined to develop a pack-

age of credible outcomes for MC10. There must be an outcome that is realistic. It called on the larger members to show leadership to make sure that MC10 is a success.

On behalf of the G10 grouping, Switzerland said that the group is ready to make a contribution but there must be a balance in terms of the areas that are of interest to the G10. It cannot accept tariff capping.

On its own behalf, Switzerland expressed appreciation for the G90 and ACP proposals.

The WTO is at a crossroads. Are members really intent on concluding the Doha Round, or are they prepared to see the negotiations on the DDA continue as a kind of negotiating "zombie", it asked.

According to Switzerland, an ambitious package is not possible, but a minimalist package is not viable either. It highlighted the need for outcomes in agriculture, NAMA and services, as well as all three pillars of agriculture.

Indonesia, on behalf of the G33 developing-country grouping, said that the Rev. 4 draft agriculture modalities text must be the basis for the negotiations. SP and SSM are "must-haves" for success at MC10. There is also a need for action on the issue of public stockholding for food security purposes, it said.

On its own behalf, Indonesia said that it wants the process to go forward in a transparent and inclusive manner. Members need to be open-minded and recalibration should not be an occasion to cherry-pick issues.

Brazil, on behalf of the G20, said that all the mandates must be respected. S&D and less than full reciprocity are the key. All three pillars are essential. The Rev. 4 text is the point from which members should be negotiating. It is a step in the direction of reforming agriculture.

Brazil underlined that agriculture would define the level of ambition for all other areas. Recalibration cannot compromise the important reforms that were to be made in agriculture under Rev. 4.

Speaking for itself, Brazil said that there is a need to revise the concepts of "realism" and "doability."

There is no possibility of concluding an agreement without the three pillars of agriculture, especially with respect to subsidy reductions in domestic support. This is something that can-

not be done in any other forum and must be done here, it said.

There cannot be any outcome that indicates a lack of balance between agriculture, NAMA and services, said Brazil, adding that it will reject upfront any proposal that would maintain or worsen the disadvantaged position of agriculture in the WTO.

Australia, on behalf of the Cairns Group, said that a meaningful outcome is needed on all three pillars. It is difficult to believe that any member could sell domestically any conclusion to the Doha Round that is devoid of meaningful results.

It noted that the major players are very far apart. The outcome of the meetings that have been held is disappointing, but an agreement is still possible.

There is a need to advance the reform process in agriculture and remove the barriers and imbalances inherited from the Uruguay Round, it said.

On domestic support, it said that there is scope for major subsidy reductions by the major subsidizers, which would still retain their policy space. An outcome on market access in agriculture would only be acceptable if it supports progress in the reform process. On export competition, it said that it is important to fulfil the mandate set by the Hong Kong and Bali Ministerial Declarations.

On behalf of itself, Australia said that members need to come back in September and define specific elements in concrete detail.

Chinese Taipei, on behalf of the Recently Acceded Members (RAMs), voiced disappointment over the failure to reach agreement on the work programme. This was not ever the objective in and of itself, however; the objective was to reach something important in Nairobi.

Saudi Arabia, on behalf of the Arab Group, said that members are at a critical juncture. The credibility of the WTO is at stake. The inability to get a work programme creates doubts that the WTO can have a successful Ministerial in Nairobi and conclude the Doha Round.

There is a need for a more focused approach but no outcome will be credible without taking into account S&D and less than full reciprocity.

Mali, on behalf of the Cotton-4 grouping, said that an ambitious outcome on cotton is critical and the group will put forward a new proposal in Sep-

tember.

Guatemala, on behalf of the SVEs, said that it is important that the flexibilities for the SVEs are preserved in the agriculture, NAMA and fisheries subsidies texts. If there is a lower level of ambition, then the contribution of the SVEs should be revised downwards.

Turkey voiced frustration at having missed another deadline, but in light of the last-minute breakthroughs that members have had in the last couple of years, it remained hopeful that MC10 can produce some meaningful results.

Members have to stop negotiating from static positions, Turkey said. There is a need for a fair outcome. If members fail to deliver at the WTO, the result is going to be an unbalanced outcome for many (in apparent reference to bilateral and regional agreements). A non-outcome in Nairobi would result in a diminished role for the WTO, it said.

Chile said that it does not have a great deal of hope that members will have a robust package in Nairobi. It said that members have been engaging but they have not yet reached a point where they are actually seeing convergence.

Members should not negotiate from entrenched and static positions, said Chile. If there is no successful outcome in Nairobi, it will leave the Doha Round in a permanent "zombified" state, it said.

Change of approach

The European Union said that despite the positive spirit that filled the WTO after MC9 and in particular after the resolution of last year's stalemate on the Trade Facilitation Agreement, members have not been able to advance as much as they would have liked on the DDA.

"While we were slowly, for several months, moving away from old ideas that didn't work in the past and starting to consider promising ideas on a without-prejudice basis, the most recent debate in the negotiating groups showed that some members have hardened their views. We will need to find the right ways to recover quickly after the summer break the progress that we had achieved and move forward."

The numerous discussions the EU has had over the last few months have clearly showed that a change of approach was needed to reach an acceptable compromise. Although this may be

difficult for some to hear and even more difficult to accept, the lessons from this exercise have been clear: if any deal is to be reached, then the ambition has to be lower than in 2008, and this adjustment needs to take place across all negotiating areas, said the EU.

The discussion on domestic support and market access clearly showed what is and what isn't possible. Those who shut their eyes to this reality and demand high levels of ambition on the one hand, yet coupled with flexibility regarding their concessions on the other, are merely pushing this organization toward another failure.

According to the EU, there is a need to target a different level of ambition than in 2008; to accept that no member will give concessions requiring major reforms of its trade and agricultural policies; to ensure proportionate contributions within and across all areas by all key WTO members, in line with their roles in international trade, while of course bearing in mind the development orientation of the Round.

"This recipe is the best hope to advance. Unfortunately, it has not yet been sufficiently accepted by all."

The EU said it is deeply worried that there are also more fundamental differences with regard to the interpretation of the significance of MC10.

For some, including the EU, the Nairobi Ministerial is the last stop to have a meaningful and full DDA outcome. At the same time, some others seem to consider that a partial outcome could be pursued in Nairobi and that the DDA process could then continue levitating unharmed for many more years.

"While some mini-deliverables may have contributed to maintain a certain momentum in the past, this is no longer a valid option at this juncture. Already today, the negotiating function of this organization is not delivering on the issues and at the pace expected by the world's traders. MC9 provided us all with a bit of breathing space, but if we do not use this chance to advance on the DDA, the attention will entirely move elsewhere."

While it is undisputable that agriculture is the central element of the Round and will need to be resolved in order to get any feasible deal, all issues need to advance in parallel. Otherwise, in fact, all of the individual issues will remain blocked as all are somehow interlinked.

Domestic support is clearly the ambition setter of what can be achieved in the DDA. However, discussions have proven that the only realistic way forward is to focus on an outcome which respects members' current policies, but also restrains trade-distorting support by introducing constraints and eliminating loopholes so as to encourage further reform. Focusing on OTDS may in fact be the only way to advance.

Market access needs to be adjusted to today's reality and needs to be considered horizontally in the sense that similar recalibration must occur in both

agricultural market access and NAMA. They involve recalibration by a certain factor, simplification and flexibility for all members in implementation (i.e., an "average tariff cut" approach). In this approach, there is no room for unrealistic expectations, such as on tariff rate quotas.

The EU said there is willingness to advance toward a good outcome on export competition, but only as part of a broader DDA package. Export competition has to be part of any DDA deal but it cannot be the only element of an outcome. (SUNS8076) □

Azevedo rebuffed at TNC by Brazil, India, G33 and LDCs

Speaking at the TNC session, representatives of several developing and least developed countries opposed moves that would result in an imbalanced, watered-down outcome for the Doha Round.

by D. Ravi Kanth

GENEVA: Brazil has delivered the strongest message yet to its former trade envoy Roberto Azevedo, who is now the Director-General of the WTO, and developed countries that Brasilia will not accept the current efforts to undermine strong disciplines for subsidy reduction commitments in domestic agricultural support, nor a truncated version of commitments in the agriculture package of the Doha Development Agenda.

The strong message from Brazil, and equally strong messages from India, the Indonesia-led Group of 33 coalition of developing countries and the LDCs, at the 31 July meeting of the Trade Negotiations Committee in effect served notice that they would not agree to the efforts of the WTO DG promoting the agendas of the US and the EU to somehow wind up the Doha Development Round and resile from their commitments (at Marrakesh in 1994) to reverse course on their highly protected agriculture sector and bring their agriculture trade under WTO-GATT trade disciplines.

Agriculture's "disadvantaged position"

Speaking at the formal meeting of the TNC before the WTO's summer break, the Brazilian Ambassador to the WTO Marcos Galvao said categorically that Brasilia will reject upfront any stratagem that aims to torpedo substan-

tial reduction commitments in the domestic support pillar of the Doha Round agriculture negotiations.

"We will reject upfront any approach, formula, benchmark, schedule, modality or proposal the result of which could amount to maintaining or worsening the disadvantaged position of agriculture within the multilateral trade regime," Galvao told the TNC chair and major developed countries.

Galvao made mincemeat of the Director-General's common refrain that members must set their sights on what is "doable" and focus on "doability." "The focus of 'doability' has to be not on WHAT we can do, but rather on HOW we can do what we ultimately HAVE to do," he told the TNC meeting.

Without naming the United States and other developed countries, which are seeking to lower the level of ambition under the guise of "recalibration", the Brazilian envoy said "reluctant though certainly well-meaning partners have to face reality and recognize, for example, that we will have to make progress vis-a-vis the status quo in the three pillars of agriculture – and also that we must have meaningful results on the development front."

At a "green room" meeting two days before the TNC meeting, Azevedo had asked members why they cannot settle for a meaningful outcome in one pillar (see following article).

The US had suggested at the same

green room meeting that the red lines of some members in domestic support are overlapping, indicating that it would be difficult for members to explore substantial reduction commitments in domestic support. The US also maintained that it can deliver on issues in the export competition pillar and the Blue Box domestic support.

Many members were surprised when Azevedo repeated the US statement at the TNC meeting when he said that "red lines are overlapping." It is not clear why the Director-General had used the language of the statement that was made by the US first at an informal trade ministers' meeting in Paris in early June and later at the green room, said a trade envoy familiar with the two meetings.

In sharp response to those countries seeking "recalibration" based on the Director-General's "doability" strategy on domestic support, Galvao said "they will have to recognize that any viable outcome requires movement in domestic support as a necessary condition."

"We all know that is one big issue that cannot be dealt with elsewhere," the Brazilian envoy argued.

"I have seen no reference to disciplining domestic agriculture subsidies in the context of mega-laterals or plurilaterals ... And this despite the immense distortions such subsidies cause to global trade, in a way that is especially damaging to developing countries," he maintained.

In response to the Director-General's advice to members that they should all come prepared to discuss "substance" after the summer break, Galvao said: "The holidays should also serve to put an end to the apparent illusion entertained by a few that we could once again end up with agriculture left behind with close to zero progress, while on other fronts, including NAMA, services and rules, there could be broader movements, even if related only to policy space."

"That is not going to happen," he said emphatically. "Brazil, for one – and I know we are not alone – will not be part of any attempt to build consensus upon any kind of unbalanced outcome," the Brazilian envoy argued.

Brazil "will continue to be engaged in discussions with a strong and permanent focus on balance, symmetry and fairness – working with the 2008 mo-

dalities as reference, particularly for any adjustment of ambition, and also, of course, taking up our more recent discussions."

Galvao's final suggestion for the summer to Azevedo and major developed countries was that "if there may be in this room, or outside, the notion that some of us need a meaningful result here in the WTO more than others, we should do our best over the vacations to let it vanish from our minds."

"I say this because such a misperception, that occasionally I sense here and there, could lead to serious, possibly consequential miscalculations. The only premise in a successful negotiation is that, despite naturally different perspectives, we all collectively need this."

No common understanding

In a similar vein, India also served a powerful message to the Director-General and major developed countries who want to now proceed on the basis of "substance" without finalizing the work programme. "There is no common understanding yet on what recalibration, simplification or lowering of ambition mean in practical terms or on the alternative approaches," India's Ambassador Anjali Prasad said.

She said "despite intensive engagement, the stark reality is that we do not have a clearly defined post-Bali work programme as mandated, which is disappointing." In short, "the consequence is that we neither have a narrowed down list of issues central to the conclusion of Doha nor a direction for further negotiations," she argued.

In the absence of a work programme, said Prasad, members must follow 10 important parameters which should form the "bedrock" of work from September. The 10 points are:

- First, we should not lose sight of the centrality of the "development dimension" as enshrined in all the Ministerial Decisions starting with the Doha Declaration.

- Second, less than full reciprocity and special and differential treatment within and across all negotiating areas are non-negotiable.

- Third, we need to respect all Ministerial mandates and Decisions relating to the DDA, and not ignore the work done by members at various stages since the Round was launched.

Relying on mandates where convenient and disregarding them where not, would not be the way to go.

