

THIRD WORLD *Economics*

TRENDS & ANALYSIS

Published by the Third World Network KDN: PP 6946/07/2013(032707) ISSN: 0128-4134 Issue No 633 16 – 31 January 2017

Austerity-related labour reforms harm human rights – UN expert

Labour market deregulation undertaken in response to sovereign debt crises has not helped countries recover but has instead undermined the rights of workers, according to a report to the UN Human Rights Council by the UN Independent Expert on the effects of foreign debt. Likewise, reporting on the case of the EU, the Independent Expert has said that austerity policies implemented to deal with the eurozone crisis have adversely affected economic, social and cultural rights.

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THIRD WORLD ECONOMICS is published fortnightly by the Third World Network, a grouping of organisations and individuals involved in Third World and development issues.

Publisher: S.M. Mohamed Idris; **Editor:** Chakravarthi Raghavan; **Editorial Assistants:** Lean Ka-Min, T. Rajamoorthy; **Contributing Editors:** Roberto Bissio, Charles Abugre; **Staff:** Linda Ooi (Administration), Susila Vangar (Design), Evelyn Hong & Lim Jee Yuan (Advisors).

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Printed by Jutaprint, No. 2, Solok Sungei Pinang 3, Sungai Pinang, 11600 Penang, Malaysia.

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Austerity-related labour reforms harmful to working people

Labour market deregulation does not seem to have helped countries recover from financial crises but has instead undermined workers' rights, according to a UN human rights expert.

by Kanaga Raja

GENEVA: Austerity-related labour market reforms promoted by multilateral and regional financial institutions in many developed and developing countries have been shown to not help economies recover after crises, and have instead inflicted substantial harm on working people which will be felt for many years.

This is one of the main findings by the UN Independent Expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, in his report to the thirty-fourth session of the UN Human Rights Council, which meets here from 27 February to 24 March.

In his report, the Argentine rights expert observed that many states with unsustainable levels of debt or experiencing a financial crisis have implemented austerity policies and labour market reforms with a strong deregulatory impetus, either on their own initiative or at the behest of external creditors, including international or regional financial institutions.

"Such reforms have often reduced the legal protection of workers and affected the bargaining power of trade unions, with important implications for workers' standard of living, economic equality and social cohesion, among others."

In a number of cases, these reforms have amounted to violations of human rights obligations and international labour standards, as documented by, among others, the international bodies monitoring these rights, said the Independent Expert.

In his report, the rights expert challenged what he said is the widespread belief that deregulating the labour market will further growth and employment. "An increasing number of studies have actually pointed to the positive economic effects of labour standards, including on

productivity and innovation. In addition, evidence that downscaling domestic labour legislation has actually helped to ensure economic and financial recovery is weak," he said.

He pointed out that financial crises are usually not caused by excessive labour regulation and labour deregulation does not help to overcome them. In fact, he said, conventional austerity-related labour reforms implemented during the last years do not seem to have helped countries recover, nor have they resulted in restoring access to employment to pre-crisis levels. Instead, they have undermined labour and other social rights contained in international law.

"It is therefore time to question the conventional wisdom that the deregulation of labour markets is a suitable and legitimate approach for responding to financial crises. Rather, the opposite is needed, that is, reform measures guided by the normative content of labour rights contained in international human rights law that foster gender equality, enhance employment and provide better access to these rights for marginalized groups and individuals," said the rights expert.

According to the report, in many developed and developing countries, austerity-related labour law reforms have been promoted by multilateral and regional financial institutions on the assumption that they will lead to economic growth and thus prevent or help overcome debt crises.

They have often recommended or insisted, as part of their lending conditionality, that the labour market be made more flexible through deregulation, downsizing the public sector and freezing or reducing wages and work-related social benefits in an effort to reduce government expenditure.

"Austerity measures and labour market reforms have often contravened the international human rights obligations of States, eroded labour rights and resulted in the retrogression of work-re-

lated gender equality,” said Bohoslavsky.

They have contributed to an increase in inequality and insecure and informal employment; fostered discrimination in the labour market towards young and older persons and individuals belonging to marginalized social groups; and resulted in the reduction of unemployment benefits and other job-related social protection.

The rights expert noted that the mainstream assumption that labour rights are generally detrimental to economic development has been challenged at theoretical and empirical levels and it has been shown more concretely that austerity-related labour market reforms do not usually help economies to recover after crises.

“Actually, these reforms have not improved economic performance; instead they have inflicted substantial harm on working people, which will be felt for many years.”

Financial crises and labour rights

Financial crises can affect labour rights in a number of ways. Obviously, financial crises may reduce economic growth and employment and impair the right to work, said the report. However, in addition, governments have often undertaken reform measures that directly affect labour rights, such as reduction in wages and employment in the public sector aimed at reducing public expenditure or labour market deregulation in the private sector purportedly to increase competitiveness, or indirectly such as by creating economic conditions which increase pressure on workers, reducing wages or threatening employment, for example, through privatization of public enterprises, trade liberalization or cutting domestic subsidies.

While the links between debt crises and labour law reform are complex, it is safe to say that unsustainable public debt levels often play a key role in a government’s decision to adopt economic adjustment reforms, with various implications for labour rights.

In this regard, said the report, the stimulus for reform can come from external actors, notably key creditors of the state concerned, while, in other cases, the political impulse for reform policies has stemmed from the government itself.

“Financial crises and labour reforms can result in a vicious downward spiral

that depresses labour rights,” the rights expert cautioned.

“Increased unemployment and weakened trade unions have the potential to entrench income inequality and stagnation of workers’ wages in the bottom half of the labour market and trade unions lose the power to fulfil their traditional role of contributing to redistribution.” Consequently, workers may borrow beyond their means to maintain their standard of living; weakened individual and collective labour rights may increase the risk of financial crises, which, in turn, may lead to further deregulation of labour markets.

The report noted that labour-related austerity policies have been openly pushed by a number of key official creditors, including the World Bank, the International Monetary Fund (IMF), and, more recently, the IMF together with the European Commission and the European Central Bank – the so-called troika.

It said that labour-related conditionality has featured prominently in IMF financial assistance programmes especially since the late 1980s. Indeed, around 50% of all lending programmes have involved one or more labour-related conditions over the period from 1994 to 2007. Since then, the number of IMF programmes with labour conditionalities appears to have fallen, but still, between 25-40% of IMF programmes adopted until 2014 contained labour-related conditions relating to the public or the private sector.

“While the IMF has occasionally supported moderate improvements in labour standards, its prevalent stance regarding labour law has been a deregulatory one.”

Close to one-third of the available letters of intent addressed by governments to the IMF between 1998 and 2005 contained commitments to be flexible with labour market regulation. Early cases can be tracked to the 1950s, such as when the IMF required Argentina to control wage increases. Adjustment measures implemented during the 1980s in the context of the Mexican debt crisis entailed a considerable reduction in both the number of public employees and their salaries, among others.

In recent years, austerity-driven labour law reforms have remained a widespread trend, said the report. No fewer than 89 countries implemented such reforms between 2010 and 2015;

more than half (49) of them were implemented in developing countries. In addition, 130 countries had reportedly implemented or were contemplating cuts in or caps on public-sector salaries, more than two-thirds (96) of which were developing countries.

According to the rights expert, in the context of the eurozone crisis, labour law reforms have been particularly far-reaching. Crisis-stricken eurozone countries have notably adopted legislation to reduce the economic costs of laying off workers. This was done through measures such as cutting severance pay, shortening notification periods, lowering the protection against unfair dismissal and easing the rules on collective redundancies, among others.

Impact on human rights

Austerity measures and economic reform programmes have often conflicted with the human rights obligations of states. These range from minor interferences with to complete negation of relevant rights and cover a number of issues, Bohoslavsky said.

According to the report, international financial institutions and national development banks must also respect labour rights when providing loans to states and imposing the conditionality of implementing certain fiscal and macro-economic reform policies.

“If implemented, fiscal consolidation programmes must fully respect human rights standards as must borrowing States and lenders, including lending international organizations and States. Both lenders and borrowers have an obligation to carry out a human rights impact assessment prior to the provision of a loan, in order to ensure that the conditionalities do not disproportionately affect economic, social and cultural rights nor lead to discrimination,” Bohoslavsky underlined.

In several instances, he noted, the economic adjustment reforms undertaken by states have created tension with regard to the right to fair remuneration. Labour law reforms facilitating the hiring and layoff of workers have led to tensions with regard to human rights obligations. Trade union-related rights have also frequently been affected by labour law reforms undertaken in the context of crisis-related economic adjustments.

Adjustment reforms undertaken to

prevent, mitigate or overcome sovereign debt crises have affected workers' human rights on a number of occasions and in various ways.

In a study that examined data on 131 developing countries over the period from 1981 to 2003, it was found that the longer the time span during which a country was subjected to a structural adjustment programme sponsored by the IMF and the World Bank, the lower the level of protection of labour rights in its territory.

