

THIRD WORLD *Economics*

TRENDS & ANALYSIS

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US flags aggressive trade policy stance

In a report presented to the US Congress on 1 March, the Donald Trump administration vowed to “aggressively defend American sovereignty over matters of trade policy” and suggested that it may ignore WTO decisions that are not in its favour. The report signals a more muscular approach to trade relations by a country that already holds considerable sway over the multilateral trading system.

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UN rights body holds panel discussion on access to medicines

A panel discussion at the UN Human Rights Council on access to medicines heard calls to ensure that intellectual property protection does not override this fundamental element of the right to health.

by Kanaga Raja

GENEVA: The UN Human Rights Council on 8 March held a panel discussion to review the key challenges to ensuring access to medicines as well as exchange views on good practices, including exploring the recommendations of the UN Secretary-General's High-Level Panel on Access to Medicines.

The panel discussion took place during the regular thirty-fourth session of the Council, which met here from 27 February to 24 March.

At its thirty-second session last July, the Council had decided to convene at its thirty-fourth session "a panel discussion to exchange views on good practices and key challenges relevant to access to medicines as one of the fundamental elements of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, taking into account all relevant reports."

The Council had also requested the UN High Commissioner for Human Rights to prepare a summary report on the panel discussion and to submit it to the Council at its thirty-sixth session.

The panel discussion was chaired by the Vice President of the Council, Ambassador Mouayed Saleh of Iraq, and moderated by Ambassador Maria Nazareth Farani Azevedo of Brazil.

The panellists included Ruth Dreifuss, former President of Switzerland and Co-Chair of the Secretary-General's High-Level Panel on Access to Medicines; Michael Kirby, former Justice of the High Court of Australia and a member of the High-Level Panel; Marie-Paule Kieny, Assistant Director-General, Health Systems and Innovation, World Health Organization (WHO); Anthony Taubman, Director of the Intellectual Property Division at the World Trade Organization (WTO); Thomas Bombelles, Head of Global Health at the Global Issues Sector, World Intellectual Property Organization (WIPO); Carlos Correa, Special Advisor on Trade and

Intellectual Property, South Centre; and James Zhan, Director of the Division on Investment and Enterprise, UN Conference on Trade and Development (UNCTAD).

The right to health

The UN Deputy High Commissioner for Human Rights, Kate Gilmore, who opened the panel discussion, said that the right to health and its associated obligations calls on states to ensure universal access to good-quality healthcare, including essential medicines, on the basis of equality and non-discrimination.

In this, she said, the protection of those who are otherwise marginalized, those with the fewest options, those who routinely are left behind, is essential. Without access to life-saving commodities, the realization of the right to health will remain an unattainable goal for numerous countries and thus for millions of their people.

She said further enjoyment of the benefits of scientific progress is a right in and of itself. It is recognized in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, and among its key elements is the affirmation that innovations essential for a life with dignity should be accessible to everyone without discrimination.

These human rights norms are so fundamental and so intertwined with numerous other rights as to be binding on all states. Yet, she noted, today millions live without access to essential medicines not due to an inherent lack of policy deficits and entrenched practices and choices that place in the balance the lives and well-being of millions the world over – not only those who are resident in low-income countries.

For example, as of June last year, 18.2 million people were living with HIV but

only half of them had access to antiretroviral therapy. That the 50% of those living with HIV have such access is a vast improvement on previous periods, but it is simply not enough.

Referring to International Women's Day, which was celebrated on the day of the panel discussion, Gilmore said "we are indeed celebrating globally women, their achievements and their contribution and yet today, still falsely packaged as cultural and political preferences, we witness the denial of women's and girls' access to essential medicines with the consequence for their well-being of injury and death."

She said it is unconscionable that today young women can be old enough to catch a sexually transmitted infection but deemed too young to have autonomous access to services for its treatment. "[It is] indefensible that a young woman can be old enough to be pregnant but too young to have access to contraception. It is unconscionable that we condemn young women for becoming pregnant, expel them from schools, and yet refuse to provide them with the medicines, the information, the education and services they need to be in control of their own fertility."