- Fourth, agriculture remains central to any outcome in the Round. It would be the bellwether in calibrating the level of ambition across all negotiating areas. Frontloading of discussion on all its three pillars with equal priority is therefore necessary to move us forward and ensure balanced outcomes in all other areas of negotiations.

- Fifth, we believe that the Rev. 3 and Rev. 4 texts provide a good basis for further work in NAMA and agriculture. We have been open to looking at new ideas and alternative approaches but do not see the possibility of a breakthrough unless there are clear and actionable proposals.

- Sixth, recalibration with a lowering of ambition cannot happen if it leads to dilution of the development quotient and is not symmetrical across all areas of the negotiations. Retention of ambition or even raising it in some areas while lowering it in others would not be helpful.

- Seventh, doability and realism cannot imply the dropping of issues and elements. All issues must remain on the table. Cherry-picking of issues has to be avoided.

- Eighth, we should avoid bringing in issues that may be divisive and counter-productive in our search for credible outcomes. Prasad referred here to suggestions made by some members that question the existing WTO legal framework of treating developing countries as a homogenous category.

- Ninth, it is important that we maintain transparency and inclusiveness in the run-up to the Ministerial Conference, and follow a member-driven and bottom-up approach. It should be our collective endeavour to complete work on Nairobi outcomes in Geneva itself.

- Lastly, we do not subscribe to a Nairobi "make it or break it" narrative or conclusion of the Round at any cost or in any manner whatsoever. India believed that the Round cannot be completed without a credible outcome on the development dimension.

Prasad criticized the outgoing chair of the Doha Round agriculture negotiations, Ambassador John Adank of New Zealand, on his concluding statement. Disagreeing with Adank's argument that there is policy space for coun-

tries to undertake new commitments, India said emphatically that "the availability of policy space cannot be a metric for undertaking commitments which, as has been the practice in WTO, [are] based on bound levels."

"Moreover, it is anomalous to equate the policy space of developing countries – the need for which is recognized by the relevant S&D provisions of WTO law – and that of developed countries," she told the meeting.

Prasad argued that the outgoing chair's report "appears to equate the elements of market access such as tariff peaks, escalation etc. with special and differential treatment." "I would stress that S&D is an abiding principle that informs all elements and pillars of the negotiations and is not to be treated as just another element," she argued.

She also chastised the chair's statement for linking the alternative approaches to tariff reduction and the Special Safeguard Mechanism (SSM). "As my delegation has repeatedly pointed out with the support of several developing countries, the inclusion of SSM is a given that flows from the mandate. The inclusion of SSM in the final package is not contingent upon the type of tariff reduction modalities that are adopted and is a standalone," she said categorically.

Prasad disagreed with the chair's assessment of potential solutions to the issue of public stockholding for food security inasmuch as there is no convergence on devising a permanent solution on the basis of elements from the Bali decision.

"The only proposal on the table is that submitted by the G33," she said, adding "we are deeply concerned that members are not engaging meaningfully on that proposal and instead asking for alternatives to be explored."

"As India has repeatedly pointed out, a permanent solution to this problem is an essential deliverable at Nairobi," Prasad emphasized.

On the report by the chair of the NAMA negotiations, India said it does not share the perception that the division of substance into smaller bits would facilitate progress as the NAMA elements enumerated by the chair are closely interlinked. In India's view, it is only on the basis of wholesome proposals covering all elements that meaningful discussions are possible.

(continued on page 16)

Azevedo pursuing his controversial ideas to help US, other ICs

A closed-door meeting held prior to the TNC session saw a continued push to steer the Doha Round negotiations on domestic farm support towards an outcome that would unduly favour the US and other industrial countries.

by D. Ravi Kanth

GENEVA: Despite widespread opposition from developing countries to shifting the goalposts for reduction commitments in domestic support, WTO Director-General Roberto Azevedo has persisted with his controversial ideas that would be tantamount to establishing new templates for helping the United States and other developed countries, trade envoys told the *South-North Development Monitor (SUNS)*.

At a closed-door "green room" meeting on agriculture domestic support on 29 July, the Director-General said there is no convergence among major players on what needs to be done in domestic support at this juncture. The green room meeting was with over 30 trade envoys.

The US trade envoy Michael Punke concurred with Azevedo's assessment that there is zero evidence of any convergence at this juncture on domestic support.

Azevedo then went on to pose some questions on domestic support. For example, the Director-General asked the participants drawn from developed, developing and least developed countries whether they are prepared to "live with" an outcome in only one pillar.

The Doha Round agriculture negotiating mandates – the 2001 Doha Ministerial Declaration, the July 2004 Framework Agreement, the 2005 Hong Kong Ministerial Declaration and the unsettled 2008 revised draft modalities – provide for substantial and significant reduction commitments on tariffs in market access, domestic subsidies, and phasing out of export subsidies and export credits. There is an internal balance constructed between the three pillars of market access, domestic support and export competition.

Besides, there is also an external balance between agriculture and market access for industrial goods and other areas. The Hong Kong Ministerial Declaration has clearly stipulated the principle of equivalence between agriculture and non-agricultural mar-

ket access in paragraph 24: "... we instruct our negotiators to ensure that there is a comparably high level of ambition in market access for Agriculture and NAMA. This ambition is to be achieved in a balanced and proportionate manner consistent with the principle of special and differential treatment."

When he was Brazil's trade envoy (until 2012), Azevedo had publicly campaigned to ensure that the balance between the three pillars as set out in the so-called Rev. 4 or 2008 revised draft agriculture modalities must not be changed. For example, he had said: "The December 2008 draft modalities are the basis for negotiations and represent the end-game in terms of the landing zones of ambition. Any marginal adjustments in the level of ambition of those texts may be assessed only in the context of the overall balance of trade-offs, bearing in mind that agriculture is the engine of the Round..."

"The draft modalities embody a delicate balance achieved after 10 years of negotiations. This equilibrium cannot be ignored or upset, or we will need readjustments of the entire package with horizontal repercussions. Such adjustments cannot entail additional unilateral concessions from developing countries."

Fundamental questions

Against this backdrop, Azevedo's question at the 29 July green room meeting on whether the participants are prepared to "live with" an outcome in only one pillar raises some fundamental ethical questions about the integrity of the process and what he has in mind, said a participant after the green room meeting.

In the face of a firm disapproval from the trade envoys to an outcome only in one pillar, Azevedo told the trade envoys to think a lot about his question. The Director-General said domestic support in itself is very com-

plex and if members make linkages then it would become more difficult.

"Since the majority would need outcomes on all three pillars, the question to ask is can you live with an outcome only in one pillar," the Director-General maintained, according to a participant from South America.

"If not, how would you close the gaps in other two areas [market access and export competition pillars], and if policy space exists, what is your problem?" he apparently asked, according to the South American participant.

By asking these questions, Azevedo is suggesting two things: (1) arriving at domestic support commitments based on the 2008 revised draft modalities which are negotiated on the basis of the ministerial mandates of the 2004 July Framework Agreement and the 2005 Hong Kong Ministerial Declaration is out of the question; and (2) he is implicitly asking the developing countries why they are resistant to undertaking fresh commitments if they have policy space.

Under the existing Doha Round mandates, the developing countries are exempt from undertaking any commitments in aggregate minimum support and *de minimis* (many of them did not have any commitments in the Uruguay Round). China is also exempt under the recently acceded member flexibility.

Therefore, posing the question as to why countries cannot undertake commitments when they have policy space without regard to the existing mandates raises serious questions, said a trade envoy.

In a sharp response, many developing-country trade envoys present at the meeting reportedly said that they would need "credible and concrete outcomes in all three pillars of agriculture talks – domestic support, market access and export competition."

Following Azevedo's questions, the United States went on to caution countries present at the meeting that red lines in domestic support are overlapping and they must be respected. (The US was alluding to China and India as having rising subsidy payments and also their *de minimis* support is a red line for them, according to a participant.)

The US said it is not asking others to deliver in domestic support where they have red lines and therefore, others must reciprocate the same with the US, according to the participant.

The US said it is ready to agree to a

global ban on farm export subsidies in the export competition pillar. The US has thus indicated that it is ready to undertake commitments only on export subsidies in the export competition pillar but not domestic support.

During the green room meeting, the Director-General also said an outcome on rules is very important for some members. He suggested that despite demands for sequencing – i.e., an outcome in agriculture followed by market access for industrial goods and later other areas – by some countries, the proponents for improvements in rules must go ahead with their proposals.

Trade envoys from India, South Africa and Brazil, among others, dismissed Azevedo's suggestion, saying they are not going to address proposals in rules unless they have clarity on agricultural domestic support and other areas of market access.

Brazil told Azevedo that it has no shame in demanding sequencing in which outcomes in all three pillars of agriculture must be decided first before rules, according to a participant at the meeting.

India said rules are not part of the core areas of market access, while South Africa maintained that a credible outcome on domestic support is crucial for unblocking other areas.

In short, said a trade envoy, Azevedo is moving heaven and earth to ensure that there are no substantial commitments in domestic support in order to help the United States.

(The US is required to bring its overall trade-distorting domestic support below \$14.5 billion as per the 2008 revised draft modalities. But the latest US farm bill passed last year has provided for domestic support that has surpassed the \$14.5 billion limit by several billions of dollars.)

SP and SSM

Meanwhile, in the face of fierce opposition from the US for allowing Special Products and Special Safeguard Mechanism in the market access pillar for developing countries, a large coalition of over 90 countries led by the G33 farm coalition reiterated their call for "renewing development through the special products and special safeguard mechanism."

In a proposal circulated on 28 July to coincide with the 31 July Trade Negotiations Committee meeting, Indonesia, on behalf of the G33, the small vul-

nerable economies (SVEs), the African, Caribbean and Pacific (ACP) Group and Chinese Taipei, said the Special Products and Special Safeguard Mechanism ought to remain at the core of any outcome in the market access pillar.

Some members, Indonesia said in its proposal, "nowadays have argued that SP and SSM are no longer needed in the name of 'simplification', 'recalibration' and 'lowering of ambition' in market access, domestic support and export competition. This call and assertion is not only a clear disregard of the July [2004] Framework and the Hong Kong Mandate, [but] even more it is unwarranted given that the inequalities and imbalances including extensive subsidization by developed Members stand to continue".

"It should be clear to all that the

G33, since the beginning of its existence, has deemed and proposed that SP or SSM should be standalone elements of the market access pillar and they should neither be linked with any tariff reduction formula nor with a level of ambition," the developing countries argued.

"Thus, the G33, SVEs, ACP, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu deem SP and SSM as 'must haves' for a successful outcome in MC10," they maintained.

The battle lines are drawn: if the developing countries cannot remain united, then the Director-General and developed countries will have a cakewalk in rewriting the commitments of a Development Round in favour of those countries with deep pockets and protectionist barriers. (SUNS8074) □

ITA-II tentative accord not commercially meaningful

Over 50 developed and developing countries have struck a deal to further free up trade in information technology-related products, but the gains to be delivered by the agreement may have been overstated.

by D. Ravi Kanth

GENEVA: A tentative agreement reached among a core group of developed and developing countries on 18 July to expand the existing Information Technology Agreement (ITA) by adding 201 new tariff lines will not be commercially meaningful, trade envoys told the *South-North Development Monitor* (SUNS).

The agreement on an ITA-II excludes from the final list of products several big-ticket items such as liquid crystal display (LCD) monitors and various other hardware items used in mobile telephones, the envoys added.

Contrary to the astronomical claims made by the WTO Director-General Roberto Azevedo and the United States Trade Representative Michael Froman that ITA-II will generate a trade turnover of \$1 trillion, the actual gains will only be a couple of billion dollars, said a trade envoy familiar with the negotiations.

The original ITA with nil-duty treatment was concluded at the WTO's first Ministerial Conference, held in Singapore in 1996.

But ITA-II, which was wrapped up

at the official level in July due to pressure from a major developed country and the WTO Director-General, omitted what would otherwise constitute core ITA products such as LCD terminals and other state-of-the-art IT products.

Moreover, the agreement was largely based on the bilateral agreement reached between the US and China last year, and some major countries refused to add new items that were not in the US-China agreement.

Consequently, South Korea had to prune its list of products down, leaving out a number of products such as LCD terminals and other items for the sake of a compromise in which Seoul was able to get zero-duty treatment only for lenses used in complex electronics products in the Chinese market.

In a give-and-take compromise, South Korea gave up its demand for LCD terminals, valued at some \$10 billion, in return for securing access for an item such as lenses with low turnover of about \$0.5 billion. Seoul also secured a concession to place some defensive items such as two medical de-

vices in the ex-out category. The ex-outs refer to a sub-category for a main harmonized tariff line with the specific description of the ITA products.

Consequently, low-end medical devices exported by China to South Korea will get reduced access into the Korean market, while the high-end medical devices from US companies are already covered in the Korea-US bilateral free trade agreement.

Approval

The core group of countries engaged in the ITA-II negotiations needed their capitals to approve the final list of 201 tariff lines by 24 July.