Another study that analyzed data from 123 developing and emerging economies found a significant negative relation between IMF and World Bank programmes and collective labour rights, notably with regard to workers' freedom of association and the right to collective bargaining, both in law and in practice.

"This adds to the literature on the impact of currency crises on labour standards, which found that such crises reduce the aggregate labour share, notably in the manufacturing sector, and lead to a decline in real wages and higher general and youth unemployment, among others," said the rights expert.

Workers' wages have very often been affected by economic adjustment reforms, he noted. A study of 110 countries identified a negative effect of IMF financial assistance programmes on the labour share in the manufacturing sector. IMF- and World Bank-sponsored adjustment programmes implemented in the 1980s reportedly went along with the drastic declines in real wages in a number of developing countries.

Trade unions have also been weakened in countries undertaking economic adjustment. A study using data on 39 least developed countries, carried out during the second half of the 1990s, showed that the signing of an IMF loan arrangement and debt service was negatively associated with the level of unionization rates.

"The privatization of public companies promoted by IMF and World Bank-driven adjustment programmes has, in several developing countries, such as India, furthered the fragmentation and weakening of local trade unions," said the report.

Labour market reforms undertaken during the European economic crisis heavily affected collective bargaining in the countries concerned. For example, said the report, Greece saw a strong de-

crease in sectoral collective bargaining combined with the spread of company-level agreements by non-union organizations; in Romania, the 2011 labour law reforms heavily affected trade unions' capacity to engage in effective collective bargaining at the national and sectoral levels; and in Portugal, the number of collective agreements adopted per year dropped dramatically between 2008 and 2012, as did the number of workers covered by those agreements.

The weakening of labour rights under structural adjustment programmes has also entailed adverse implications for other human rights, said the rights expert. In Zimbabwe, for example, substantial layoffs in the public sector, among other factors, reportedly pushed a number of workers and their families into poverty and homelessness, affecting their right to food and adequate housing.

"Austerity-related labour law reforms undertaken in the course of the eurozone crisis are – together with reforms of pension systems – expected to result in widespread old-age poverty," Bohoslavsky warned.

In Greece, the income loss brought about by the austerity measures, labour law reforms and the scaling down of the public sector have led to an increase in poverty, in particular among workers in the private sector, which has been exacerbated by the lack of a social security system capable of providing sufficient relief.

Other adverse effects concern the quality of the public service. Reductions in public servants' salaries can affect productivity in the public sector, which, in turn, lends itself to an argument for privatization or additional wage cuts. In Cote d'Ivoire, reductions in teachers' salaries, as recommended by the IMF and the World Bank, appear to have had a negative impact on education quality, owing to cross-border brain drain.

Finally, said the rights expert, IMF- and World Bank-sponsored adjustment programmes have, in some cases, been associated with violations of civil and political rights. For example, since the 1950s in Argentina, IMF programmes have repeatedly been accompanied by violence against trade unions opposing labour market-related measures, involving, among others, crackdown on protests and imprisonment of union leaders.

"In numerous countries, the effects of austerity policies have led to protests and riots, often accompanied by the disproportionate use of force by law enforcement officials against demonstrators and resulting in violations of civil and political rights."

Economic effects of labour standards

Bohoslavsky emphasized that the assumption that labour rights are generally detrimental to economic development has been vigorously challenged at the theoretical level and refuted by empirical data.

"Evidence that austerity-related labour market reforms have contributed to economic recovery after debt-related economic crises is weak. Sometimes it appears that debt crises have rather provided a pretext to push through labour market reforms favouring business interests rather than addressing economic problems. It is therefore not surprising that debt crises frequently exacerbate economic inequality."

According to conventional wisdom, labour legislation, in particular employment protection legislation, is a main obstacle to economic growth and employment. In this regard, the Organization for Economic Cooperation and Development (OECD), the IMF and the World Bank have advocated that high labour protection standards are a driver of unemployment, among others, and should be scaled down. "Those views have, however, been challenged on a number of fronts," the Independent Expert noted.

With regard to developing countries, evidence of a negative impact of labour standards on a country's economic performance appears to be weak.

While relevant data on developing countries is scarce, research on Argentina, for example, suggests that labour market deregulation seems to have reduced employment elasticities instead of increasing them.

A study analyzing data on various countries from 1985 to 1994 found that higher labour standards correlated with lower levels of corruption, among other positive effects.

Overall, said the report, research suggests that the economic implications of worker protection legislation are significantly complex, vary across countries

and economic sectors and can, more importantly, even increase economic efficiency, depending on the context.

In many cases, said the report, “factors other than labour standards seem to play a stronger role in influencing economic outcomes. The economic case for dismantling labour standards, including in the area of collective bargaining and dismissal protection, is, hence, weak.”

If encroaching on labour rights does not have any justifiable benefits, even for rights holders who are outside the labour market, and if downsizing labour rights does not lead to enhanced enjoyment of economic and social rights for all, such retrogressive measures cannot be considered as permissible and justifiable responses to financial and economic crises, the report stressed.

Empirical findings overall do not seem supportive of the claim that labour law deregulation fosters recovery after economic crises, said the rights expert.

Evidence from Latin America suggests that reforms that deregulated individual and collective labour law in Argentina, Bolivia, Brazil, Chile, Mexico and Uruguay in the 1980s and 1990s led neither to less informal employment nor to reduced employment instability, which saw an increase during that period. “Indeed, in several Latin American countries, the weakening of employment protection legislation appears to have aggravated the precariousness of work with little evidence of improved employment performance.”

The economic effects of the austerity measures taken recently in the context of the eurozone crisis appear to be similarly weak. Research suggests that the European Union countries that performed relatively better during the economic crisis of 2007-11 were those that had less flexible labour markets.

Overall, said the report, there is little evidence that labour market deregulation furthers recovery in the context of financial and economic crises, while the negative impact on economic and social rights is substantial.

“This also highlights the potential relevance of other factors behind deregulatory reforms that undermine labour standards, such as ideological bias and non-explicit retrogressive distributional agendas,” it added.

The rights expert underlined that it is essential to submit austerity-related re-

forms to robust human rights impact assessments before they are carried out.

First of all, any such impact assessment should include an assessment of the impact of such measures on the population, including whether there are any viable human rights-compliant policy alternatives to austerity reforms, before they are carried out. The assessment should recommend policies that meet the economic needs of the country in a manner that fully protects human rights.

Too often, the measures taken, as in the case of European austerity, have not improved the economic situation but have, simultaneously, substantially worsened the human rights of millions of people, he said.

Human rights impact assessments should feed into both the policymaking of the state considering reforms as well as that of the external actors recommending or requiring such reforms, such as international financial institutions, the rights expert added. (SUNS8403) □

EU austerity policies undermining rights, increasing inequalities

In an addendum to his report, the UN Independent Expert decries the impairment of human rights caused by austerity policies implemented in the EU in response to the eurozone financial crisis.

by Kanaga Raja

GENEVA: Austerity policies have all too often gone hand-in-hand with undermining economic, social and cultural rights, while at the same time increasing inequalities in income and wealth within the European Union and its member states.

This is one of the main conclusions highlighted by Juan Pablo Bohoslavsky, the Independent Expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights, in his report to the thirty-fourth session of the UN Human Rights Council.

The Independent Expert had conducted an official visit to Brussels from 30 May to 3 June 2016, focusing specifically on the response of the European Union to the sovereign debt crisis that affected several member states and its impact on the enjoyment of human rights, in particular economic, social and cultural rights.

In his report, the rights expert said ensuring financial stability and controlling public debt are important tasks. However, he said that he is deeply concerned about the “paradigmatic shift” that has taken root in the European Union in recent years that is undermining a previously balanced approach to ensuring economic stability, equality and social cohesion in favour of a dispro-

portionate focus on budgetary discipline and competitiveness.

“Austerity policies have unfortunately all too often gone hand-in-hand with undermining economic, social and cultural rights. At the same time, inequalities in income and wealth have increased within the European Union and its member States.”

Fiscal consolidation and structural reform policies implemented in Cyprus, Greece, Ireland, Portugal and Spain have deepened economic recessions and further increased unemployment and poverty.

Harsh cuts to public expenditure on social protection, healthcare and education cast doubt on whether sufficient priority was given to sheltering vulnerable groups from the effects of the crisis. In addition, social partners, civil society organizations and affected groups and individuals should be better consulted in programme design, review and evaluation.

The rights expert pointed out that economic reform programmes agreed between European Union member states, the European Commission and the European Central Bank were implemented without any official assessments of their impacts on economic, social and cultural rights or on vulnerable groups.

“Programme reviews and official evaluations by the European Commission were concerned mainly with

whether economic and fiscal targets were met and contained only limited analyses of adverse social impacts and how they could be better prevented in the future.”

“To regard human rights considerations as exogenous to such economic reforms not only ignores international human rights law obligations, but also deprives the relevant policy discussions of a critical perspective,” Bohoslavsky underlined.