When medicines are put beyond the reach or means of those who most need them, families and communities are left to manage tragic consequences. Concrete steps can and must be taken to correct course, Gilmore said.

She cited the UN Special Rapporteur on the right to health as pointing out the need for states to shift from the dominant market-oriented perspective on access to medicines towards fulfilment of the right-to-health paradigm. Powerful commercial and other interests should not dictate public health policy to the detriment of the fulfilment of human rights.

This means, said Gilmore, recognizing and responding to a number of challenges, including:

- The protection of intellectual property rights must not be allowed to trump enjoyment of the right to health. Strong competition laws and policies together with forceful enforcement are required to prevent companies from indulging in anti-competitive practices and to promote competitive pricing of medicines.

- Human rights and stakeholder participation both must influence trade agreements. Stakeholders do have a right

to influence health policy formulation, implementation and its monitoring, and under the human rights-based approach, trade and investment agreements should be negotiated with human rights in mind and concluded with human rights input.

- The availability, accessibility and acceptability of good-quality medicines for everyone on the basis of non-discrimination must be integrated into all public health policy frameworks.

- Policymakers and other actors responsible for the implementation of health policy should be made accountable to the users of health services.

For this to take place, "we have the opportunity – not only the responsibility – to undo the power imbalances that lie at the heart of this issue by empowering rights-holders to be partners in health, to claim their health and health-related rights and to enable health policymakers to make people-centred decisions and hold them accountable for delivering on this."

According to Gilmore, perhaps the greatest obstacle to fulfilling the obligation to ensure access to essential medicines for all is political will. She said it is also a question of health economics, the ethics of the pharmaceutical industry, and the responsibility of healthcare providers and health professionals and their schools.

She called on all these authorities and actors under the banner of the state health plans incorporating human rights to stand up for the right to health.

Ambassador Azevedo of Brazil, the moderator of the panel discussion, explained that based on the request of the Human Rights Council, the panel discussion would provide a platform for states and all relevant stakeholders to review key challenges applicable to ensuring access to medicines and to exchange views on good practices in this regard. The discussion would also explore, from a human rights perspective, the recommendations presented by the High-Level Panel on Access to Medicines.

She said every human being is entitled to the enjoyment of the highest attainable standard of physical and mental health conducive to living a life in dignity. States are obliged to respect, protect and fulfil this right, including ensuring access to medicines, recognizing the essential importance of international co-operation and technical assistance to this effect.

She noted that even with the great

potential of science and technology to advance healthcare, at least one-third of the world population have no regular access to medicines. The recent outbreaks of highly infectious diseases and epidemics have demonstrated the importance of developing new and innovative medicines and vaccines.

High-Level Panel

Dreifuss, Co-Chair of the High-Level Panel on Access to Medicines, explained the mandate and work of the High-Level Panel. (The High-Level Panel was established by the UN Secretary-General "to review and assess proposals and recommend solutions for remedying the policy incoherence between the justifiable rights of inventors, international human rights law, trade rules and public health in the context of health technologies." It issued its final report, which was submitted to the Secretary-General, in September 2016 – see *TWE* No. 625.)

Dreifuss said that the panellists had scrupulously confined themselves to the limited mandate that they had been given. She however pointed out that the mandate was not confined only to access to medicines. On the one hand, prevention, treatment, rehabilitation and social integration required access by all not just to medicines but to vaccines, diagnostic tools and all sorts of medical equipment. On the other hand, the mandate also addressed shortcomings in biomedical research and in the development of medicines.

Incentives provided by intellectual property rules are based on the existence of a viable market, and are thus inapplicable to many diseases. In this context, she highlighted as examples neglected tropical diseases and rare diseases, vaccines, child formulas and new solutions to growing antibiotic resistance.

Dreifuss pointed out that when research and development (R&D), particularly for non-infectious diseases which now represent the most serious health burden in both the North and the South, leads to new medicines, the time-limited monopoly afforded by patents and licences leads to prices which prevent many patients from benefiting from the progress in science. This happens not just when the patients have to pay for these medicines out of their own pockets but also leads to problems even in health systems which are designed to guarantee universal coverage but are forced to

introduce restrictions and rationing of such treatment and medical technologies.