[The EU, as the chair of the final round of the ITA-II negotiations, subsequently called for an ambassadors' meeting on 24 July to confirm with participants the approval by capitals of the "Declaration on the Expansion of Trade in Information Technology Products" and the list of products.

[Informing the WTO membership about this development at a 27-28 July WTO General Council meeting, the EU said that, out of the 25 participants in the ITA-II negotiations (representing 54 WTO members, counting the 28 EU member states and the EU), 22 participants have already confirmed their acceptance of the Declaration and the list.

[The participants who have accepted the list are: Albania, Australia, Canada, China, Costa Rica, EU, Guatemala, Hong Kong-China, Iceland, Israel, Japan, Malaysia, Montenegro, New Zealand, Norway, Philippines, Singapore, South Korea, Switzerland, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), Thailand and the US.

[According to the EU, the remaining three participants (reportedly Mauritius, Turkey and Colombia) are still undergoing the internal domestic procedures for approval but hope to be able to confirm soon.

[The EU said that the Declaration provides for a roadmap which should allow participants to finalize the overall negotiations in time for the Nairobi Ministerial Conference of the WTO in December.

[The negotiations on staging, i.e., timeframe for implementation, will start

(continued on page 25)

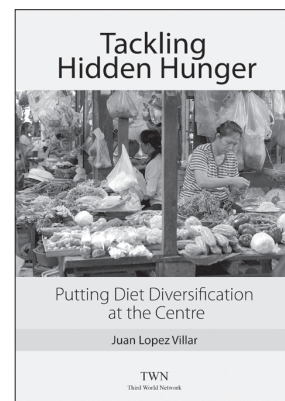
TACKLING HIDDEN HUNGER

Putting Diet Diversification at the Centre

By Juan Lopez Villar

The scourge of "hidden hunger" or micronutrient deficiency affects around two billion people worldwide who lack adequate intake of vitamins and minerals in their diet. While several international and regional initiatives are underway to combat malnutrition, and specifically micronutrient deficiency, these have largely focused on the approaches of nutrient supplementation and food fortification at the expense of dietary diversification, considered the most durable solution to hidden hunger. The development of nutritionally enhanced genetically engineered crops, such as "Golden Rice", has further attracted controversy and raises serious biosafety concerns.

For a global strategy on nutrition to be successful, this book argues, it must place central emphasis on diversifying diets.



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Consensus on post-2015 development agenda struck behind closed doors

UN member states have agreed on a landmark global agenda of development cooperation over the next 15 years, but not before going through murky last-minute talks which produced some significant compromises.

by Bhumika Muchhala, Ranja Sengupta and Chee Yoke Ling

After over eight months of intergovernmental negotiations in New York and numerous iterations of an outcome document, consensus was reached on the United Nations' post-2015 development agenda, titled "Transforming Our World: The 2030 Agenda", on 2 August.

The final round of talks had been scheduled for 20-31 July, and with continuing differences over several key issues, almost non-stop closed-door negotiations stretched into the weekend. The finalized text will be formally adopted at a summit on 25-27 September during this year's UN General Assembly session.

The post-2015 agenda's outcome document comprises, at its centre, the Sustainable Development Goals (SDGs, which are built on 17 goals and 169 targets produced by the UN Open Working Group on SDGs after negotiations in 2013-14), as well as a political declaration, a chapter on means of implementation, and a chapter on conclusion on follow-up and review. Together, this agenda is to serve as a foundation for international development cooperation for a period of 15 years, coming into effect on September 2015 and expiring in September 2030.

The framework of the SDGs and the post-2015 development agenda is the first of its kind to be characterized by universality, where all countries, both developing and developed, take on actions and steps towards sustainable development. This distinguishes the SDGs from the Millennium Development Goals (MDGs), which were essentially based on a donor-recipient model.

The Rio Declaration on Environment and Development as well as Agenda 21 adopted by heads of state and government at the 1992 Earth Summit in Rio de Janeiro contained principles, commitments and actions for developed and developing countries. However, the MDGs reduced these and subsequent internationally agreed ac-

tion plans, including on social development and women's rights, into limited goals under which developed countries' primary role was as provider of official development assistance (ODA). The obligations of developed countries related to new and additional financing, technology transfer and reform of the global economic architecture, and their own domestic actions (such as consumption and lifestyle transformation) receded. Universality thus became a key principle for the post-2015 development agenda.

The SDGs and the post-2015 agenda are also defined by a foundation of three indivisible and interlinked pillars of economic, social and environmental issues that were first endorsed at the highest political level in Rio in 1992. The post-2015 agenda is to operate on international, regional and national levels.

Significantly altered

In the negotiations, the final version of the outcome document was significantly altered outside of plenary and behind closed doors on 2 August, where only member states were allowed, and that too only the key negotiators and ambassadors. Preceding the acceptance of the document, this altered text was distributed in hard copy to everyone physically present at the plenary. However, at the time of writing (6 August) this hard copy has not yet been made available in soft copy nor has it been published on the UN website.

While the post-2015 agenda and the SDG framework contains numerous constructive gains in issues, language and resolutions, the eleventh-hour changes carry some adverse implications. For example, there are changes that undermine the legally binding Convention on Biological Diversity (CBD) that enjoys almost universal membership (with the United States

being the prominent non-Party) and the Convention's Nagoya Protocol on access and benefit sharing of genetic resources. The changes also selectively import some of the most regressive text from the outcome document of the recent Third International Conference on Financing for Development (FfD) held in Addis Ababa, and weaken previously agreed language in the text on human rights.

The opaque process through which the changes came about is not healthy for multilateralism. It is indeed unfortunate that in the pressure-cooker atmosphere of negotiations to produce an agreed outcome, the final hours of the post-2015 agenda process reflected some of the negative precedents in trade and, in recent years, climate negotiations where alarming compromises are ultimately struck by a limited number of countries in a non-participatory and untransparent manner.

What is particularly poignant about what transpired over the weekend of Friday 31 July to Sunday 2 August is that the backroom discussions were a stark contrast to the integrity of the process in which the SDGs had been formulated. The SDGs were constructed in good-faith negotiations that began in March 2013 and concluded in July 2014 in the UN Open Working Group, and the SDG outcome reflected developing countries' priorities and views. It was, by and large, a transparent, inclusive and legitimate process where the substantive formulation of targets and goals occurred in open plenary.

This was not the case in the last few days and hours of the post-2015 development agenda negotiations. Many talks were carried out behind closed doors and in small groups. The firmly drawn red line of the Group of 77 and China comprising 134 developing countries – to not reopen the SDG text to renegotiation – was violated by the revision of three targets, consisting of one substantial change and one relatively minor change.

The main battle fought in plenary in the last two weeks of the negotiations from 20 July-2 August centred on the Addis Ababa FfD outcome document, which largely reflects the agenda of developed countries. The FfD process, both in the run-up to and during the Addis Ababa conference (13-16 July), had also been marked by bad-faith negotiations in several respects. The concern was that the compromised Addis Ababa outcome document would un-

dermine the more comprehensive means-of-implementation provisions necessary for the post-2015 agenda as well as the distinctness and independence of the FfD process. Prior to the last weekend, developing countries were able to ensure that the Addis Ababa outcome document is not annexed to the post-2015 development agenda text.

However, revisions to paragraph 62 (explained below) in the post-2015 outcome document unravel, to a significant degree, the determined intention of developing countries to keep the Addis Ababa outcome relatively detached from the post-2015 development agenda and the SDG framework.

Common but differentiated responsibilities reaffirmed

A core and foundational red line for developing countries is the principle of “common but differentiated responsibilities” (CBDR). Throughout both the SDG and post-2015 negotiations, the G77 and China stressed that CBDR is applicable to the entire sustainable development agenda, that a functional set of means of implementation requires developed countries to take the lead in providing financial resources, technology transfer and capacity building, and that the implementation of the goals, while being universal, is also differentiated according to varying levels and realities of national development, capacity and capability.

CBDR did manage to manifest itself in paragraph 12 of the text till the end. It reads, “We reaffirm all the principles of the Rio Declaration on Environment and Development, including, inter alia, the principle of common but differentiated responsibilities, as set out in principle 7 thereof.”

However, some observers are concerned that this provision is potentially compromised by referencing Rio Principle 7, which developed countries interpret narrowly to confine CBDR to addressing environmental damage. Developing countries had argued that in an indivisible and interlinked SDG framework of economic, social and environmental issues, CBDR must be applicable without ambiguity. In other words, CBDR should also apply to economic and social goals and targets. Accordingly developing countries did not want reference to Principle 7 that could open the door to ambiguity if the developed countries’ narrow interpre-

tation prevailed.

Nonetheless, paragraph 12 clearly lays down CBDR as an accepted underlying principle for the post-2015 development agenda. And since Principle 7 clearly talks of historical responsibilities and sustainable development, the application of CBDR to the entire agenda based on Rio Principle 7 will be a matter of considerable interpretation.

Eleventh-hour alterations to the text

Regression on benefit sharing from use of biodiversity

In SDG target 2.5 the word “ensure” was replaced with “promote” in the sentence “...and ensure [now: promote] access to and fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed.”

The same “tweak” was made to SDG target 15.6, with the addition of “As internationally agreed” at the beginning of the sentence. It now reads: “As internationally agreed, promote fair and equitable sharing of the benefits arising from the utilization of genetic resources and promote appropriate access to such resources.”

This demand was reportedly made by the United States on the morning of 2 August as a new and sudden red line, never announced by the US delegation in plenary. According to an unofficial source, the US was not willing to accept the outcome without this amendment. A large number of G77 and China countries, reportedly including Indonesia, Peru, Ecuador, Colombia and Mexico, balked at this pressure campaign and presented arguments rejecting the US ultimatum. These countries reportedly recalled the agreements and language made in the CBD and its Nagoya Protocol.

This alteration is alarming in that it dilutes language in the legally binding CBD and Nagoya Protocol that requires Parties to those treaties to take mandatory measures for benefit sharing.

The CBD’s Article 15(7) states: “Each Contracting Party *shall* take legislative, administrative or policy measures, as appropriate, ... *with the aim of sharing* in a fair and equitable way the results of research and development and the benefits arising from the com-

mercial and other utilization of genetic resources with the Contracting Party providing such resources ...” (emphasis added). The CBD stipulates that the benefits include technology transfer.

The Nagoya Protocol that was concluded under the CBD in 2010 provides for the further implementation of access and benefit sharing. Article 1 of the Nagoya Protocol reads, “The objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources ...” There is no notion of “promote”.

Article 5(1) states: “In accordance with Article 15, paragraphs 3 and 7 of the Convention, benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization *shall be shared* in a fair and equitable way with the Party providing such resources ...” (emphasis added).

The Protocol goes further to oblige each Party to take legislative, administrative or policy measures “with the aim to ensure” benefit sharing when genetic resources held by indigenous peoples and local communities are utilized.

By replacing “ensure” with “promote”, there is the adverse potential of developed countries seeking to weaken their legal commitments even further. The irony is that the US is not a Party to the CBD but yet succeeded at the last moment to impose its regressive position – as the country whose corporations and research institutions are the largest users of genetic resources from the rest of the world, especially developing countries.

Adverse debt language

With regard to debt language in the post-2015 agenda, paragraph 69 in the text reflected fairly progressive language, such as “We recognize the need to assist developing countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief, debt restructuring and sound debt management, as appropriate.”

By 2 August afternoon, the following sentence from paragraph 97 in the Addis Ababa outcome document was inserted at the pressure of developed countries: “Maintaining sustainable debt levels is the responsibility of the borrowing countries; however we acknowledge that lenders also have a responsibility to lend in a way that does not undermine a country’s debt

sustainability.”

This contentious language from the Addis Ababa outcome erroneously places the primary “responsibility” of debt burdens on borrowing countries without the necessary emphasis on the unfair and unfavourable aspects of the international financial system, which include austerity policies, a lack of regulation over volatile and speculative short-term capital flows, and an overall structural dependency particularly in the least developed countries.

This addition is one of the most regressive setbacks of the Addis Ababa FfD conference compared to the notion of co-responsibility between lenders and borrowers that was present in the text of previous FfD agreements from Monterrey in 2002 and Doha in 2008. Unfortunately, this regressive language that explicitly faults borrowers for their debt burdens is now part and parcel of the post-2015 agenda text.

It is precisely such harmful language that was driving the developing countries to ensure that the Addis Ababa outcome document did not become an annex to the post-2015 agenda. Developed countries kept insisting, until the last hour, on annexing the Addis outcome as their firm red line.

In this light, the selective importation of particular Addis language is a compromise that developing countries had to accept. While several other textual imports from the Addis Ababa outcome were also proposed by developed countries in the final hours, such as removing reference to “policy space”, but were eventually not carried through, the specific debt language that was included is particularly regressive.

Influence of Addis Ababa outcome strengthened

While the Addis Ababa outcome is not annexed to the post-2015 development agenda, recent drafts had already proposed two significant insertions of the word “integral,” in the context that the Addis outcome “is an integral part of the 2030 Agenda for sustainable development.”