In his view, economic reform programmes should undergo human rights as well as social impact assessments, and their results can change policy choices. Such assessments should be carried out in consultation with affected rights holders and civil society and be more than an exercise in ticking boxes to be meaningful.

In addition, evaluations of past reform programmes should assess not only whether they managed to reduce budget deficits, restore debt sustainability or enhance economic growth, but whether they ensured a fair and equal distribution of the burden of adjustment within society.

The Independent Expert said: “The economy is society’s servant, not its master, and financial policy is a tool that Governments must ensure serves the best interests of all, and not just the privileged and powerful.”

It is therefore absolutely relevant to know the extent to which economic and social rights have been successfully protected, what gaps exist and who is most affected by lack of protection of their rights. This exercise would not only allow lessons to be learnt from past mistakes in order to be better equipped for the future, but also ensure that identified infringements of social and economic rights can be addressed and corrected.

According to the report by the Independent Expert, the financial and economic crisis of 2009 affected the European Union as a whole, putting additional pressure on the public finances of many member states. Several countries resorted to financial consolidation policies to address banking crises, public deficits and debt.

Five euro-area countries – Cyprus, Greece, Ireland, Portugal and Spain – requested financial support from the Union and its member states as they experienced very serious difficulties in relation to their financial stability. Support in the form of loans from European in-

stitutions, including new financing mechanisms set up by European Union member states, and the International Monetary Fund (IMF) was provided on the condition that they implement fiscal consolidation and economic adjustment policies.

“Fiscal adjustment policies have the potential to impair a number of internationally recognized human rights, including the rights to food, housing, health, education, social security, water and sanitation, and the right to just and favourable conditions of work,” said the rights expert.

“The crisis and the response to it have resulted in increased poverty, homelessness, reduced gender equality, dramatically increased youth unemployment in Greece, Portugal and Spain, and cuts to social welfare benefits and pensions. Some countries witnessed drastic reductions of social and health services for persons with disabilities while the number of people not being able to access affordable health-care services has increased.”

According to the report, the integrity of international human rights law needs to be ensured when international organizations, international financial institutions and regional integration organizations recommend or prescribe certain policies to their member states.

“International organizations have to act in accordance with human rights obligations binding on them on the basis of their own foundational treaties, customary law and general principles of international law, or human rights treaties ratified by them. In addition, they have to ensure that measures proposed or enforced by them respect the human rights obligations binding on their member States.”

While international human rights bodies have recognized the constraints that states may face during a financial crisis, there are limits on the extent to which states may deviate from their obligation to realize economic, social and cultural rights to comply with conditions imposed by their creditors, said Bohoslavsky.

Member states also have to comply with their human rights obligations when they exercise decision-making control in international organizations, for example, through their membership on the boards of international financial institutions such as the European Stability

Mechanism or IMF.

“Certain procedural obligations should be respected when designing, negotiating and implementing adjustment policies. These include the obligations to undertake a meaningful human rights impact assessment and to ensure transparency, participation and accountability,” said the Independent Expert.

Impact of debt crisis on human rights

In his report, the Independent Expert focused on impacts in euro-area countries that were subjected to strict conditionalities for receiving lending, and highlighted his concerns in relation to the rights to work, to health and to social security.

He said in the years following the financial crisis, public debt levels increased significantly in most European Union countries and have remained above the official debt ceiling set for euro-area member states at 60% of gross domestic product (GDP).

In Greece, Ireland, Portugal and Spain, public funds used to stabilize the financial sector and to safeguard the banking sector from collapse contributed significantly to the increase of public debt. Private debt was turned into public debt. In Greece, the present level of public debt is financially and socially unsustainable.

“Current debt levels may easily become a risk for the enjoyment of human rights. While debt service costs in some countries may still be manageable in the short run, they could significantly increase should the period of historically low interest rates come to an end, making the refinancing of public debt more expensive,” the rights expert cautioned.

Even today, the cost of servicing debt consumes important resources that could be better used for productive and social investment to fulfil economic, social and cultural rights. This is the case in Greece in particular, which, in the view of the Independent Expert, requires debt relief to boost economic and socially inclusive growth. “Regrettably, fiscal consolidation and economic reform policies have so far largely failed to reduce public debt levels.”

During the period 2008-14, overall government expenditure hardly changed in real terms for the European Union as a whole. However, in Greece, public ex-

penditure was in freefall, with extreme cuts in the field of healthcare.

While the number of unemployed persons in Greece increased from 380,000 in 2008 to 1,270,000 in 2014, spending on unemployment benefits went down, indicating that the majority of the unemployed had either never received unemployment benefits or had lost their entitlement to receive them owing to long-term unemployment.

On the other hand, Cyprus, Ireland and Portugal significantly increased spending on unemployment benefits.

Government expenditure in Ireland was reduced in real terms, with particularly harsh cuts in education, benefits and services for persons with disabilities, the sick, families and children.

Portugal made large spending cuts in health and education. Overall government expenditure contracted in Spain, where significant cuts were made in family and child benefits, education and public healthcare; only expenditure on old-age pensions increased.

Cyprus, Greece, Ireland and Portugal reduced funds for combating social exclusion and poverty.

"This raises the question of whether mitigating negative social impacts on vulnerable groups was actually as much of a priority as claimed in some official policy documents," the rights expert said.

Expenditure on benefits for sick persons and persons with disabilities was also slashed significantly in Cyprus, Greece, Ireland and Spain.

The Independent Expert said he is concerned that the economic reform policies implemented across the European Union have caused severe cutbacks in health services and social welfare entitlements for persons with disabilities.

"These cuts have undermined their right to an independent living, reduced support services for families with disabled children, inhibited the de-institutionalization of persons with disabilities and restricted the right of children with disabilities to live in family settings. The right to an adequate standard of living and social protection was also disproportionately affected."

The report also noted that fiscal consolidation policies often included reducing the number of public employees. Restrictions on hiring in the public sector were introduced in Cyprus, Greece, Ireland, Portugal and Spain. In Greece, measures also included a labour reserve

scheme aimed at transferring or dismissing workers employed in the public sector. Conditions for collective dismissals were relaxed in Greece and Spain.

Public sector wages were cut in Cyprus, Greece, Ireland and Portugal and minimum wages frozen in Portugal and cut in Greece, including to levels below the statutory minimum wage for young workers entering the labour market.

The number of unemployed persons in the European Union increased to about 22.9 million in 2015, 6.1 million more than in 2008, before the financial crisis. Within the European Union, the highest unemployment rates can still be observed in Greece (23.4% as at June 2016), followed by Spain (19.5% in August 2016). Unemployment in Cyprus (12.1%) and Portugal (11.0%) has also remained above the European Union average (8.6%).

More worryingly, 10.9 million persons, or nearly one in two job seekers, have been without a job for more than 12 months.

Long-term unemployment has remained high, particularly in countries that underwent adjustment programmes. In Greece, 73.1% of all unemployed have been without a job for more than 12 months; in Ireland, Portugal and Spain the figures are 56.2%, 57.4% and 51.6% respectively.

In the European Union as a whole, 4.2 million people between the ages of 16 and 25 are without a job, with youth unemployment rates reaching 47.7% in Greece and 43.2% in Spain.

Women are still more frequently affected by unemployment than men within the European Union. In Greece, this difference is particularly marked: the female unemployment rate stands at 27.8%, compared with 19.8% for men. A similar pattern can be observed in Spain (21.5% versus 17.7%).

The fiscal consolidation policies have limited the affordability and accessibility of public healthcare services in programme countries. In Greece, a large number of individuals dropped out of the public health insurance schemes. Reform measures included reduction of healthcare staff, reduction in the number of public hospital beds and an increase in co-payments for outpatient treatment or medication, effectively shifting the cost burden from public budgets to citizens. Waiting times for medical examinations and surgery increased in Cyprus,

Greece, Ireland and Spain.

Measures implemented in countries affected by adjustment included reform of pension and social welfare systems, including unemployment benefits or benefits for families, children and persons with disabilities.

"The reform measures have so far not been able to reduce poverty and material deprivation, in particular among children, migrants, the unemployed, single-parent households and female pensioners," the Independent Expert said.

In several countries, the official retirement age was increased and measures taken to reduce early retirement. In addition, existing and future pensions were cut.

In Greece, Portugal and Spain, bonuses were cut or completely abolished. In Portugal, all pensions except the minimum social security pension were frozen, and some were reduced.

However, the number of persons inadequately covered by social security, unemployment or social welfare benefits has increased. About 121 million people in the European Union were at risk of poverty or social exclusion in 2014, 4.7 million more than in 2008; this increase was concentrated mainly in euro-area countries implementing austerity measures and structural reforms.

In Cyprus, Greece, Ireland, Portugal and Spain there were 3.8 million more persons at risk of poverty and social exclusion in 2014 than in 2008. Furthermore, it is unlikely that the European Union will reach its own target of reducing the number of people at risk of poverty or social exclusion by 20 million by 2020.