Dreifuss said the mandate of the High-Level Panel refers to the legitimate rights of inventors. Inventors by their very nature are physical persons and they are entitled to fair remuneration and recognition for their contribution to science. But the legitimate rights of inventors are not the same thing as intellectual property rights, which are usually given to companies that are granted a time-limited exclusive right to use an invention.

She said that trade rules and intellectual property rights were developed in order to promote economic growth and to stimulate innovation. On the one hand, governments seek to get the economic benefits of international trade. On the other hand, the obligation to respect medical technology patents can in some cases be an impediment to public health objectives.

"We therefore must welcome the Doha Declaration [on the TRIPS Agreement and Public Health] introducing flexibilities for states in meeting these obligations," she said. "But we must also emphasize the fact that there is continuing incoherence particularly because subsequent negotiations have reduced the Doha Declaration flexibilities or put countries under pressure, preventing them from invoking the flexibilities."

Dreifuss pointed out that the High-Level Panel had recognized that it is a matter of state sovereignty for states to lay down the criteria for granting patents and also for states to determine health emergencies which require them to take particular measures.

"We also emphasized the importance of transparency as an absolute precondition for ensuring the coherence we were called upon to address with proposals in order to achieve that coherence," she said.

Policy incoherence

Kirby, a member of the High-Level Panel, said that the issue is not just a matter of ethics but also one of international law. He said great developments have been achieved in inventions relevant to the right to health, in the distribution of those inventions and in global solidarity. However, high among the impediments to the attainment of the right to health has been the clash of

policy incoherence and the weaknesses of market mechanisms in stimulating invention and in promoting just distribution in accordance with human rights principles.

He said the High-Level Panel conducted public hearings in London, Johannesburg, and with links to Bangkok, so as to listen to the nation states, to industry, to civil society and to individuals effectively denied access to essential medicines. "We will never forget the voices of those who are left behind, who came before our public hearings. Many of them women and girls, representing families forced to beg for charity and the supply of patented drugs that would save lives, but often denied that charity as outside the guidelines for selective assistance.

"We will never forget the people of Africa and Asia who have contracted multi-drug-resistant tuberculosis and who cannot afford the prohibitively costly therapies of limited effectiveness that [are] presently all that is available."

"It is therefore necessary to say bluntly at this session," Kirby underlined, "that unless the world and the United Nations and this Council act now, there is no way that we will attain Sustainable Development Goal No. 3 by 2030." (Sustainable Development Goal 3 is to "ensure healthy lives and promote well-being for all at all ages".)

"In the High-Level Panel some of us would have gone further than in the report which we produced," said Kirby. "Some of us would have taken a different path than in this report. But all of us agreed on the core of essential conclusions which represented our consensus."

Among those conclusions were, firstly, that the WTO members must respect the flexibilities in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and respect human rights protection in the Doha Declaration. "There must be no more pressuring to force countries to surrender their rights ... to invoke compulsory licences and to contest 'evergreening' and other misuse of market power," said Kirby.

Secondly, he said, the international community should negotiate a global R&D treaty to repair the market failures in the invention and availability of essential medicines for all.

Thirdly, the UN Secretary-General should initiate an independent review body for health and technology innova-

tion with a high-level meeting by 2018 to address global market weaknesses once and for all.

The policy incoherence, Kirby stressed, needs to be addressed. The High-Level Panel's report is the minimum prudent package placed before the Human Rights Council; its foundation is indisputably universal human rights. "And respectfully we suggest it deserves the support of this Council."

Public health impact assessments

Correa from the South Centre focused on the recommendation contained in the High-Level Panel report which states: "Governments engaged in bilateral and regional trade and investment treaties should ensure that these agreements do not include provisions that interfere with their obligations to fulfil the right to health. As a first step, they must undertake public health impact assessments. These impact assessments should verify that the increased trade and economic benefits are not endangering or impeding the human rights and public health obligations of the nation and its people before entering into commitments. Such assessments should inform negotiations, be conducted transparently and made publicly available."