Subsequently, on 2 August afternoon a brand new sentence was inserted, through ad hoc and closed-door modalities, into paragraph 62 of the means of implementation (MoI) chapter of the post-2015 agenda text. The

new sentence reads, “The Addis Ababa Action Agenda supports, complements and helps contextualize the 2030 Agenda’s means of implementation targets.”

The text of paragraph 19 in the Addis outcome, which developing countries supported, states that the post-2015 development agenda is “supported by the concrete policies and actions” in the Addis outcome. Paragraph 19 allowed for some degree of ambiguity. The new sentence emboldens the influence of the Addis outcome through the word “contextualize.” In essence, there is a concerted effort to reinterpret the MoI chapter of the post-2015 agenda under the Addis Ababa outcome document.

Dilution of discrimination and human rights language

Paragraph 19 of the post-2015 agenda cemented critical language on human rights, discrimination and fundamental freedoms. Up until 31 July the paragraph was progressive and expansive. It read, “This is an Agenda which seeks to respect, protect and fulfil all human rights. It will work to ensure that human rights and fundamental freedoms are enjoyed without discrimination on grounds of race, ethnicity, colour, sex, age, language, religion, culture, migration status, political or other opinion, national or social origin, economic situation, birth, disability or other status.”

However, between 31 July and 2 August, both the African and Arab Groups called for the removal of this paragraph, or at the very least a major revision. A compromise was made to revert to a copy-paste of paragraph 9 from the outcome document of the Rio+20 conference of June 2012.

The Rio+20 outcome document is not as strong as the previous version. For example, the Rio+20 paragraph replaces the phrase “respect, protect and fulfil” with “respect, protect and promote.” The word “promote” is not as comprehensive and correct in human rights terminology as the word “fulfil” is. The Rio+20 paragraph also fails to mention “discrimination” by name, nor does it include ethnicity, migration status, culture, economic situation or age as a protected status. The one addition, however, is the word “property,” and the paragraph at least maintains the

term “other status.”

An interesting note is that the co-facilitator of the post-2015 agenda negotiations, Ambassador Macharia Kamau of Kenya, called these significant regressions “small language editorial issues.”

A few positive amendments

Perhaps the most celebrated positive “win” in the latest version of the post-2015 outcome text is the clearer enunciation and the inclusion of details on the agreed Technology Facilitation Mechanism (TFM) in the MoI chapter, which is to provide technological development in support of achieving the SDGs. This had been a clarion call of developing countries. The TFM is potentially a historic breakthrough with regard to both MoI and FfD, particularly as its work will cut across both these frameworks.

Paragraph 70 outlines the TFM and reads, “We hereby launch a Technology Facilitation Mechanism in order to support the sustainable development goals. The Technology Facilitation Mechanism will be based on a multi-stakeholder collaboration between Member States, civil society, private sector, scientific community, United Nations entities and other stakeholders and will be composed of: a United Nations Interagency Task Team on Science, Technology and Innovation for the SDGs, a collaborative Multistakeholder Forum on Science, Technology and Innovation for the SDGs and an on-line platform.”

Further details, for example on the UN Interagency Task Team, the online platform, the Multistakeholder Forum on Science, Technology and Innovation and on the relationship between the Forum and the High Level Political Forum (established by Rio+20 to replace the UN Commission on Sustainable Development), have been added in this last version through four additional bullet points.

Another positive outcome is reflected in paragraph 34 of the post-2015 agenda. The first part of the paragraph addresses peace and security, rule of law, good governance and access to justice; the second part addresses colonial and foreign occupation. The change from “people” to “peoples” is a substantive improvement. The particular sentence reads, “We reiterate our com-

mitment to take further effective measures and actions, in conformity with international law, to remove the obstacles to the full realization of the right of self-determination of people[s] living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.”

The change is substantive because the term “peoples” is the normative word for recognizing self-determination. Indigenous peoples as well as peoples under foreign occupation have historically fought for this term in UN conferences and negotiations.

The current paragraph 29 that refers to refraining from applying unilateral measures has been a matter of some debate in the recent period. The G77 and China had consistently asked for the retention of this paragraph and in spite of severe opposition from the US, this paragraph has survived. It reads, “States are strongly urged to refrain from promulgating and applying any unilateral economic, financial or trade measures not in accordance with international law and the Charter of the United Nations that impede the full achievement of economic and social development, particularly in developing countries.”

Climate change – UNFCCC integrity maintained

The last two days of the negotiations also saw hectic deliberations on climate change. In the 30 July draft, there was an alternative suggestion, numbered paragraph 31.alt, which was hazy at best and could have undermined the positions of developing countries in the UN climate talks, for example, by not including reference to climate change adaptation. There were also inconsistencies with decisions of the Conference of Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC). The US for one had pushed hard for this language.

However, in the last hours compromise language was found and is reflected in paragraphs 30 and 31 in the text (quoted below). While this language is not optimum for developing countries, it is an improvement on paragraph 31.alt of the 30 July text.

However, the specific mention of CBDR in the context of climate change as suggested in the 30 July version was left out in this formulation. This is in

spite of the fact that CBDR is a legal principle in the UNFCCC and reaffirmed through decisions taken by the COP including the 2014 decision of the COP meeting in Lima, Peru. Nevertheless, despite no specific mention in paragraph 30, CBDR clearly applies to climate since it is part and parcel of the UNFCCC and is reaffirmed in paragraph 12 as a general principle.

Paragraph 30 now reads, “We acknowledge that the UNFCCC is the primary international, intergovernmental forum for negotiating the global response to climate change. We are determined to address decisively the threat posed by climate change and environmental degradation. The global nature of climate change calls for the widest possible international cooperation aimed at accelerating the reduction of global greenhouse gas emissions and addressing adaptation to the adverse impacts of climate change. We note with grave concern the significant gap between the aggregate effect of Parties’ mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with having a likely chance of holding the increase in global average temperature below 2°C or 1.5°C above pre-industrial levels.”

Paragraph 31 reads, “Looking ahead to the COP21 conference in Paris in December, we underscore the commitment of all States to work for an ambitious and universal climate agreement. We reaffirm that the protocol, another legal instrument or agreed outcome with legal force under the Convention applicable to all Parties shall address in a balanced manner, inter alia, mitigation, adaptation, finance, technology development and transfer, and capacity-building, and transparency of action and support.”

Essentially, the G77 and China succeeded in ensuring consistency with the UNFCCC decisions and mandate for ongoing negotiations so that the post-2015 outcome document would not preempt or undermine the ongoing climate talks.

Some other compromises during the final negotiations

Despite attempts in the late hours of 1 August to do away with reference to one of the most vital concepts for developing countries, that of policy space, it is still mentioned twice, in paragraph

44 (related to international financial institutions and governance reform) and in paragraph 63 (related to poverty eradication). However, paragraph 63 qualifies policy space with the same language as that of paragraph 9 of the Addis Ababa outcome document: “...while remaining consistent with relevant international rules and commitments.”

This seems to negate the very point of policy space, which is to address the very “international rules and commitments” that constrain the ability of a state to formulate and carry out development-oriented policies.

Member states express last thoughts at adoption

Before the strike of the gavel by the two co-facilitators of the post-2015 process, Ambassador Kamau and Ambassador David Donoghue of Ireland, several member states as well as the UN secretariat voiced their parting thoughts. Some even articulated resounding concerns.

The UN secretariat kicked off the adoption plenary by saying that a two-stage approval in the UN General Assembly will take place after this first adoption by member states. The current 69th session of the Assembly will agree to refer to the agreed outcome document, and the final step is the adoption of the document at the post-2015 summit in late September itself. Two formal meetings of the Assembly, at the 69th session and at the 70th session, will take place. With regard to the explanation of the vote, each member state has the right to vote.

Informal processes and reservations of this stage will not form part of the official record of the summary (of the negotiations). (Reservations can be expressed at the General Assembly session and those will be on record.)

The G77 said that despite protracted negotiations, its membership has worked in good faith to address the critical obstacles to global development and poverty eradication. The new inclusion of landlocked developing countries in target 7.b was welcomed by the Group. In a sense, said the G77, the co-facilitators have been like magicians, making things appear whenever they want and disappear when they wish it to.

The Group said further that the focus of the UN will now finally move

from negotiations to ensuring that over the next 15 years the international community works together nationally and globally to deliver on sustainable development.

The G77 noted that the amount of work member states have just completed is amazing. As Nelson Mandela has said, "It is always impossible until it is done." On that note, the G77 declared that its membership is ready to adopt the outcome document of the post-2015 development agenda.

A statement was delivered by Mexico on behalf of a grouping of diverse developing countries: Bolivia, Brazil, Colombia, Costa Rica, Ecuador, India, Indonesia, Jamaica, Mexico, Nicaragua, Peru, the Philippines, and Trinidad and Tobago. These countries expressed their concern on the amendments carried out in targets 2.5 and 15.6 under the SDG chapter. They said that both targets should and could have been addressed without necessarily making a major substantive change to the targets, which had been extensively discussed and agreed by consensus at the Open Working Group on SDGs.

These two targets, said the countries, are very important to strengthen and reflect the international commitment to implement fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources as stipulated in the Nagoya Protocol. For member states that are not Parties to the Nagoya Protocol, the addition of "as internationally agreed" at the end of target 15.6 would have been sufficient. In this light, these countries fervently asserted their understanding that under targets 2.5 and 15.6 as revised in the final outcome document of the post-2015 development agenda, the commitment to ensure the implementation of the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and associated traditional knowledge, will not be weakened.

Article 1 of the Nagoya Protocol states, "The objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding,

thereby contributing to the conservation of biological diversity and the sustainable use of its components."

At a later stage, this group of countries plans to request that this statement and understanding on these targets be formally noted in the General Assembly records.

The Least Developed Countries group said they will not accept any further change that undermines the focus of the post-2015 development agenda from LDCs. The group said they held six ministerial meetings to prepare for the post-2015 negotiations. They said many of their views and positions were incorporated into the SDGs which were formulated through the Open Working Group in an inclusive and participatory manner.

The LDCs said they undertook rigorous preparation for the SDGs and their contributions were substantive, backed by facts and figures as well as legislative mandates. The special value of the SDGs for the LDCs was in setting the right emphasis for sustainable development by holding up the importance of LDC priorities.

The LDC group also recognized the valuable contributions of the UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, as well as major groups and stakeholders who provided LDCs with evidence-based and very relevant proposals that enriched their demands for opening up new horizons for people in LDCs and reflecting LDC aspirations for a just and equitable world.

Brazil said it would have preferred more progressive language on human rights. Nevertheless the post-2015 agenda is a people-centred document even if it has not captured everything and everyone. Brazil highlighted that although the text does not mention lesbian, gay, bisexual, transgender and intersex (LGBTI) people, the implementation of the post-2015 agenda will include all of the LGBTI community, so that the core principle of leaving no one behind can find its true meaning.

Brazil emphasized that the universality of the SDGs is a breakthrough, one that makes differentiation all the more relevant in light of CBDR, a cherished principle for developing countries and an integral part of the UN framework to which all member states are now committed. It added that the climate

change paragraph endorses a political commitment from member states without prejudging the outcome at the forthcoming UNFCCC COP in Paris.

Last but not least, Brazil celebrated the progress made through the establishment of a Technology Facilitation Mechanism, which it said is a small breakthrough in and of itself and presents a strong initiative for the UN.

Going against the grain of most member states, Nigeria said the post-2015 document does not give the UN any right to mandate human rights around sexual orientation and gender identity. There is no consensus, Nigeria clarified, around paragraph 19 on human rights.

The Philippines said it recalls the 1948 Universal Declaration of Human Rights, as well as the human rights of all groups of people, and that therefore paragraph 19 is very important.

Norway said that the spirit of compromise going forward is very encouraging.

However, new challenges await in the next phase of formulating the indicators for the SDGs, a process which is already experiencing significant challenges in reflecting the priorities of all member states.

Despite the eleventh-hour alternations to the text, and the many imperfections and shortfalls, there is still a lot in the SDGs and the post-2015 development agenda outcome document overall that we can all work with over the next 15 years. □

(continued from page 8)

On behalf of the G33 countries, Indonesia called for a robust outcome on Special Products and Special Safeguard Mechanism.

Australia said the Cairns Group wants credible outcomes in all three pillars of the agriculture negotiations, while Brazil, on behalf of the G20, said agriculture will remain as the engine of the Nairobi outcomes.

Bangladesh, on behalf of the LDCs, called for credible outcomes on preferential rules of origin for LDC products, duty-free and quota-free market access, and cotton.

In sum, Brazil, India, and developing and least developed countries remain skeptical about efforts by the Director-General and major developed countries to proceed on "substance" in September without regard to previous ministerial mandates. (SUNS8076) □

UN committee adopts sovereign debt restructuring principles

A committee of the UN General Assembly has adopted nine principles for sovereign debt restructuring. This is a timely outcome as more countries are facing debt crises which raise the need for debt restructuring that is fair and economically sustainable.

by Adriano Jose Timossi and Manuel F. Montes

A United Nations committee has adopted a set of nine principles for sovereign debt restructuring. A report will now be submitted to the UN General Assembly for its review and action.