Rights-based approach

The Independent Expert said that the European Union should be commended for several initiatives to mitigate the consequences of the economic and financial crisis. In this context, he cited the Youth Employment Initiative to address youth unemployment, an investment plan for Europe to boost growth and employment, and the European Commission's Social Investment Package.

While welcoming these initiatives, he, however, said that they do not yet appear to have been able to address in a

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WTO secretariat reproached for vitiating negotiating climate

India has criticized the WTO secretariat for appearing to promote the contentious subjects of e-commerce and investment facilitation in the face of a lack of consensus among WTO member states on these issues.

by D. Ravi Kanth

GENEVA: India and several developing countries on 23 February reproached the World Trade Organization secretariat led by Director-General Roberto Azevedo for “vitiating” the negotiating climate by pushing controversial new issues such as e-commerce and investment facilitation despite opposition from a large majority of members, trade envoys told the *South-North Development Monitor (SUNS)*.

At an informal meeting of heads of delegation (HOD), India delivered the harshest critique of the manner in which the negotiating process is vitiated by a push for “certain issues” by some members along with the WTO secretariat.

By pushing for controversial new issues, the secretariat seems determined to torpedo “the needs and interests of developing-country members and the LDCs [least-developed countries]”, according to members who took part in the meeting.

“This goes against the letter and spirit of what the Ministers have said [at the WTO’s tenth Ministerial Conference, held in Nairobi in 2015]; it is almost as if at least some parts of Ministerial Declarations remain merely on pieces of paper to be placed on the shelf after each Ministerial rather than directions to be acted upon,” India’s trade envoy Ambassador Anjali Prasad said, according to trade envoys who asked not to be identified.

The Indian envoy denounced what she called “selective visibility and hearing in favour of such issues [e-commerce and investment facilitation] and against those [issues] that are being taken up by many developing and least-developed countries to correct or rebalance existing asymmetrical rules.”

Without mentioning WTO Director-General Azevedo, who is also the chair of the WTO’s Trade Negotiations Committee (TNC) and who provided his assessment on the state of play in various negotiating bodies at the HOD meeting, Prasad said the officials / trade envoys in charge of various negotiating bodies have failed to provide an “impartial –

more factual and less impressionistic” assessment, according to an African trade envoy who asked not to be cited.

She suggested that biased views and assessments by officials in charge of negotiations “vitate the discussions on all issues and raise questions on the conduct of the concerned officials.”

In an organization which prides itself on being a “consensus-driven body”, it is imperative that the officials chairing the different bodies “assess the state of play and the extent of consensus or divergence, impartially, objectively and factually and not in a value-loaded manner”, the Indian envoy emphasized.

Prasad urged the TNC chair to direct the chairs of the different negotiating bodies to “desist from value-loaded assessments” as members move towards the eleventh Ministerial Conference, so as to avoid “vitiating” the process. (The eleventh Ministerial Conference will take place this December in Buenos Aires.)

She said the manner in which the TNC chair and the chairs of negotiating bodies held meetings in “formats” lends itself to selective hearing and visibility on the part of those assessing consensus or divergence.

“Therefore, it is imperative that the Geneva process should be as transparent, impartial and fair as possible, with negotiations being structured in inclusive and representative formats; only if this is done can we as members have faith in the legitimacy of the process,” India emphasized, according to trade envoys present at the meeting.

Secretariat presentations

India’s trenchant critique centred around the manner in which the WTO secretariat pushed for negotiations in areas such as e-commerce, investment facilitation, and disciplines for micro, small and medium enterprises (MSMEs) at a March meeting in Berlin of officials from the G20 grouping of the world’s leading economies.

In “a member-driven organization”, India said, the secretariat “is meant to be

an impartial institution [which ought to be] exclusively international in character.”

Further, “the Agreement Establishing the WTO bars the secretariat from taking any action which might adversely reflect on their position as international officials ... The secretariat, therefore, should not only be impartial but also be seen to be so,” India emphasized, according to trade envoys who took part in the HOD meeting.

However, the recent representations made by the WTO secretariat to the Working Group on Trade and Investment under the G20 in Berlin gravely undermined the role of a member-driven WTO.

On investment facilitation, the secretariat made a presentation in which it not only attempted to “define investment facilitation but has also proposed next steps.” India sought to know how the secretariat adopted a position on this despite investment facilitation being a contentious issue, according to trade envoys present at the HOD meeting.

Commenting on the secretariat’s (PowerPoint) presentation on e-commerce, India said the last two slides of the presentation actually called for “further discussions towards a multilateral outcome.” The secretariat official concerned presented the following bullet points:

(i) Transparent and inclusive discussions – Lay the ground for advancing work multilaterally.

(ii) Consider adopting general principles / best endeavour provisions on e-commerce.

(iii) Binding principles / obligations could be considered – TFA (Trade Facilitation Agreement) approach – Flexibilities; TA (technical assistance) and CB (capacity building).

(iv) Greater coherence; certainty; consumer confidence.

E-commerce, according to India, “remains a highly contentious area in the WTO, which is a fact not even mentioned in the presentation.”

“We wonder what gives the WTO secretariat the authority or the mandate to propose next steps or multilateral outcomes on subjects on which discussions have not even begun in the WTO,” India said.

“Were the contents of these presentations [on investment facilitation and e-commerce] discussed by members and was there a consensus on the propositions contained therein that the WTO should be encouraged to launch a dialogue on strengthening trade and invest-

ment policy coherence or that there should be further discussions towards a multilateral outcome on e-commerce?" India asked.

Such presentations, according to India, went well beyond "the remit of the functions of the WTO secretariat, and violate the letter and spirit of the Agreement Establishing the WTO."

In fact, these two presentations, said India, "seem to convey [to] my delegation that the WTO secretariat hold a brief for certain constituency of members, thereby raising a question on its impartiality and international character as required in the Agreement Establishing the WTO."

India also referred to the TNC chair's comments, made during a recent visit to India, on public stockholding programmes for food security (PSH) and special safeguard mechanism (SSM) for developing countries, in which he purportedly said that "the primary responsibility for any proposal rests with the proponents and not the WTO." If this were the case, India said, "the question that comes to mind is whether the WTO secretariat has also become a proponent on these two issues [e-commerce and investment facilitation]."

"If the secretariat continues to act in this manner, it would further vitiate the negotiating process in the WTO and the members' attempts to reiterate strongly the relevance and primacy of the WTO as an institution central to the global trading system," India warned.

Development dimension

On substantive issues, India emphasized "the primacy of the development dimension of the DDA [Doha Development Agenda] and that the unfinished work in the decisions taken at the Bali and Nairobi Ministerial Conferences must get precedence over any other areas [e-commerce or investment facilitation], which can only be negotiated multilaterally if there is agreement by all the members as stated in the Nairobi Ministerial Declaration."

Prasad underscored the need for urgent "constructive engagement on public stockholding programmes for food security and special safeguard mechanism without linkages with other areas of agriculture negotiations", according to trade envoys present at the meeting. Both PSH and SSM, according to India, "are fundamental to bringing about development that is broad-based and balanced in many developing and least-developed countries."

Prasad also referred to the draft negotiating text introduced by India on trade facilitation in services which seeks "to remove unnecessary regulatory and administrative obstacles to trade in services."

India's position on e-commerce, she said, is crystal clear suggesting that New Delhi wants discussions to proceed in accordance with the 1998 work programme in the relevant WTO negotiating bodies.

Rules for e-commerce as proposed by some countries are "completely premature", India said. At a time when the e-commerce market is highly monopolistic in nature, such rules would only benefit a few major companies while simultaneously "constraining the policy space of the developing countries to develop their e-commerce space."

Referring to statements made by WTO officials that e-commerce rules would meet the needs of MSMEs or that they would automatically help economic development in developing and least-developed countries, India dismissed these as "profoundly simplistic – almost like the \$1 trillion spin-off of the TFA."

India cautioned that "there is a risk of further deepening the divide in case undue importance is given to the so-called new issues where even the narratives are not still clear."

"Any attempts to cherry-pick ministerial decisions or a few members projecting consensus on issues where none exists, would seriously undermine the credibility of the WTO," India warned,

according to trade envoys present at the meeting.

Many African countries told the TNC chair that work on e-commerce and other new issues must not proceed without first addressing the outstanding Doha issues.

Several African countries and India also said the Nairobi Ministerial Conference process should not be repeated as it produced outcomes that failed to reflect members' views.

Uganda's trade envoy Ambassador Christopher Onyanga Aparr said "we would like to call upon you, Mr Chairman, to put in place a credible process that does not seek to replicate Nairobi ... It has to be bottom-up, transparent, predictable and inclusive ... The small club of five should be abandoned ... We are all equal representatives of sovereign states and are recognized under public international law."

Aparr said "any text to be presented to the Ministerial Conference must have been agreed to by consensus by the membership of the whole at least six weeks before the Ministerial Conference."