The adoption of the Principles on Sovereign Debt Restructuring Processes (see box next page) is timely, as more countries are facing or are in danger of facing sovereign debt crises, and the need for and terms of restructuring their debts have become urgent and often controversial topics.

The nine principles were agreed to at the third working session of the Ad Hoc Committee on Sovereign Debt Restructuring Processes on 27-28 July, held at the UN headquarters in New York. They will be part of the Chair's summary to be submitted to the UN General Assembly.

The principles had originally been put forward by the developing-country Group of 77 and China, which had also been responsible for initiating the establishment of the committee in 2014.

Although the principles were adopted by all countries present, it should be noted that most developed countries boycotted the meeting as they were not in favour of the ad hoc committee or the United Nations taking up this issue. The International Monetary Fund (IMF) also decided not to attend.

The right of a state to design its own macroeconomic policy, including restructuring of its sovereign debt, without being frustrated or impeded by abusive measures, is one of the agreed principles.

Another principle is that sovereign immunity from jurisdiction and execution regarding sovereign debt restructurings is a right of states before foreign domestic courts and exceptions should be restrictively interpreted.

Another principle is sustainability, which implies that sovereign debt restructuring workouts should lead to a stable debt situation in the debtor state, preserving creditors' rights while pro-

moting economic growth and sustainable development, minimizing economic and social costs, warranting the stability of the international financial system and respecting human rights.

Other principles include good faith by both the sovereign debtor and all its creditors; transparency to enhance the accountability of the actors concerned; impartiality among all institutions and actors involved in sovereign debt restructuring workouts; equitable treatment for creditors; legitimacy, entailing respect for the requirements of inclusiveness and the rule of law; and majority restructuring, which implies that sovereign debt restructuring agreements that are approved by a majority of creditors are not to be impeded by other states or a non-representative minority of creditors.

This outcome was the culmination of the three working sessions of the committee. There have also been numerous informal sessions and consultations with various organizations and governments, including in locations outside of New York, led by Bolivia's Ambassador to the UN Sacha Llorenti, who chaired the committee.

The ad hoc committee was established by a UN General Assembly resolution A/RES/69/247 of 29 December 2014, which mandated the committee to elaborate a multilateral legal framework for sovereign debt restructuring processes.

In the past few months, many informal sessions were organized to negotiate the nine principles on debt restructuring. The principles had been proposed by the Group of 77 and China (the grouping of developing countries in the UN), and several of them were based on the outcome of a UN Conference on Trade and Development (UNCTAD) Working Group on a Debt Workout Mechanism comprising experts, legal scholars, investors, policymakers and civil society repre-

sentatives.

"An important contribution"

At the third working session of the committee, Ambassador Denis G. Antoine of Grenada delivered a statement on behalf of the President of the UN General Assembly (Sam Kutesa of Uganda). He said that the set of nine principles "constitutes an important contribution on sovereign debt restructuring, since the principles could serve as a basis for future deliberations of the UN General Assembly towards a multilateral legal framework for sovereign debt restructuring processes with the participation of all Member States". He added that the work of the committee, having been carried out through a transparent and participatory approach, will contribute towards the goal of increasing the efficiency, stability and predictability of the international financial system and achieving sustained, inclusive and equitable economic growth and sustainable development.

In the same session, Nobel Prize-winning economist Joseph Stiglitz, currently a professor at Columbia University and former Chief Economist and Senior Vice President at the World Bank, gave a keynote speech. Stiglitz had been the chair of the Commission of Experts on Reforms of the International Monetary and Financial System established by the President of the UN General Assembly in 2008, which studied the 2007-08 global economic and financial crises and called for a framework to deal with sovereign debt. However, progress on this proposal has been very limited, despite the importance of the issue.

Stiglitz pointed to Greece and Argentina as recent examples of countries that have suffered because of inadequate frameworks for debt restructuring. "In the absence of an adequate framework for debt restructuring economies often go into deep recession – depressions as we see today in Greece, as we saw in Argentina," he said.

Stiglitz congratulated the committee for establishing the set of principles on which to build such a framework. He especially welcomed the fact that a set of principles is being put forward by the committee since the UN is the right place for discussing these issues, instead of the IMF. "The IMF is an institution of creditors. You would not ask Citibank to design the bankruptcy law in the United States," he said. "We

know how they would design the law, it would have indentured servitude. We need a fair bankruptcy law, an efficient bankruptcy law and the bankruptcy laws that come out of creditors are neither fair nor efficient." The only place where one can have creditors and debtors at the table is the UN. "The balanced nature of your report provides testimony to the fact that you are the right place and I think that you have done a great job," Stiglitz said.

Stiglitz identified five reasons why the issue has once again reached the top of the policy agenda. First, many countries are facing problems of excessive indebtedness. Sovereign debt is no longer a problem of the past. He pointed to the debt crises faced by Greece and Puerto Rico, and potential crises in many countries around the world.

Secondly, court rulings, particularly in the US and the UK, have highlighted the incoherence of the current system and have made orderly debt restructuring, at least in some constituencies, more difficult, if not impossible. Capitalism could not work without a framework for debt restructuring, and this is why every country has a bankruptcy law, but unfortunately there is no international framework and no international law. The committee, Stiglitz said, was setting principles which will guide the creation of that kind of international law. Meanwhile what is in place today is an incoherent system where one jurisdiction makes one ruling and another jurisdiction makes a different ruling and there is no place where these can be reconciled.

The third reason is that there has been a movement of debt from banks to capital markets and this has increased significantly the difficulties of debt renegotiations. There are so many more creditors with often conflicting interests at the table.

The fourth reason – which Stiglitz said is not as well recognized as it should be – is the development of credit default swaps, which are financial instruments for shifting risk. The parties at the debt negotiating table may thus have no economic interest in a settlement; instead, they may have economic interest in not having a settlement. The consequences of the separation of the ownership of claims and economic interests have not been taken on board fully and it is imperative to do that.

The fifth reason is the growth of vulture funds, whose business model

The nine principles

The nine principles adopted by the UN ad hoc committee to guide sovereign debt restructuring processes are as follows:

1. A sovereign state has the right, in the exercise of its discretion, to design its macroeconomic policy, including restructuring its sovereign debt, which should not be frustrated or impeded by any abusive measures. Restructuring should be done as the last resort and preserving at the outset creditors' rights.

2. Good faith by both the sovereign debtor and all its creditors would entail their engagement in constructive sovereign debt restructuring workout negotiations and other stages of the process with the aim of a prompt and durable reestablishment of debt sustainability and debt servicing, as well as achieving the support of a critical mass of creditors through a constructive dialogue regarding the restructuring terms.

3. Transparency should be promoted in order to enhance the accountability of the actors concerned, which can be achieved through the timely sharing of both data and processes related to sovereign debt workouts.

4. Impartiality requires that all institutions and actors involved in sovereign debt restructuring workouts, including at the regional level, in accordance with their respective mandates, enjoy independence and refrain from exercising any undue influence over the process and other stakeholders or engaging in actions that would give rise to conflicts of interest or corruption or both.

5. Equitable treatment imposes on states the duty to refrain from arbitrarily discriminating among creditors, unless a different treatment is justified under the law, is reasonable and is correlated to the characteristics of the credit, guaranteeing inter-creditor

equality, discussed among all creditors. Creditors have the right to receive the same proportionate treatment in accordance with their credit and its characteristics. No creditors or creditor groups should be excluded ex ante from the sovereign debt restructuring process.

6. Sovereign immunity from jurisdiction and execution regarding sovereign debt restructurings is a right of states before foreign domestic courts and exceptions should be restrictively interpreted.

7. Legitimacy entails that the establishment of institutions and the operations related to sovereign debt restructuring workouts respect requirements of inclusiveness and the rule of law, at all levels. The terms and conditions of the original contracts should remain valid until such time as they are modified by a restructuring agreement.

8. Sustainability implies that sovereign debt restructuring workouts are completed in a timely and efficient manner and lead to a stable debt situation in the debtor state, preserving at the outset creditors' rights while promoting sustained and inclusive economic growth and sustainable development, minimizing economic and social costs, warranting the stability of the international financial system and respecting human rights.

9. Majority restructuring implies that sovereign debt restructuring agreements that are approved by a qualified majority of the creditors of a state are not to be affected, jeopardized or otherwise impeded by other states or a non-representative minority of creditors, who must respect the decisions adopted by the majority of the creditors. States should be encouraged to include collective action clauses in their sovereign debt to be issued. □

involves holding out against settlement and non-cooperation (with the debtor country) in order to obtain payments greater than what is available to those participating in the debt restructuring exercise. This business model is making debt restructuring under existing institutional arrangements much more difficult if not impossible.

A press conference was held on 28 July at the UN headquarters by the committee chair Llorenti; Ambassador Maria Cristina Perceval, Permanent Representative of Argentina to the UN; Carlos Alberto Bianco, Secretary of International Economic Relations, Ministry of Foreign Affairs and Worship of Argentina; and Richard Kozul-Wright,

Director of the Division on Globalization and Development Strategies at UNCTAD.

"This constitutes a historic moment when it comes to resolving the issues of foreign debt restructuring," said Llorenti at the press conference.

However, Llorenti noted that 11 countries had not supported the establishment of the committee in December 2014 and that these same countries have a greater share of the votes at the IMF, which currently has a great say over sovereign debt issues.

Kozul-Wright said that part of the problem was that the same rules and practices that had been created at national levels to manage debts did not exist at the international level. "At the international level where we have also high levels of indebtedness, there is no

equivalent of national bankruptcy laws and it's a major gap in the international system," he said.

Kozul-Wright also described the committee's decision as an important step that UNCTAD has been advocating for the past 30 years. "This is a very important first stage in moving towards a more rational way of handling sovereign debt crises from the very fragmented, unfair system that we have," he said. □

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States asked to effectively control vulture fund activities

A report by a UN human rights advisory body trains the spotlight on the "predatory" activities of vulture funds which profiteer from the debts of poor developing countries and which may impede the latter's ability to realize basic rights obligations.

by Kanaga Raja

GENEVA: The UN Human Rights Council's Advisory Committee has highlighted the growing concerns over the strategies employed by vulture funds and has recommended that states undertake a number of measures, both individually and in a coordinated manner, to effectively control their activities.

This recommendation comes in the Advisory Committee's preliminary research-based report, prepared by Jean Ziegler, Rapporteur of the drafting group on the activities of vulture funds and their impact on human rights.

The Advisory Committee, which serves as a think-tank to the Human Rights Council and is composed of 18 independent experts, held its fifteenth session here on 10-14 August.

According to the report, which was considered at the session, there is no international legal regime that governs cases of state "insolvency" or "bankruptcy".

"When a state defaults on its sovereign debts, it has to start, on its own initiative, a process of restructuring its foreign debt, which entails complex and protracted negotiations with a range of very different types of creditors, includ-

ing private commercial creditors."

Participation in such processes is voluntary and therefore, under certain circumstances, certain creditors may decide, for a variety of reasons, not to take part and to hold out for a higher level of repayment.

It is at this point that vulture funds come into play. They systematically hold out and/or collect and purchase from other bondholders the debt with the sole aim of obtaining a high return by suing the state in court. To that end, they make the most of existing failures in the system.

The report said that in the context of sovereign debt, a vulture fund is a hedge fund that invests in sovereign debt considered to be weak or in danger of default. These funds are not lenders but private funds that purchase the distressed debt on the secondary market at a discount, with a view to making a profit by suing the debtor for more than the price they paid to acquire the debt.

Their investment strategies are popularly called "vulture" because of their predatory *modus operandi* whereby they, amongst others, target

sovereign states with distressed economies and generally with weak capacity for legal defence.

Poor countries targeted

The report said successful instances of litigation against poor developing countries outnumber by far those against any other group of countries.

According to World Bank estimates, nearly one-third of countries that are eligible for debt relief and other poverty alleviation programmes are targeted by nearly 26 vulture funds.

The report observed that vulture funds also refuse to participate in any orderly and voluntary debt restructuring processes. Once a state starts to negotiate a restructuring with private bondholders, vulture funds exercise their right to hold out or rather collect and purchase the distressed bonds in the secondary market. They then take advantage of the weak position of a country close to default by putting it under additional pressure.

Such pressure may easily end up in an agreement whereby the debtor state accepts a disadvantageous settlement as the only means to avoid a long and costly process against a particularly aggressive litigator.

This was the case with Greece in 2012 when the government decided to pay €436 million to settle a case with several holdouts on its debt restructuring. Dart Management, an investment fund based in the Cayman Islands, was accorded privilege in the payment, receiving 90% of that amount.

According to the report, Greece seemingly yielded to pressure, deciding to pay off the holdout investors in order to avoid being sued by the vulture funds, in the midst of the particularly unstable and sensitive political situation the country was going through.

To ensure the court's decision is favourable to their interest, the report said, vulture funds choose "creditor-friendly jurisdictions", usually the US or the UK. However, increasingly they sue in the debtor countries themselves, where weaker legal systems are easily overwhelmed by the level of technical detail involved in adjudicating such cases.