In conclusion, the WTO secretariat's dubious role in advancing the interests of powerful developed and some developing countries is exposed most grotesquely as never before. But it is highly unlikely that Azevedo, who will be securing a second term as Director-General, will draw any lesson from what was said at the HOD meeting, several trade envoys said. (SUNS8410) □

WTO members voice their views on key issues for MC11

The 23 February HOD meeting at the WTO also saw member states discuss what issues to prioritize in the run-up to the trade body's eleventh Ministerial Conference this December.

by Kanaga Raja

GENEVA: The informal heads-of-delegation (HOD) meeting at the WTO on 23 February heard a range of members voicing their views on what they see as their priority issues for possible deliverables at the eleventh WTO Ministerial Conference (MC11) in Buenos Aires later this year.

Many developing countries stressed the importance of outcomes on the issues of public stockholding for food security purposes and the Special Safeguard Mechanism (SSM) at MC11.

They also highlighted the importance of the development dimension, special and differential treatment (S&D), the need to address trade-distorting domestic support in agriculture in particular on cotton, and fisheries subsidies.

Many developing countries also called for a transparent and inclusive process in the run-up to the Buenos Aires conference.

The views of the developing countries came following an assessment by WTO Director-General Roberto Azevedo

on the state of play in the negotiations in the various negotiating groups in the lead-up to Buenos Aires.

At the meeting, India reportedly critiqued the manner in which the negotiating process is “vitiated” by some members together with the WTO secretariat pushing certain issues.

In his statement at the informal HOD meeting (excerpts posted on the WTO website), Azevedo said that from his discussions to date, “my honest assessment is that in all areas we still have a long way to go – and a huge amount of work ahead if we are to arrive at concrete outcomes.”

“In practical terms we have just 8 months between now and the 11th Ministerial Conference. Progress has to be driven by members, and so they will have to quickly think about how they wish to advance, and on which areas. I think the proponents in particular must further intensify their engagement with other members in order to move forward. I welcome that many members are doing this, but we need to be mindful that time is moving quickly.”

The DG further said: “The time is fast approaching when we will have to transition from the current stage of conceptual and general discussions to much greater specificity. I hope we can achieve this by the summer. Of course MC11 is not the end of the road. I think the most productive approach if we want to deliver substantive outcomes is to aim to achieve outcomes pragmatically and – if needed – incrementally. Those areas that are not ripe by then could be delivered at a later stage. Of course as part of this we need to keep focused on the implementation of existing decisions, and development needs to be a key element as we look to advance any issue.”

Views of members

According to trade officials, at the informal HOD meeting, Switzerland highlighted the ministerial meeting that it had convened in Davos earlier this year where some 29 delegations participated. The ministers had stressed the key role of the multilateral trading system as a framework for world trade, as well as the importance of trade as a tool for development and growth. Protectionism was not the answer, they said, adding that there was a need to make trade more inclusive.

According to Switzerland, the ministers had highlighted issues such as do-

mestic support in agriculture including cotton, the permanent solution for public stockholding programmes for food security, fisheries subsidies and Target 14.6 of the Sustainable Development Goals (SDGs), domestic regulation and services trade facilitation, S&D, and least-developed-country (LDC) issues.

(SDG Target 14.6 states: “By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation.”)

Other issues taken up that were central to the discussions included e-commerce, as well as the means of better integrating micro, small and medium-sized enterprises in the global trading system, the ministers in Davos had said.

Cambodia, on behalf of the LDCs, highlighted as key the issues of trade-distorting domestic support in agriculture, including on cotton, fisheries subsidies, especially overcapacity, overfishing and IUU (illegal, unreported and unregulated) fishing and a ban on those kinds of subsidies.

It also highlighted the importance of S&D, implementing the Nairobi decision on rules of origin, and the need for an agreement on duty-free, quota-free market access (DFQF) for LDC products. Rules of origin are as important to the LDCs as DFQF, it said.

Morocco, on behalf of the African Group, highlighted several issues of importance to the Group, including trade-distorting domestic support, the SSM, public stockholding for food security purposes, fisheries subsidies and S&D. There is a need to achieve tangible progress, and also to continue to follow the mandates, Morocco said, adding that it intends to organize a meeting in Marrakech shortly before MC11.

Japan said while it would be good to obtain deliverables at MC11, it is also a clear priority to make sure that members know beyond this meeting how they are going to work. Incremental progress is important. The Trade Facilitation Agreement (TFA) may give some valuable clues as to how to approach things, it said (see box next page).

Chile highlighted the need to adhere to the SDGs and the 2030 Agenda for

Sustainable Development, and the important role of the WTO on this. Developing countries have increased their share of world trade from 27% to 42%. Trade liberalization has brought great benefits to developing countries but the threat of de-globalization can be very damaging to developing countries, it said.

Agriculture priority

Pointing to agriculture as a priority, Ecuador highlighted the issues of domestic support and market access. The Rev. 4 draft agriculture modalities text of 2008 should be the basis for negotiations, it said.

It also stressed on public stockholding for food security purposes and the SSM. It wanted S&D for developing countries on non-agricultural market access (NAMA). On services, it said the development dimension is key. It said that it is supportive of India’s proposal on trade facilitation in services. It also supported an outcome on fisheries subsidies in line with SDG Target 14.6.

Ecuador underlined that any other negotiating options would require a consensus.

Paraguay welcomed the entry into force of the Trade Facilitation Agreement. An incremental step is sensible, it said. The pace needs to be stepped up in agriculture as it is lagging behind. It said it has quite a lot of sympathy for the proposal on public stockholding. It is also ready to deepen discussions on e-commerce particularly those elements that pertain to small and medium-sized enterprises.

Uganda said that more needs to be done for the LDCs. All members should prioritize the LDCs, as should the DG as he seeks a second term.

Infrastructure projects, industrialization and regional integration are priorities for Africa, said Uganda. It was happy to see citizens in the North rising up against globalization.

Agriculture is a priority, Uganda stressed, and the Rev. 4 text should be the basis for the negotiations. S&D is also important.

Uganda underlined that there should be no repeat of the process that took place at the tenth Ministerial Conference in Nairobi, and that texts circulated for Buenos Aires should be submitted to the membership six weeks before MC11.

Mexico said that anti-trade senti-

WTO Trade Facilitation Agreement enters into force

GENEVA: The Trade Facilitation Agreement (TFA), the first multilateral agreement reached by the WTO, came into force on 22 February.

The TFA had needed ratification by at least two-thirds of the WTO's 164 members accepting the Protocol of Amendment before it could be inserted among the agreements in Annex 1A of the WTO Agreement to make it binding on those ratifying it.

The Protocol of Amendment inserting the TFA into Annex 1A had been adopted by members at a WTO General Council meeting on 27 November 2014.

According to a WTO press release, Rwanda, Oman, Chad and Jordan submitted their ratifications on 22 February, bringing the total number of ratifications over the required threshold of 110 members for the TFA to enter into force.

The WTO secretariat, citing a 2015 study carried out by WTO economists, said that full implementation of the TFA

can reduce trade costs by an average of 14.3%. It also said that by 2030, implementation of the TFA could add up to 2.7% a year in global export growth, and more than 0.5% to world GDP growth.

[In a 2014 article "Trade facilitation may result in trade hallucination" published in the *South-North Development Monitor (SUNS)*, Jeronim Capaldo, a senior researcher at the Global Development And Environment Institute (GDAE) at Tufts University, had argued that official estimates (by the International Chamber of Commerce, OECD et al.) of the benefits of trade facilitation from trade expansion, job gains and income tend to overstate the benefits and ignore its costs. "When all underlying assumptions are brought to light, expecting large gains appears unreasonable. And estimated employment benefits may easily turn into net losses," he pointed out.] (*Kanaga Raja/ SUNS8409*) □

ment is rising even in countries that have benefited the most, and that this sentiment is being fostered at the highest political levels. There is a threat that global value chains could be disrupted, which could have ramifications across the globe. It said that investment is already being hit, and these repercussions could also be global. The WTO membership, it said, has the responsibility to ensure that the case for trade and for stable rules is recognized. Mexico further said that it would like to see outcomes at MC11.

Turkey said that MC11 presents a great opportunity to make the case for trade. There is a need to get convergence in Geneva (in the lead-up to MC11), so that the same kind of process as in Nairobi is not repeated, it said.

On agriculture, Turkey said it is ready to build on the Nairobi decisions on public stockholding and SSM. It is difficult to work on an MC11 package without these elements, it stressed. Domestic support and cotton also need to be addressed. There also needs to be a means of addressing the imbalance between those countries that use an Aggregate Measurement of Support (AMS) system and those which use a *de minimis*

system. There should also be disciplines on the Green Box domestic support.

On services, Turkey said domestic regulation and e-commerce are two issues that stand out. It is ready to work on these issues for an outcome at MC11, it said, adding that global rules on e-commerce are needed. There needs to be recognition of a link between e-commerce and small and medium-sized enterprises and development, but the LDC issues must also be addressed and their difficulties with respect to e-commerce must be accorded high priority.