Cases brought by vulture funds are particularly protracted in that the medium estimate for recovery is six years, with annualized returns averaging from 50% to 333%. Such proceedings

are always burdensome and can complicate financial and reserve management.

Vulture funds have averaged recovery rates of about 3 to 20 times their investment, equivalent to returns of 300–2,000%. In 1996, for example, Elliot Associates LP bought defaulted bank debt owed by Peru for \$11.4 million (with a face value of \$20.7 million) and in 2000 successfully sued the country for \$58 million.

The International Monetary Fund (IMF) estimates that in some cases the claims by vulture funds constitute as much as 12–13% of a country's gross domestic product (GDP).

The report stressed that given the high success rate of past litigation (72% of winning cases), lawsuits by vulture funds will most likely proliferate. It cited a recent study that found that between 1976 and 2010, there were about 120 lawsuits by commercial creditors against 26 defaulting countries in the US and the UK alone. Also, according to the African Development Bank, the reported number of outstanding cases against debtor countries has doubled since 2004, with an average of eight new cases filed per year.

"As a consequence, the likelihood of creditor litigation in cases of debt crisis has increased from less than 10% in the 1980s to more than 40% in recent years."

The report said the recent outcome of the vulture fund litigation against Argentina and the ensuing changes in legal doctrine regarding the *pari passu* clause have opened the door to increasingly "disruptive" lawsuits not only against least developed but also against middle-income and highly developed countries.

"There is no doubt that, as things stand, the existing financial system offers opportunities for 'vulture funds' to profiteer at the expense of poor developing countries as well of creditors that have made sacrifices to let the country recover. Such a 'perverse' outcome has led to an increasingly broad agreement on the need to reverse this situation."

Vulture funds have a long history of predatory practices against many developing countries including heavily indebted poor countries (the so-called HIPC), mostly in Africa and the Americas.

According to the report, Africa is by far the continent most harassed by vulture funds, with an average of eight suits filed every year. Without the ca-

capacity or the resources to face complex and protracted processes, African countries have been particularly harassed by vulture fund litigation, losing the bulk of the suits.

High-profile cases

Despite vulture funds having operated in Africa since the 1990s, such actions went largely unnoticed among the general public until very recently.

It has taken a high-profile case, namely the dispute confronting the government of Argentina with one of the most well-known vulture fund firms, to prompt the international community to tackle the situation.

The report went on to cite a number of prominent cases, including that of Donegal International v. Zambia and NML Capital Ltd v. Argentina.

In the case of Donegal International v. Zambia, in 1979, the Zambian government bought agricultural equipment from Romania. By 1984, the government had difficulty servicing the debt, which amounted to about \$30 million, interest included.

In 1999, just as Zambia was about to reach the decision point under the HIPC Initiative for comprehensive debt relief, Romania sold the debt to Donegal International (based in the British Virgin Islands) for about \$3 million, equal to 11% of the debt's face value.

In 2003, in controversial circumstances involving allegations of corruption and bribing of public officials, Zambia signed a settlement agreement with Donegal International in which it agreed to waive sovereign immunity from litigation and pay around \$15 million of the then \$44 million face value. It also agreed to penal rates of interest in the event of default and to have any disputes determined under English law.

Zambia paid a total of \$3.4 million in three instalments and thereafter stopped paying, arguing that the agreement was tainted with corruption and had been signed without the requisite authority.

The company waited until 2006 when, months before Zambia was due to receive debt cancellation under the HIPC Initiative, it initiated litigation in the UK courts seeking \$55 million. In February 2007, the English High Court ruled in favour of Donegal, but accepted one of Zambia's defences that the stipulated interest rate under the settlement agreement was an illegal penalty. The

end result was a reduction of Donegal's claim to \$15.4 million.

However, the report noted, this was still nearly 17 times the amount the company paid, constituting a 370% return on its "investment" and equal to 65% of the country's savings in debt relief that year.

Reportedly, the government of Zambia recognized the judgment and allocated the funds originally earmarked for health programmes to service the debt.

The impact of the vulture fund's claim on Zambia is striking, bearing in mind that about 65% of the amount it received in debt relief was intended to assist in development projects, the report underlined. The total expenditure of the central government on social benefits, according to the IMF, was around \$140 million; thus the vulture fund took away almost 15% of total government social welfare expenditure.

"Money that could have been channelled to education, health care, and poverty alleviation thus had to be used to pay the 'victorious' vulture fund."

"This case study shows that 'vulture funds' do not hesitate to interfere with debt rescheduling programmes set up for the poorest developing countries. They take over the benefits of such programmes, seizing on the opportunity presented by resources newly freed up or about to be released by debt relief," said the report.

In the case of NML Capital Ltd v. Argentina, the report said, a recent decision of a New York court in litigation between vulture funds and Argentina has highlighted both the need to find better legal solutions for sovereign debt restructurings and the potential negative consequences of vulture fund activities on the enjoyment of human rights.

It noted that it is well documented how the deteriorating economic, financial and social situation led Argentina to a catastrophic collapse in 2001. Soon after defaulting, the government recognized the need to restructure the debt (roughly \$81 billion).

In two successive exchange offers in 2005 and 2010, Argentina made an agreement with more than 92% of its creditors, getting them to take an approximately 70% "haircut" on their bond holdings. This was a quite successful outcome.

A group of bondholders led by NML Capital rejected the restructuring and sued Argentina for the full amount

in the New York State courts.

Vulture funds had bought up part of the defaulted bonds on the secondary market just before the collapse in 2001, but most were purchased, at bargain prices, after the default and some even after the exchanges. It is claimed that the vulture funds paid around \$48.7 million for more than \$220 million in defaulted bonds.

Vulture funds constitute a minor part of the bondholders, only 1.6%. NML Capital is a hedge fund company based in the Cayman Islands and owned by Paul Singer.

With this case, they managed to win three major battles: getting the US judge to change the legal doctrine on the *pari passu* clause; a Second Circuit confirmation on that ruling; and a refusal by the Supreme Court to take the case, meaning it stood by the lower court's decisions.

The report said that the US court's ruling with regard to the *pari passu* clause represents a major departure from the traditional approach applied in sovereign debt restructuring processes. According to the ruling, this clause, instead of providing for contractual protection against "favoured creditors" who would otherwise be paid first, should be interpreted such that its holdings must have equal preference with regard to all other creditors.

"The consequences of the ruling are quite shocking: Argentina is requested to fully pay the 'vulture funds' before any of the restructured bondholders get paid. It is not surprising that this decision had been widely challenged, including by the US Government itself."

Moreover, implementing the ruling would be very damaging for Argentina in practice since it could face demands from other holdouts and holders of restructured bonds for repayment on equal terms, said the report.

In November 2012, a US District judge ordered Argentina to pay NML Capital and other holdouts in full (roughly \$1.33 billion), an amount that represents an exorbitant profit of about 1,600%. According to the report, the court ruled that Argentina could not pay any creditor until it had paid the holdout creditors. The Supreme Court, in June 2014, upheld that ruling, ordering the relevant US financial institutions to turn over to the vulture funds information about the assets that Argentina holds worldwide, including accounts held by entities of the Argen-

tine government and by individual officials.

On 30 June 2014, when Argentina attempted to pay its restructured bondholders, the US District judge ordered the deposited money to be frozen.

Setback

The US rulings represent a setback for debt restructuring, damaging as well the current negotiations for the establishment of an international mechanism for sovereign debt restructuring, said the report.

"The US rulings not only represent a resounding victory for the hedge funds that did not participate in Argentine debt swaps but are also a setback for orderly sovereign debt restructuring 'with consequences well beyond the borders of the United States and Argentina'."

The US court's ruling has created a negative precedent but at the same time has triggered wide-ranging and solid support for the position Argentina has taken against the vulture funds. This can be considered a positive and unexpected outcome, the report added.

The report noted that in terms of national legislation, as of today, only two countries have enacted legislation to prevent vulture funds from pursuing excessive claims against indebted countries before their national courts, namely, Belgium and the UK. Unsuccessful attempts were made to adopt such legislation in France and the US.

Vulture fund litigation is mainly sought before US courts and concerns firms that are registered under US domestic law. This is not by chance, said the report. Over recent decades, US legislation and its courts have been particularly permissive and favourable to vulture funds' actions and interests. For this reason, that this country enacts legislation to stop vulture funds seems to be an essential step towards effectively avoiding this disruptive litigation.

The report also noted that over recent decades a growing consensus has emerged on the need to curb vulture funds' activities. Social organizations have been calling for years for concrete action to address the "perversity", "immorality" and "outrageous outcomes" of these predatory investments.

Increasingly, states both from developing and developed countries have expressed the need for a robust legal regulatory framework to restructure

sovereign debt as a way of addressing the root causes of vulture funds.

Human rights impact

The ability of vulture funds to jeopardize the objectives of the IMF and World Bank HIPC Initiative makes clear that the implications of vulture funds' activities are not exclusively financial or economic and, more importantly, that the adverse impact of these activities cannot be effectively addressed in an isolated or partial manner.

It is a fact that vulture funds' activities have the ability to hinder and even jeopardize a state's capacity to fulfil its human rights commitments, particularly those linked with economic and social progress, the elimination of poverty, and development, said the report.

While debts held by these private investment firms may represent a small fraction of poor countries' debt, awards in vulture fund litigation undeniably represent a substantial burden on the budgets of already poor countries.

Harmful conditions of loans or high and abusive interest rates may make the repayment of debt extremely difficult and may place the state in a situation of having to repay far more than the amount originally borrowed.

The negative impact of vulture funds' actions on the state's ability to fulfil its human rights obligations will increase as a financial and economic crisis becomes harsher. So they may also contribute to exacerbating the adverse impact of the debt burden and may lead to harsh austerity measures involving cuts on public spending that may ultimately impact on the economic growth and development of the country and thereby on the enjoyment of economic, social and cultural rights. As a result, money earmarked for poverty reduction and basic social services, such as health and education, is diverted to settling the substantial claims of vulture funds.

The report said the case of Malawi constitutes a good example of how debt repayments may impact negatively on the enjoyment of certain rights. In 2002, following a poor harvest, seven million from a population of 11 million were left facing a serious food shortage because the government was forced to sell the maize from its National Food Reserve Agency to raise funds to repay loans. This example shows that vulture

funds' action ultimately may diminish the capacity of the country to create the conditions necessary for the realization of the rights of the people, in this case, the right to food.

More generally, it has been empirically demonstrated that in many of the poorest countries debt repayment is often carried out at the expense of basic human rights, including the rights to food, health, education, adequate housing and work. "Debt servicing and harmful conditions linked to loans and debt relief often limit investments in and undermine the provision of accessible public services."

The report underlined that governments should not be placed in a position where they are unable to ensure the realization of basic human rights because of excessive debt repayments.

"The State's responsibility to ensure the enjoyment of basic human rights may take priority over their debt service obligations, particularly when such payments further limit the country's ability to fulfil its human rights obligations."

It has been recommended in this regard that debt sustainability analysis should include an evaluation of the level of debt a country can carry without undermining its capacity to fulfil its human rights obligations, including the right to development. Thus, such assessments on debt sustainability should take due account of the potential adverse human rights implications of debt service.

The question of whether a state might be under an obligation not to repay its debt to vulture funds if it can only do so at the expense of neglecting the basic social needs of its people is highly controversial, said the report.

"It requires making a choice between contractual obligations toward creditors and social rights obligations towards the people of the country. But in the absence of a multilateral independent mechanism capable of solving disputes over the repayment of sovereign debt, debtor states have little choice but to prioritize their contractual obligations."

It is a logical consequence of the

evolution of human rights law that a state cannot decide to service debt at the expense of meeting its human rights obligations, particularly economic and social rights, including the right to development.

"Particularly in the case of immoral, disproportionate, and speculative claims deriving from debts that have been settled under abusive terms, it is required to take a more human-rights centred approach," the report said.

The report recommended a number of positive actions that states could undertake in order to mitigate the negative effects of vulture fund activities, including cooperating to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights; ensuring adequate regulation of vulture funds; encouraging through national regulations compliance by and requiring due diligence from vulture funds; and having an independent body undertake debt sustainability assessments. (SUNS8082) □

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No aid, no tax, no development

In light of the pressing need for resources to fund the development effort, *Jomo Kwame Sundaram* looks at how best developing countries can harness revenue from taxation.

The Addis Ababa Action Agenda adopted by the Third International Conference on Financing for Development in July is widely seen as a major disappointment for developing countries as well as others hoping for adequate means of implementation to realize national development ambitions and the Sustainable Development Goals (SDGs).

It has become clear that the South, including the least developed countries, should not expect any serious progress to the almost-half-century-old commitment to transfer 0.7% of developed countries' economic output to developing countries.

But to add insult to injury, developing countries cannot expect to participate meaningfully in intergovernmental discussions to enhance overall as well as national tax capacities.

While the rich countries of the Organization for Economic Cooperation and Development (OECD) agree that taxation is the only viable strategy for developing countries to exit foreign aid dependency in the long run, they have refused to accede to the latter's desire for a full-fledged intergovernmental body for international tax cooperation under United Nations auspices.

The ability to pursue development policies depends crucially on available fiscal space, which relies mostly on domestic revenues, especially taxes.