Avoiding crisis

China said that MC11 will be very different from MC9 and MC10. It is going to be very important to avoid any crisis of the multilateral trading system. Members have to ensure that no issues are dropped off the table at MC11. A business-as-usual approach cannot be used, China said, adding that an incremental approach is a sound way forward.

China said it is very supportive of the issue of public stockholding and there needs to be an agreement here. There is also a need to find a way out on

the SSM. Without a deal here, it is difficult to see movement elsewhere, it said.

On rules, it highlighted the issue of trade remedies as being important. It also underlined that all of the LDC decisions need to be implemented. On e-commerce, it said that it is important to focus on the issue of cross-border trade in goods, and that negotiations on cross-border data flows and on data localization should be avoided.

Argentina said that while the situation at present is very uncertain, it is optimistic for Buenos Aires. An outcome on agriculture domestic support and cotton is very important. It also highlighted the issues of fisheries subsidies, services, e-commerce and investment facilitation as well as a cross-cutting discussion on issues that benefit small and medium-sized enterprises. It agreed that a better process is needed for MC11 than that at MC10.

Brazil said that Buenos Aires is an opportunity to address the rising anti-trade sentiment, stressing the need to reaffirm the relevance of the WTO.

Brazil said the Doha Development Agenda and its mandate are the reference point. But in light of current circumstances, the incremental approach might be the best approach for Buenos Aires. It is ready to discuss all the issues, including the "new issues". A developmental outcome is crucial and must also be central.

Brazil held that deliverables are most important in the areas of agriculture, small and medium-sized enterprises, fisheries subsidies, and regulatory issues including technical barriers to trade and sanitary and phytosanitary measures. It said it is supportive of a reduction in trade-distorting domestic support, pointing to the possibility of agreeing on a framework for dealing with this issue.

It also supported the issues of public stockholding and cotton reform for Buenos Aires. On fisheries subsidies, it said it prefers a multilateral approach but is participating as well in the plurilateral and this could be a stepping stone.

Brazil said that it has been very active on e-commerce and has submitted three proposals. The WTO has a key role to play here, it said. One issue that could be resolved is e-signatures, which could be addressed in Buenos Aires. In addition, there could be an outcome on how to address the digital divide, as well as perhaps something on the table that

would indicate the way forward post-MC11.

On investment facilitation, Brazil said it already has a programme along these lines domestically, but it does not want this issue to delve into investment protection. It also does not want a dispute settlement system along the lines of the investor-state dispute settlement system.

Zimbabwe welcomed the entry into force of the Trade Facilitation Agreement and the TRIPS amendment on access to essential medicines.

It said it wants to see a transparent and inclusive process. It recognized the need for efficiency but said it is very important to have a transparent process of which all members feel as though they are a part.

It said it is very much in favour of significant reductions in trade-distorting domestic support under the Rev. 4 text. It also supports public stockholding for food security purposes and the SSM.

While it recognized that e-commerce is important, it preferred this to be taken up under the existing 1998 mandate mostly because many developing countries are not ready to move forward on this due to the digital divide.

Costa Rica agreed with the overall sentiment expressed by Mexico and Chile. It said it is very important to adhere to the SDGs.

South Africa mentioned the recent African Union ministers' meeting where advanced integration and industrialization for Africa were discussed.

On WTO issues, South Africa highlighted domestic support, the development dimension, cotton, SSM, public stockholding, fisheries subsidies and S&D. It said it was clear there is a very considerable political backlash against globalization, and that this is filtering its way through to the WTO discussions where there is no agreement on mandates or issues. There are different priorities and different ways in which people see linkages. On e-commerce, it said that it is prepared to address the issue under a non-negotiating mandate.

Guyana, on behalf of the African, Caribbean and Pacific (ACP) countries, strongly affirmed the importance of the development dimension, the Doha Development Agenda, S&D and reduction in trade-distorting domestic support in agriculture. It wanted a clear framework for the gradual elimination of trade-distorting domestic support, and hoped to have this framework on the table by the summer break.

It also expressed support for the proposals on public stockholding for food

security purposes and the SSM, and was in favour of the proposals on fisheries subsidies, but added that there must be S&D that takes into account the importance of fishing in developing countries and ACP members.

The ACP Group also wanted flexibility for developing countries on services. On e-commerce, it is prepared to continue to explore this issue, particularly the development dimension. It further wanted to see a transparent and inclusive process at MC11.

Nicaragua said that there is a need for an outcome on trade-distorting domestic support. There must be a balanced outcome and flexibility for small and vulnerable economies. The process must be transparent and inclusive. On e-commerce, it said it is prepared to discuss this issue within the existing mandate. The issue of fisheries subsidies is also very important, it said.

Fair and transparent approach

Bolivia said that it is supportive of the multilateral trading system. It wanted to see a balanced, fair, transparent, inclusive and bottom-up approach.

On agriculture, it would like to see the elimination of trade-distorting domestic support. On services, it wanted to see S&D for developing countries. It also wanted a multilateral outcome across all areas. On e-commerce, it noted that there is a lot that needs to be discussed, and it would not support a plurilateral approach.

Gabon welcomed the entry into force of the TFA and the TRIPS amendment on access to essential medicines. It said that the issues of greatest importance to it in the run-up to MC11 are trade-distorting domestic support, fisheries subsidies and S&D.

Fiji, on behalf of the Pacific Group, said it wants to see tangible and meaningful outcomes in Buenos Aires. The development dimension is important. For the group, the issue of fisheries subsidies is of crucial importance, because of its importance to the livelihood of people in this region. It said it would like a multilateral outcome in this area that builds on the Doha mandate and SDG Target 14.6.

On the issue of agriculture, Fiji highlighted the issue of trade-distorting domestic support as well as flexibility for developing countries. It also wanted to see a process that is transparent and inclusive.

Chinese Taipei, on behalf of the Article XII group (formerly the Recently Acceded Members), said the issues of

agriculture and services are very important, as are the development issues. It said there needs to be a way in which agricultural support can be dealt with so that the contributions made by recently acceded members are matched by those of longstanding members. Market access is important to the group and should not be left behind, it added.

Israel highlighted the importance of services and said that it is ready to advance the negotiations in this area. On agriculture, it said that it has already paid a price as it has committed to eliminating export subsidies. It also wanted to see a transparent and inclusive process.

Nepal said that e-commerce and small and medium-sized enterprises are extremely important for development but there are gaps that need to be addressed with respect to the digital divide.

Saudi Arabia, on behalf of the Arab Group, said that it is important to build on the Bali and Nairobi outcomes, and to keep the development dimension at the centre.

The United States told the meeting that it is not in a position to speak in detail on account of its current political transition. What it said last year with respect to ensuring that there was no sense of over-expectation for MC11, was something that it would probably continue to say, the US said.

It also said that it is likely to remain supportive of an open and market-oriented global economy. It said it is also very likely to seek very close examination of the way in which disputes are being handled, not least in terms of issued rulings which include elements of new rules that had never been agreed by WTO members.

South Korea said that it is very important to continue to have successful outcomes at the WTO Ministerial Conferences as in Bali and Nairobi. E-commerce is vitally important, it said, adding that it is also important to try to get agreement on non-controversial issues where possible.

Cuba expressed support for the statement made by Guyana on behalf of the ACP Group. It said that there is a lot of uncertainty out there and this makes it more important than ever that the Doha Development Agenda be the basis for work. The Doha issues must be the priority. There is also a need to bridge the digital divide. It realized that e-commerce is very important but said it can only take it up in the context of the 1998 work programme. (SUNS8411) □

Planned US border tax would most likely violate WTO rules

The border adjustment tax mooted to improve the US trade balance may fall foul of WTO rules, but whether this will compel the US to scrap the controversial plan is another matter.

by Martin Khor

As American lawmakers and the Trump administration prepare the ground for introducing a border adjustment tax, many controversial issues have emerged, including whether such a measure would go against the rules of the World Trade Organization (WTO).

The border tax is part of the overhaul of the US corporate tax system proposed by Republican Congressional leaders and appears to have the support of President Donald Trump.

If adopted, the tax measure is sure to attract the opposition of the US' trading partners, as their exports to the US will have the equivalent of a 20% tax imposed on them, whereas the exports from the US will be exempted from a 20% corporate tax (see *TWE* No. 632).

The tax on US imports, without the same being applied to US-made products, discriminates against foreign products, while US exports being exempted from taxes is tantamount to being an export subsidy.

How will this be taken at the WTO, the guardian of the multilateral trading system?

US Congressman Kevin Brady, chairman of the House Ways and Means Committee, and the plan's main advocate, is convinced the plan is WTO-consistent, but has yet to explain why.

On the other hand, many trade and legal experts think the plan violates the principles and rules of the WTO, although they caution that a final opinion is possible only when the language of the law is known.

Their general view is as follows: Firstly, the inability to deduct import expenses from a company's tax (while allowing deductions for locally sourced products and services and wages) discriminates against imports vis-à-vis domestic products, and violates the "national treatment" principle of the WTO and the rules of the General Agreement on Tariffs and Trade (GATT) which specify that imports must be treated no less favourably than similar locally produced goods.