However, tax revenues in most low- and lower-middle-income developing countries are low. The average tax-to-GDP ratios in low-income and lower-middle-income countries are around 15% and 19% respectively, compared to over 30% in high-income countries.

Low- and lower-middle-income countries should take steps to increase their revenues, but the main approach in recent decades has been to increase tax rates only if unavoidable. It was presumed that lower rates would ensure better compliance with tax laws and thus raise revenue.

The prevailing tax wisdom also favoured broadening the tax base, even when taxation capacities are modest. Thus, indirect taxation has tended to increase while direct taxation of corporations and individuals has tended to

decline. The latter was supposed to be good for investment and growth although the empirical support for this presumption is dubious.

In the vast majority of countries in sub-Saharan Africa and Latin America, the tax-to-GDP ratio has actually stagnated or declined as tariffs and export duties, which accounted for the largest share of tax revenue, declined with trade liberalization. Unfortunately, other taxes have not grown to compensate for the lower trade taxes.

There is an urgent need to reverse this trend, with greater commitment to revenue generation in order to improve social protection, create employment and otherwise contribute to sustained economic recovery.

With their different economic circumstances, it does not make sense for developing countries to simply try to emulate developed economies in trying to generate revenue. Even among developing countries, no one size fits all. And certainly not for all time, as tax systems must evolve with changing economic circumstances. A key question is: which taxes are most likely to meet the requirements of implementability, buoyancy and stability?

Domestic taxes: direct or indirect?

The revenue-to-GDP ratio can rise in the following ways: the domestic tax base is widened; tax avoidance and evasion are reduced; and new sources of international taxation are found.

There is no reason to be overly pessimistic about direct taxation as tax reform has significantly improved the contribution of direct taxes to overall revenue in many countries. It is certainly possible to enhance tax revenues by increasing the share of direct taxation of the wealthy through more progressive income taxes in developing countries.

However, there should also be a greater effort to ensure better compliance with and higher collection of existing taxes. Limiting the discretionary authority of tax officials could also help improve compliance and reduce evasion.

Computerization of tax administra-

tion can help limit corruption, as it makes it harder to tamper with records. But government computerization alone cannot ensure effective introduction of the much-touted value-added tax (VAT), an indirect tax largely responsible for facilitating the shift from direct to indirect taxation.

Improved tax administration can increase the share of personal income taxes in total tax revenue. Expansion of the scope for tax deduction at source has been very effective in taxing those otherwise hard to reach. Every individual who is a house owner, vehicle owner, club member, credit card holder, passport, driving licence or identity card holder or telephone subscriber can be required to file a tax return.

Excise taxes are another important source of revenue in developing countries as they have a buoyant base and can be administered at low cost. They are typically levied on products such as alcohol, tobacco, petroleum, vehicles and spare parts. From a revenue perspective, they are convenient, involving few producers, large sales volumes, relatively inelastic demand and easy observability.

Excises may be levied on quantities leaving the factory or arriving at ports, thus simplifying measurement and collection, ensuring coverage, limiting evasion and improving monitoring. Excise taxes currently amount to less than 2% of GDP in low-income countries, compared to about 3% in high-income countries.

Globalization and tax evasion

Revenue losses due to globalization need to be addressed.

There are three main reasons for revenue losses. First, capital movements increase opportunities for tax evasion because of the limited capacity that any tax authority has to check the overseas incomes of its residents; evasion is easier as some governments and financial institutions systematically conceal relevant information.

Where dividends, interest, royalties and management fees are not taxed in the country in which they are paid, they more easily escape notice in the countries where the beneficiaries live.

There have been large non-resident aliens' bank deposits in some countries like the US that impose no taxes on interest from such deposits.

Second, avoidance (not evasion) may increase, given international dif-

ferences in tax rules and rates, because of the choice of tax regime that international tax treatment of enterprise income commonly offers.

This is more likely for taxation of profits from corporations' international operations.

Transfer pricing for goods, services and resources – moving among branches or subsidiaries of a company – provides opportunities for shifting income to minimize tax liability.

Third, international competition for inward foreign direct investment has led governments to reduce tax rates and increase concessions to foreign investors. The tax rates that governments can impose are thus constrained by international competition.

Hence, they are reluctant to raise rates or to tax dividend and interest income for fear of capital flight although it is well known that direct tax concessions have little effect in diverting international investment, let alone in attracting such flows. Hence, such tax concessions constitute an unnecessary loss of revenue.

Not surprisingly, income tax rates, both on corporations and on individuals, have fallen sharply since the 1980s.

Beggar-thy-neighbour policies have led to losses of revenue for many developing countries in a larger race to the bottom also involving labour and environmental standards and conditions, which also undermines the possibility of balanced, inclusive and sustainable development.

Finance ministries and tax authorities in developing countries need to co-operate among themselves and with their counterparts in the OECD economies to learn from one another and to close existing loopholes in their mutual interest.

With the huge and growing size of public debts as well as the real and imagined fiscal constraints to sustained global economic recovery, such cooperation is more urgent than ever. (IPS)□

Jomo Kwame Sundaram is the Coordinator for Economic and Social Development at the Food and Agriculture Organization (FAO) and received the 2007 Wassily Leontief Prize for Advancing the Frontiers of Economic Thought.

Argentina and the ISDS system

Argentina's experience in dealing with claims lodged against it under the investor-state dispute settlement system throws into sharp relief the many deficiencies of this arbitral regime.

by Federico Lavopa

The investor-state dispute settlement (ISDS) system has come under increasing criticism in recent years.

Inconsistent decisions, poorly reasoned awards, lack of transparency, parallel proceedings, serious doubts about arbitrators' impartiality and the sheer size of the compensations sought by investors and awarded by arbitration tribunals are just some examples of the flaws that have been pointed out by detractors of the system.

The dozens of cases that were initiated against Argentina as a result of the outburst of one of its worst economic and financial crises in late 2001 became an often-quoted sad illustration of many of these shortcomings of the ISDS system.

Apart from the tragic consequences entailed by the economic and political crisis which was faced by Argentina, in particular in 2001-02 – which included a 50% fall in per capita gross domestic product (GDP), an unemployment rate of over 20%, a poverty rate of

50%, strikes, demonstrations, violent clashes with the police, dozens of civilian casualties and a succession of five presidents in 10 days – Argentina received a flood of claims from foreign investors that were filed under different ISDS mechanisms and, in particular, before the International Centre for Settlement of Investment Disputes (ICSID).

Indeed, in the period 2003-07, claims against Argentina represented one-quarter of all the cases initiated within the framework of the ICSID Convention.

These claims before international arbitral tribunals challenged the changes to the economic rules that Argentina had implemented to contain the effects of perhaps the worst economic cycle of its history.

Deregulation ... and crisis

After 1991, Argentina had embarked on an economic deregulation

and liberalization programme. Among others, this programme included the convertibility of the Argentine peso and the creation of a currency board to maintain parity between the peso and the US dollar by limiting the local money supply to the amount of Argentina's foreign exchange reserves.

This pro-market programme was accompanied by a strong emphasis on attracting foreign investment, which, among other aspects, resulted in the conclusion of 58 bilateral investment treaties (BITs), 55 of which came into effect.

It also included a mass privatization process of public companies which, at that time, represented an important part of the domestic economy.

This market-oriented model reached its limits in the late 1990s, and in May 2003, a new president took office whose government reformed the regulatory framework for the economy – particularly that for the public services privatized over the 1990s – and introduced a package of emergency laws which implied a considerable change in the conditions under which foreign investors and, in particular, public services providers had to run their business in Argentina.

As a consequence, many of them decided to resort to the investor-state dispute settlement mechanisms embodied in the dozens of bilateral investment treaties that Argentina had signed in the 1990s. In total, in the period 2001-12, exactly 50 cases were filed against Argentina.

A striking characteristic of the Argentinian experience is the amount of compensation claimed by the companies that sued Argentina. According to estimates made when the peak of cases following the crisis was reached, if all the investors that sued Argentina had obtained 100% of their claims, the total amount that the country would have had to bear would have been at around \$80 billion. This sum would have been practically impossible to pay, even if Argentina had not been undergoing a period of acute economic crisis, because it represented approximately 13% of Argentina's GDP for 2013.

Although Argentina's response to this flood of cases was varied and it is still early to offer definite figures, it is already possible to conclude that, in general, arbitration tribunals were prone to render awards in favour of investors.

Almost 45% of the cases have re-

ceived a condemnatory award, although most of these cases could still be reversed by annulment proceedings, whereas only 15% of the arbitration proceedings ended up with a final decision completely in favour of Argentina. The remaining 40% are mostly cases which either resulted in an agreement between the parties, were altogether suspended or are still awaiting a decision.

All in all, of the \$80 billion in possible compensation calculated when the peak of cases against Argentina was reached following the crisis, Argentina has so far received final rulings involving the payment of \$900 million.

Inflexible, inconsistent

The first salient conclusion is that the ISDS system has a very low capacity to adapt to totally exceptional circumstances for which it does not seem to have been designed.

Despite the efforts of Argentinian attorneys to show that the measures implemented in the post-crisis period were adopted in an emergency context, being so exceptional as to justify any breach of the substantive clauses of the BITs, few tribunals were prepared to sustain this defence.

This notwithstanding, and with most of these cases having already been dealt with, the upcoming scenario for Argentina seems much less drastic than that forecast when the peak of cases was reached.

While they represent a heavy burden for a developing country like Argentina, so far the compensation actually paid amounts to a small portion of the sum initially estimated.

The Argentinian case also represents a worrisome example of the failure of the ISDS system to ensure coherence and soundness in its decisions.

Although the dozens of cases submitted against Argentina addressed exactly the same package of measures (the post-crisis emergency laws) and the arbitrators had to assess very similar arguments of the different claimants and a practically identical series of defences put forward by the Argentinian government, the conclusions at which they arrived have shown striking differences.

Additionally, some of the decisions have been subject to strong criticism and/or declared null and void by an-

nulment committees.

Finally, the experience of Argentina shows the difficulties that arbitration tribunals might encounter when trying to scrutinize the economic policy choices made by governments.

On top of the sensitivities of examining sovereign decisions of states, arbitrators might find themselves in the awkward situation of deciding on highly technical matters which they are clearly ill-equipped to assess.

The case of Argentina thus represents a sad example of the urgent need to reconsider and reform the ISDS system. Yet, the lessons to be drawn from this experience do not seem to lead to clear conclusions about which direction to take.

(continued from page 11)

in September with the objective to finalize them by October, so as to allow every participant to produce draft schedules by 30 October and to verify and approve other participants' draft schedules by 4 December, it added.

[Under the Declaration, the parties shall apply three-year staging in four equal annual reductions of customs duties, beginning in 2016 and concluding in 2019.]

After sustained negotiations between negotiators from South Korea and China at the EU mission in the week of 13 July, the EU offered a compromise to settle an agreement to include only lenses under the HS-6 classification.

The final deal involved give-and-take as between South Korea and China, said a trade envoy familiar with the negotiations.

Nevertheless, ITA-II will have a systemic effect because of proposed changes, said another participant in the talks.

At a meeting of ITA-II trade envoys on 18 July, the EU Ambassador Angelos Pangratis circulated the final list of 201 tariff lines based on the HS-6 classification that includes several ex-outs.

"During the last few days all sides have demonstrated the necessary leadership and flexibility that allowed for this important outcome," Pangratis said in a press statement.

Chinese Taipei expressed sharp concern over the final list of products,

On the one hand, the system has proved to be extremely inflexible, which prevented it from addressing the exceptional peculiarities of the Argentinian case. On the other hand, however, the wide margin of discretion available to the arbitral tribunals resulted in the adoption of inherently poor decisions, and with high levels of incoherence among them. (IPS Columnist Service) □

Federico Lavopa is a professor at the University of San Andres and University of Buenos Aires. This article is based on the paper "Crisis, emergency measures and the failure of the ISDS system: The case of Argentina", published as a South Centre Investment Policy Brief (No. 2, July 2015, www.southcentre.int/investment-policy-brief-2-july-2015). The views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to, IPS - Inter Press Service.

suggesting that its products of interest have not been taken on board.

But China and South Korea, the two main parties who had been unable to come to an agreement on some dozen core ITA tariff lines for the past nine months, expressed satisfaction on the final list of products, said a participant familiar with the meeting.

The US-China bilateral agreement became the backbone of ITA-II, with other countries merely securing inconsequential gains here and there. From an initial list of some 350-odd items, the final list is pruned down to 201, because of China's demand to remove many items. (SUNS8066) □

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Public agenda, private players

Barbara Adams and Gretchen Luchsinger caution against the hijacking of the global post-2015 development agenda, and the UN system that oversees it, by narrow private and corporate interests.

A critical issue repeatedly arising in the post-2015 negotiations relates to responsibility. There is shared responsibility, the preference of rich countries who would like to shift traditional official development assistance (ODA) and other "burdens" given the "rise" of some developing countries. There is common but differentiated responsibility, stressed by developing countries to link common commitment with the reality of varying capacities.