Secondly, the exemption of export

revenues from taxable income would be most likely assessed as a prohibited export subsidy under the WTO's subsidies agreement.

The renowned international trade expert Bhagirath Lal Das says that there are two separate issues to be considered: the differential treatment of domestic and imported materials, and the differential tax treatment of income based on whether the product is domestically consumed or exported.

Says Das: "It appears that the proposal is to deduct the cost of domestic input (product) from a company's income while computing the tax, whereas there is no such deduction if a like imported input is used in the production. If this be the case, such a provision will clearly violate the principle of national treatment contained in Article III of GATT 1994."

Under that article, imported products must be accorded treatment no less favourable than that given to similar domestic products in respect of laws and regulations.

Adds Das: "If the use of the domestic product results in tax reduction whereas the use of the like imported product does not get similar treatment, clearly the imported product will get 'less favourable' treatment. And that will violate the principle of national treatment, and it can be successfully challenged in the WTO on this ground."

On the second issue, the proposal is to differentiate between the earning from domestic sale and that from export in the matter of taxation in respect of a product.

Das comments: "Here it would appear that the exemption of the tax is conditional on export. This practice will clearly qualify for being categorized as export subsidy which is prohibited under Article 3 of the WTO's Subsidies Agreement."

Das cites the case of a particular type of American company, the domestic international sales corporation (DISC), where a portion of its profit which was engaged in export was tax-free. The

European Economic Community raised a dispute in the GATT forum in 1973. The matter was delayed for a long time until a panel at the WTO ruled in 1999 that the US practice was in fact an export subsidy and was prohibited.

"This case may not be exactly the same as the currently anticipated proposal, but it does point to the fallibility of providing government benefit contingent on export," says Das.

Das was formerly Chairman of the General Council of GATT, Indian Ambassador to GATT, and subsequently Director of Trade in the UN Conference on Trade and Development, and has written many books on the WTO and its agreements.

According to another eminent expert on the WTO, Chakravarthi Raghavan, whether the US law is considered "legal" depends on the language of the law and its actual effects. "There is little doubt that the 'pith and substance' of the Republican border tax proposal or ideas will be in violation of Articles II and III of GATT and Article 3.1 of the Subsidies Agreement."

Raghavan, Editor Emeritus of the *South-North Development Monitor (SUNS)*, has closely followed and analyzed the trade negotiations of the Uruguay Round and of the WTO for years.

Limits to taking action at the WTO

Countries can challenge the US at the WTO, and if they succeed, the US has to change its law or face retaliatory action. The winning party can block US exports to it equivalent in value to the loss of its exports to the US.

However, there are many shortcomings with the WTO dispute system. Few countries have the courage or financial resources to take up cases against the US. If some countries do take up cases, it takes as long as three to four years for a case in the WTO to wind its way through panel hearings and to a final verdict at the Appellate Body, and for the winning party to get the go-ahead to take retaliatory action. During that period, the US can continue with the laws and practices in question.

If the US loses, it need not pay any compensation to the successful party for having suffered losses. Moreover, based on past experience, when it loses cases at the WTO, the US has typically not complied with the orders made on it. Even if it does comply, it needs to do so only in respect of the parties that brought the action against it; it need not do so for

other parties.

If it does not comply, the complainant countries are allowed to take retaliatory action by blocking US goods and services from entering their markets up to an amount equivalent to the losses they have suffered. This retaliatory action can only be taken by those countries that successfully took up the case.

Thus, the US may decide to implement the border adjustment tax and wait two to four years before a final judgment is made at the WTO and, if applicable, before retaliatory action is allowed by the WTO. It can meanwhile reap the benefits of its border tax measures.

Another possibility is that Trump may make good his threat to leave the WTO if important cases go against the US. That would cause a major crisis for the WTO and for international trade.

With regard to the WTO process, Raghavan said: "Apart from the difficulties of taking up cases in the WTO, including costs, the lengthy process and no retrospective damages when any WTO member raises a dispute, the onus of proving the violation is on them."

"To the best of my knowledge, in none of the rulings against the US requiring changes in law or regulations has the US implemented them, and even major trading partners have been chary of taking retaliatory action."

"Countries that are affected could act to unilaterally deny the US some rights, but they cannot justify that this is retaliation until there is a ruling in their favour."

Is the border tax similar to value-added tax?

American advocates of the border adjustment tax plan have claimed that it is similar to a value-added tax (VAT), which is considered by the WTO to be a legitimate measure, and thus that the border adjustment tax would also be compatible with the WTO.

Almost all major developed countries have instituted the VAT system, with the notable exception of the US. The Republican Congressional leaders and Trump have argued that this places the US at a disadvantage in its trade relations because the VAT system imposes a tax on imports whilst allowing companies to obtain a refund for taxes paid on their exports. They claim the border tax would correct this disadvantage and that the WTO should similarly recognize the border tax as legitimate.

However, several well-known economists and lawyers are of the opinion that there are important differences between the VAT and the border tax.

There are two parts to their argu-

ments. Firstly, the VAT imposes taxes on both imports and locally produced goods and services, and therefore does not discriminate against imports; whereas the border tax system imposes a tax on imports whilst excluding domestic inputs and wages from tax, which therefore discriminates against imports. Secondly, the VAT system does not subsidize exports, whereas the border tax system does.

In a 1990 paper, economists Martin Feldstein and Paul Krugman found that the VAT does not improve the trade competitiveness of countries using it. They said: "The point that VATs do not inherently affect international trade flows has been well recognized in the international tax literature ... A VAT is not a protectionist measure."

Krugman, in a recent blog post, reiterated that "a VAT does not give a nation any kind of competitive advantage, period." But a destination-based cash flow tax like the border adjustment tax has a subsidy element that "would lead to expanded domestic production."

In another paper, Reeven Avi-Yonah and Kimberly Clausing from Michigan Law School and Reed College respectively analyzed the difference between the VAT and the proposed border adjustment tax and why the former is WTO-consistent whereas the latter would violate WTO rules.

They said: "US trading partners are likely to be hurt in several ways. The ef-

fects of the wage deduction render the corporate cashflow tax different from a VAT, and these differences have the net effect of increasing the incentive to operate in the United States.

"In addition, such a tax system would exacerbate the profit shifting problems of our trading partners, since the United States will appear like a tax haven from their perspective."

Economists also agree that the border tax will raise the value of the US dollar but there is a debate as to how long this will take and by how much it will rise. If the dollar appreciation is significant, this may have an adverse effect on countries that hold debt in US dollars, as they would have to pay out more in their domestic currency to service their loans. This would include many developing countries with substantial dollar-denominated debts of the public or private sectors, and some of them may tip into new debt and financial crises.

According to former US Treasury Secretary Lawrence Summers: "Proponents of the plan anticipate a rise in the dollar by an amount equal to the 15 to 20 per cent tax rate. This would do huge damage to dollar debtors all over the world and provoke financial crises in some emerging markets." (IPS) □

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Avoid patent clauses in trade treaties that can kill millions

By strengthening patent monopolies on medicines, new trade agreements under negotiation can price life-saving treatments out of reach of needy patients.

by Martin Khor

Recently, a very interesting article on why there are inequalities in access to healthcare and how medicine prices are beyond the reach of many people was published in *The Lancet*, one of the most prestigious medical journals in the world.

The authors, who are eminent experts in development and public health, pinpointed trade and investment agreements as one of the greatest health threats.

Reading their powerful commentary leads one to think: What's the point of having wonderful medicines if most people on Earth cannot get to use them? And isn't it immoral that medicines that can save your life can't be given to you

because the cost is so high?

The article picks on the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) as the worst culprits.

It says the TPP's chapter on intellectual property is "particularly intrusive to health and restricts access to the latest advances in medicines, diagnostic tools and other life-saving medical technologies."

This agreement, say the authors, contains many provisions that "strengthen patent protection that provides monopolies and inevitably leads to high prices."

They mention provisions that extend patent terms beyond the 20 years re-

quired by the WTO and lower the criteria of what can be granted patents; and “data exclusivity” provisions that put up barriers to manufacturers of generic drugs entering markets after the expiry of patents.

This viewpoint article was co-authored by Prof. Desmond McNeill (University of Oslo); Dr. Carolyn Deere (Oxford University); Prof. Sakiko Fukuda-Parr (The New School, New York, and formerly the main author of the UNDP’s annual Human Development Report for many years); Anand Grover (Lawyers Collective India and formerly the UN Human Rights Council’s Special Rapporteur for the Right to Health); Prof. Ted Schrecker (Durham University, UK); and Prof. David Stuckler (Oxford University).

They said growing evidence suggests that the agreements “will have major and largely negative consequences for health that go far beyond earlier trade agreements. This situation is particularly disturbing since the agreements have created blueprints for future trade agreements.”

The Nobel Peace Prize-winning medical group Medecins Sans Frontieres (MSF) is even more scathing in its criticism. “The TPP represents the most far-reaching attempt to date to impose aggressive intellectual property standards that further tip the balance towards commercial interests and away from public health ... In developing countries, high prices keep life-saving medicines out of reach and are often a matter of life and death.”

This condemnation is just as relevant despite President Donald Trump withdrawing the United States from the TPP.

There are efforts underway for the remaining 11 countries in the TPP to put the agreement into effect without the US. Moreover, these countries have already prepared changes to their laws and policies to comply with the TPP’s provisions, and may implement these even if the TPP never actually comes into effect.

This would be an immense tragedy for public health, because most of these countries did understand that the TPP’s chapter on intellectual property would have negative effects but they accepted it as part of a bargain for getting better market access for their products, especially to the US market.

Since the TPP is now in suspension, it does not make any sense for the coun-

tries to change their patent laws when the benefit of market access is no longer available.

During the TPP negotiations, the other countries managed to dilute some of the very extreme demands of the US, but only to a small extent. The final intellectual property chapter still reflects the extreme proposals of the US.

Moreover, the major developed countries can be expected to seek to inject the TPP’s intellectual property chapter into negotiations for new trade agreements such as the Regional Comprehensive Economic Partnership (RCEP), the Asian regional agreement. Negotiators, especially from developing countries, and civil society groups should thus be vigilant that the TPP’s provisions that have adverse effects on health are not reproduced in other trade agreements.

“TRIPS-plus” rules

Member states of the World Trade Organization are required to implement its intellectual property agreement, known as the TRIPS Agreement, but they are not obliged to take on any additional obligations.

There are many provisions in TRIPS that allow a country to choose policies that are pro-health. The TPP, however, has “TRIPS-plus” clauses which go beyond the TRIPS obligations and prevent a country from making use of many of these options.

First, there is a TPP provision that lowers the standards a country can adopt to grant a patent.

Some patent applications are not for genuine inventions but are only made to “evergreen” a patent, to enable its term to continue beyond its original expiry. Under TRIPS, a country can choose not to grant secondary patents for modifications of existing medicines.

In contrast, the TPP (Article 18.3) requires countries to grant patents for at least one of the following modifications: new uses of a known product, new methods for using a known product or new processes for using a known product. For example, a drug used for treating HIV / AIDS can be granted a new patent for treating hepatitis, or a drug in injection form can be given a new patent in capsule form.

Second, the TPP enables an extension of the patent term beyond the 20 years required by TRIPS.

Most countries now count this 20 years from the date of filing the patent application. The TPP requires the patent term to be extended beyond that if there are “unreasonable” delays in issuing the patents (Article 18.46) or if a delay is caused by the marketing approval process (Article 18.48).

Extending the patent term means delaying affordable treatment for patients for so many more years.

Third, the TPP has a provision (Article 18.50) to create “data exclusivity” or “market exclusivity”, which prevents drug safety regulators from using existing clinical trial data to give market approval to generic drugs or biosimilar drugs and vaccines.

Under TRIPS, the clinical test data of a company can be used by a country’s drug regulatory authority as a basis to give safety or efficacy approval for generic drugs with similar characteristics, thus facilitating the growth and use of generic drugs.

Under the TPP, the data of the original company is “protected” and approval of similar drugs on the basis of such data is not allowed. The period of “exclusivity” is at least five years for products containing a new chemical entity, or three years for modifications (a new indication, new formulation or new method of administration) of existing medicines.

Fourth, there is a TPP provision on “biologics” (Article 18.51).

The TPP is the first trade agreement that obliges its members to undertake data protection obligations for “biologics”, a category of products for treating and preventing cancer, diabetes and other conditions. They are very expensive, some priced above \$100,000 for a treatment course, and the clause will enable the prices to remain high for longer periods.

The exclusivity for biologics is for at least eight years, or five years if other measures are also taken. These provisions on exclusivity give drug companies extra protection even if the product is not patented or if the patent has expired. The drugs will be out of reach except for the very wealthy for longer periods.

Fifth, the TPP has a provision (Article 18.76) that requires TRIPS-plus extra enforcement of intellectual property rights.

Countries are obliged to provide that the right holder can apply to detain any

imported product that is suspected to be counterfeit or having a “confusingly similar trademark”. This can block legitimate generic medicines from entering the country.

There have already been many cases of drugs being detained and later released when no infringement was found, thus needlessly delaying treatment to patients. The provision will increase the incidence of such instances.

All in all, these TRIPS-plus TPP obligations would make it more difficult for patients to obtain cheaper generic drugs. If these clauses are widely adopted in other trade agreements and made into national laws, this would shorten the lives of millions of people who would be denied treatment.

For example, many millions of people worldwide are afflicted with hepatitis C, which can lead to liver failure and death. They need the new medicines that have nearly 100% cure rates but the prices are over \$80,000 for a 12-week treatment course. Even with discounts, very few can afford this.

Some developing countries, making use of TRIPS flexibilities, are able to provide treatment with generic drugs at around \$500 per patient, a very small fraction of the original drug’s price. But if the TPP clauses are translated into domestic law, this access could be blocked.

People in the developing countries are the most affected by patent over-protection, but patients in developed countries are not spared.

The mainstream *Time* magazine in October 2016 listed the need to “reform the patent process” as one of the issues the US presidential election should address. The *Time* article commented that many people believe drug companies are “gaming” the system. “Instead of focusing on developing new cures, they are spending millions tweaking the way existing drugs are administered or changing their inactive ingredients. Those moves have the effect of extending a drug’s patent and upping the amount of time it can be sold at monopoly prices, but they don’t necessarily help consumers.”

It is high time for a rethink to the system of drug patents. At the least, the situation should not be allowed to worsen further, which would happen if TRIPS-plus measures are adopted.

The lives and health of millions are at stake. Sometimes this is forgotten or put as a low priority when pitted against the promise of getting more exports in a free trade agreement.

But with the TPP in limbo and perhaps in perpetual suspension, there is really no reason why the provisions that have adverse effects should be implemented in the countries that had negotiated the TPP, when there are no benefits to be obtained to offset them.

More generally, in all countries, policymakers and people should be on guard and not agree to TRIPS-plus clauses in the trade treaties that they negotiate or sign. (IPS) □

implemented.

Guidance published by the European Commission suggests that in the field of economic governance, including “recommendations, opinions and adjustment programmes”, impact assessments are not a priori necessary, on the basis that such “specific processes are supported by country specific analyses”.

It may therefore not be surprising that the European Commission did not publish any social or human rights impact assessments in relation to the financial assistance programmes implemented in Cyprus, Ireland, Portugal or Spain, said Bohoslavsky.

Moving forward, the Independent Expert called for a change of approach. In this context, he welcomed the first social impact assessment by the European Commission, undertaken in August 2015 for the third economic reform programme currently being implemented in Greece.

“It is a first step in the right direction, although the social impact assessment, which was produced on short notice, was not able to assess the economic reform measures against international human rights standards,” he said.

“There is also significant room for improving the monitoring of social and human rights impacts of financial assistance programmes in the context of official programme reviews or evaluation reports.”

The Independent Expert, amongst others, recommended to the European Commission, the Council of the European Union and European Union member states that they ensure that human rights impact assessments of macroeconomic reform and financial assistance programmes supported by the European Union are prepared before, during and after their implementation.

He also called on these institutions to develop particular guidelines for conducting human rights impact assessments for macroeconomic reform programmes, building on the normative components of internationally recognized economic, social and cultural rights and on existing impact assessment guidelines and tools.

They were also called upon to incorporate human rights obligations into debt sustainability analysis to ensure that debt service does not undermine the fiscal space of states for ensuring social protection and accessible and affordable public services in the field of education and healthcare. (SUNS8405) □

(continued from page 7)

satisfactory manner the poverty and unprecedented levels of youth unemployment in European Union member states.

The Independent Expert also welcomed the considerable effort made by the European Union to incorporate a human rights-based approach in its development cooperation and its external policies.

For example, in its Action Plan on Human Rights and Democracy, the European Union recognizes the human rights dimension in the areas of social policy, health, education and access to food and water, and promotes and supports the development and increased coverage of national social protection floors for the promotion of economic, social and cultural rights.

In the area of trade and investment policy, the Action Plan specifies that the European Union will continue to develop

by 2017 a robust and methodologically sound approach to the analysis of human rights impacts on trade and investment agreements in ex ante impact assessments, sustainability impact assessments and ex post evaluations.

In Bohoslavsky’s view, there is, however, a need to enhance policy coherence in the field of external and internal human rights policies of the European Union. “No credible argument can be made that what can be done externally for the benefit of rights holders outside the European Union cannot be done internally, for the benefit of its own citizens and residents. A human rights-based approach should therefore also guide country-specific recommendations and inform the lending of European institutions to its own member States,” he said.

He further said it is deplorable how little lending conditionalities were formally assessed for their potential harm to human rights holders before they were