Debates also circle, directly or otherwise, around the role of the state, with some camps continuing to promote its central responsibility. Others call for more room for "stakeholders" to be responsible – notably, the private sector.

The post-2015 agenda must aim for transformation, given that the current course of development is so off-track, from imbalanced consumption and production patterns, to gaping inequalities, to the surpassing of planetary boundaries. The intergovernmental negotiating process has recognized this need; drafts of the outcome document referred to its unprecedented scope and significance. But will the rhetoric see action? How likely is that if some newly "responsible" actors – namely, the large private corporations and foundations from whom trillions of development dollars are expected to flow – are also among the primary drivers of unsustainable development?

Fit for whose purpose?

For a look at how the balance between public and private responsibility has shifted, and what this means in the real world in terms of adherence to international standards and norms, one need look no further than the United Nations itself. A new report by Global Policy Forum – *Fit for Whose Purpose?: Private Funding and Corporate Influence in the United Nations* – details how private corporations and corporate philanthropic organizations are increasingly paying to play there.

Why are corporate-led solutions to global problems seen as the way forward? How is it that measures poorly aligned with UN values receive the UN stamp of approval?

In recent decades, the United Nations has been subject to two trends that may also be familiar to some governments. One is the tendency for government donors to earmark funds, leaving different entities scrambling to please donors instead of providing strategic guidance for a consistent, coherent set of core programmes. Many organizations have also ended up looking for new sources of funds, often with the private sector. The underlying thinking is that the public sector can benefit not only from greater private resources, but also from private "efficiency" and "effectiveness." Not factored into this equation is how inefficient and ineffective large private actors have often been in sustaining public goods and upholding human rights.

What are some of the results of "outsourcing" the United Nations? Growing business influence in political discourse, the fragmentation of global governance, the weakening of

representative democracy, unpredictable funding that undercuts UN mandates, and a lack of accountability, to name some of the most obvious.

The UN system is meant to serve all the peoples of this world and the planet they inhabit. Total funding per year is around \$40 billion, about half the budget of New York City, and less than a quarter of the budget of the European Union. A zero-growth doctrine for the UN regular budget has been in place for over three decades since the 1980s, as governments have bought into the theory that the public sector is somehow less capable, and backed away from adequately funding the multilateral system.

What's the system to do? Increasingly, the answer has been: welcome in big business and private philanthropies. Private funding for UN-related activities reached an unprecedented \$3.3 billion in 2013, constituting 14% of all voluntary contributions. The growing use of general trust funds – where contributions have jumped by 300% over the last decade – allows donor governments and private concerns to direct UN funding choices outside the "one country, one vote" democracy of UN policy processes.

UN gateways for business

Private business interests now have multiple options to pay and play at the UN. The one that has opened the door to many others is the UN Foundation, established as a non-profit organization under US law to receive a billion-dollar gift from CNN founder Ted Turner. Since the foundation is not a UN organization, the United Nations set up the UN Fund for International Partnerships (UNFIP) as a trust fund to channel the money into UN activities. The relationship between the foundation and the fund is governed by an agreement initially made public, but not so for the most recent iteration.

In 1999, as the UN Foundation established itself, almost all of its annual expenses went towards grants, primarily through UNFIP. Today, only around half goes to grants, and less than 60% of grant funds go to UNFIP. Much of the rest backs activities outside the UN system – aligned with UN causes, if often carried out by large US NGOs. Deciding on the UN grants rests, in practice, with the foundation; UNFIP reviews the selections.

Over the last decade, the original Turner funds have remained stagnant, while contributions from other private and public donors have risen, notably from the Bill & Melinda Gates Foundation. Others include ExxonMobil, Goldman Sachs, Cemex, Bank of America and Shell, where a variety of questions might be raised around their links to issues ranging from environmental impacts to the stability of global and national financial systems – in other words, some of the major concerns at the heart of the post-2015 agenda. Where governments give funds, there are questions around why these need to travel through the UN Foundation instead of going directly into the UN system. For one recent UNFIP grant, an

internal UN audit flagged concerns about the source of donations, noting the potential for reputational risks and a conflict in ethical values.

The UN Foundation, despite now-diminished contributions to UNFIP, enjoys a prominent role at the UN. It freely encourages closer ties with business, often through global “partnerships,” and to a large extent benefits from the UN name. Its representatives advise the UN Secretary-General. In its own words, it has evolved from a “traditional grantmaker to an actively involved problem solver ... to solve the great challenges of the 21st century.” All of this is happening aside from the processes led by UN member states that, from the beginning of the UN system, have aimed at being democratic, inclusive and responsive to the needs of all – not just a few.

Fragmentation and more fragmentation

Around 60% of UN funding overall goes to activities for development and humanitarian assistance; member states have now made vocal calls for this system to be fit for achieving the post-2015 agenda. Yet core or unearmarked resources have plummeted from nearly half of all resources in 1997 to only a quarter today. Non-core or earmarked resources make up the balance, imposing significant administrative burdens and diluting programmatic focus. They introduce fragmentation, competition and overlap, in the face of ongoing UN member state calls for more coordination.

One response has been to try to diversify funding sources – in part by turning to the private sector, often without fully acknowledging the reputational risks that may be involved, or the strong potential for further fragmentation, and the undercutting of the multilateral nature and value of UN development programmes. In 2012, the Global Fund to Fight AIDS, Tuberculosis and Malaria, created in the wake of donor dissatisfaction with UN agencies, was, ironically, the largest donor to the UN Development Programme (UNDP), exceeding even the largest government contributor. It is financed in large part by the Gates Foundation, which is now also the second largest donor to the World Health Organization (WHO), behind only the United States.

UNESCO has attempted to market itself to private donors by promising “a strong image transfer by associating yourself with a reputable international brand” as well as “benefit[ing] from UNESCO’s role of a neutral and multi-stakeholder broker” and “strengthen[ing] your brand loyalty.”

The UN Capital Development Fund, faced with resource constraints almost from the time it opened its doors, is now the beneficiary of large multimillion-dollar donations from the Gates Foundation as well as Visa, MasterCard and Citigroup. Why the sudden interest in a fund that spent years providing small amounts of microcredit and assisting with local development finance? Could it be the market possibilities from the estimated 2.7 billion people around the world who do not yet have access to formal financial services?

Non-core resources have skyrocketed, from under \$10 million in 2006 to over \$70 million in 2014. Much of this funding goes, for instance, to programmes promoting the use of electronic banking platforms.

Whose health?

An ongoing budget crisis has threatened the stability of

WHO, long seen as the global health authority, even amid enormous global health concerns. Until 1998, half its budget came from assessed government contributions spent based on what the organization saw as the most compelling priorities. By 2014, assessed contributions comprised less than a quarter of the budget.

What has received the budgetary axe recently? Communicable diseases, and outbreak and crisis response, both the top health priorities particularly of the poorest countries. What’s flush with extra cash? Non-communicable diseases, and preparedness, surveillance and response, both favoured by wealthier countries who have bigger problems with the former, and are interested in protecting themselves against disease outbreaks in the case of the latter. These shifts were on ready display for the Ebola crisis, where WHO’s weakened capacities, especially due to cuts that slashed staff expertise, diminished its response, in stark contrast to its widely lauded action on the SARS outbreak little more than a decade before.

Other concerns stem from the growing number of major pharmaceutical companies that have become significant donors to WHO, including GlaxoSmithKline, Hoffmann-La Roche, Novartis, Bayer, Merck and Pfizer. In the swine-flu outbreak of 2009-10, experts who advised that WHO declare it a pandemic had ties with drug companies that in turn used the occasion to establish new vaccine contracts with governments.

WHO Director-General Margaret Chan, in reference to her now highly earmarked budget, says it is “driven by what I call donor interests.” These include, as noted earlier, the Gates Foundation, which is mainly interested in technical solutions with quick, measurable, visible outcomes. As for health systems – which in most countries remain publicly run – Bill Gates has reportedly said that he will never fund these because “it is a complete waste of money, [with] no evidence that it works.” Concerns have been repeatedly expressed by researchers that the large sums Gates sinks into what he thinks is worth funding stifle the research agenda and could divert attention in some health systems from underlying causes of diseases such as malnutrition.

Chan notes that going against the business interests of powerful economic operators is one of the biggest challenges facing health promotion. Many industries do not hesitate to use well-documented tactics to fend off regulation and advance their interests. In her words, these comprise “front groups, lobbies, promises of self-regulation, lawsuits, and industry-funded research that confuses the evidence and keeps the public in doubt. Tactics also include gifts, grants, and contributions to worthy causes that cast these industries as respectable corporate citizens in the eyes of politicians and the public. They include arguments that place the responsibility for harm to health on individuals, and portray government actions as interference in personal liberties and free choice.”

She continues, “This is formidable opposition. Market power readily translates into political power. Few governments prioritize health over big business ... This is not a failure of individual willpower. This is a failure of political will to take on big business.”

Slicing and dicing development

Despite all the talk about “integrated” issues in the post-2015 agenda, there are already moves afoot to split up re-

sponsibilities and resources, most notably through the use of so-called vertical funds that focus on single issues – some commentators have gone so far as to propose having a fund for each goal. For example, the new Global Financing Facility to support the UN Every Woman Every Child initiative was launched at the Third International Conference on Financing for Development in July. Managed by the World Bank with the blessing of a few major government backers, it is expected to serve as a major vehicle for financing the proposed Sustainable Development Goal on healthy lives.

Every Woman Every Child is one of a series of global multistakeholder partnerships involving public and private actors. These are seen as a practical step in a time of scarce resources, pooling resources and skills, and allowing quick, focused action on a discrete set of targets. Their approach may appeal particularly to “partners” with little interest in making links and questioning systemic issues that collectively drive deficits across all elements of sustainable development.

For its part, Every Woman Every Child aims to save the lives of millions of women and children. How is it doing so far? In 2010, it identified a funding gap of \$88 billion for reproductive, maternal, newborn and child health services in 49 countries. To date, it has met at most 19% of this gap, with, as is often the case, only a portion of committed resources becoming actual disbursements. But the number of commitment-makers has tripled, including a number of governments, foundations, large NGOs and other global partnerships, like the Global Fund to Fight AIDS, Tuberculosis and Malaria.

The initiative’s most recent progress report trumpets “its success in mobilizing the private sector.” Merck has made commitments to expanding childhood asthma programmes and donate vaccines; Johnson & Johnson agreed to donate medicines and help expand training for health workers. In a series of “Business Impact Stories” published by Every Woman Every Child, Nestlé’s Women’s Empowerment Initiatives are oddly championed as “integrated in the company’s shared value approach and result in increased penetration, footprint and additional volume for Nestlé; strong and emotional links with consumers ... and enhanced trust with all stakeholders.” It is not immediately clear how exactly women’s empowerment fits into this equation.

Other global partnerships include Sustainable Energy for All and Scaling Up Nutrition. The former has allowed a definition of renewable energy that includes hydropower and biofuels, despite negative environmental consequences from both. Its initial Global Action Agenda was developed by a High-Level Group where half the representatives were from the private sector, including top managers from Bank of America (a major financier of the coal industry), Accenture, Renault-Nissan, Siemens and Statoil. One civil society representative was invited to attend, from the Barefoot College in India. Similar patterns have persisted throughout the Advisory Board and other governance structures set up to manage SE4All, with the board now chaired by the UN Secretary-General and the President of the World Bank.

The initiative so far has come up with solutions to finance sustainable energy that rely on the same market mechanisms that tend to be associated with perpetuating inequalities and unsustainability – they propose turning to bond markets, public guarantees to mitigate private capital risks and insurance products, among others.

It has also mobilized a series of both financial and non-financial commitments from public and private actors, like the US Power Africa initiative. Among the biggest expected beneficiaries of the \$7 billion scheme: General Electric. Companies that make commitments under SE4All are prominently featured on the initiative’s website, but come with no effective mechanisms to monitor and review implementation.

Changing the discourse

For the UN system to respond adequately to today’s critical challenges, *Fit for Whose Purpose?* stresses that public funding of it must increase. Funding must be high in quality, including through strict limits on earmarking. Norms, standards and guidelines must be set to govern all interactions of the United Nations with the corporate sector, and both the intergovernmental framework and UN institutional capacity for monitoring and overseeing partnerships must expand.

Perhaps most importantly, the surrounding discourse needs to fundamentally change, drawing a clear distinction between those who regulate and those who are regulated, and reclaiming the public space for the UN system and within it. And responsibilities need to be more than just generically “shared” – they must be well delineated and defined, grounded in norms that protect the collective public interest, and linked to varying capabilities.

Post-2015 aims for a transformative agenda. Is this to be sought in the “new business model” that has emerged, where the focus is literally on large corporate interests? Can the UN system ever be fit for purpose for “we the peoples” if private players, arriving with a mix of contradictory incentives, increasingly channel funds and steer agendas without democratic scrutiny?

In the post-2015 agenda, member states face a turning point. Endorse or tacitly accept this model. Or reaffirm that their primary responsibilities are to speak and act according to the inherent rights of their citizens, and the planet they share. Only the latter choice has hopes of putting the world on track for transformation. □

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