Referring specifically to these impact assessments, Correa cited a study carried out in 2006 by Thailand's National Commission for Human Rights on the potential impact on public health of the intellectual property provisions that were being negotiated at that time in a trade agreement with the United States. A number of ex ante academic studies have also been undertaken prior to trade agreements being brokered such as the US-Central America Free Trade Agreement (CAFTA). There have also been methodologies proposed by a number of academics.

Following the recommendation made by the High-Level Panel, it would be important for the Human Rights Council to embark upon the development of some methodologies and guidelines for the realization of impact assessment studies, Correa said.

He underlined that the majority of the impact assessments on public health have been carried out ex ante, i.e., before the negotiation of agreements that increase intellectual property protection and typically extend patent monopolies. As a result of this ex ante approach, there

is a lack of appropriate methodologies to address the ex post consequences of the adoption of certain intellectual property rights standards.

Correa said developing countries that accept maximalist intellectual property rights provisions in trade agreements do so in the context of asymmetric power relationships. They do not have the power to resist the imposition of these protectionist provisions.

The outcome of this wave of over-protectionism in the area of intellectual property rights should not be deemed irrevocable. None of this is carved in stone, stressed Correa.

Kieny of WHO highlighted the activities of the organization in supporting access to medicines and the challenges faced in this context. She said that WHO has a long tradition of commitment and activity to support access to medicines as one of the fundamental elements of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The WTO's Taubman described the panel discussion at the Human Rights Council as a welcome step forward in the journey together towards the shared goal of access to medicines for all and promoting the development of urgently needed new medicines, recognizing the centrality of the human rights perspective for this collective effort.

For the WTO, he said, the Doha Declaration was a significant milestone on this journey. Unanimously, at the highest political level, Doha framed the legal, practical and policy context of TRIPS squarely within a public health setting. Doha remains a benchmark for policymakers today, all the more pertinent in the light of the Sustainable Development Goals, the growing complex of regional and bilateral trade agreements, and the renewed multilateral dialogue exemplified by the very resolution that established the Human Rights Council panel discussion.

Bombelles of WIPO said that the promotion of intellectual property as a tool to support innovation, creativity and economic development is central to WIPO's activity and reason for existing. Importantly, WIPO's founding documents stress that WIPO should pursue its mandate in coordination with other UN bodies and also participate in the relevant work of other UN bodies.

"Our mission is to lead the development of a balanced and effective inter-

national intellectual property system that enables innovation and creativity for the benefit of all." In this context, he said, WIPO and its member states have long understood and appreciated that intellectual property has transcended the confines of legal issues relating to patents, copyrights, trademarks etc. and touches on many of the most important public policy issues of our time, including health, environment, food security and many others.

In the field of global health specifically, the question of how to simultaneously sustain innovation in new medicines and other health technologies while also ensuring access for all, is a central challenge, Bombelles said.

Zhan of UNCTAD highlighted that UNCTAD has been working on access to medicines since 2005, from the specific angle of intellectual property rights and investment in local pharmaceutical production. (SUNS8420) □

Housing now valued as a financial commodity, charges UN expert

The treatment of housing as a commodity for wealth accumulation is disconnecting it from its social function of providing a place to live, and undermining the realization of housing as a human right, a UN rights expert has said.

by Kanaga Raja

GENEVA: The "financialization" of housing is one of the greatest challenges to the right to adequate housing, with housing now being valued as a commodity rather than a human dwelling, a United Nations rights expert has charged.

This admonishment came in a report by the UN Special Rapporteur on the right to adequate housing, Leilani Farha (from Canada), which was presented to the UN Human Rights Council on 1 March.

The Human Rights Council held its thirty-fourth regular session here from 27 February to 24 March.

At a media briefing on 2 March, Farha said the housing sector has been transformed by global financial actors and unprecedented amounts of excess capital. "It is no longer as we once knew it. Housing has been financialized: valued as a commodity, rather than a human dwelling, it has become for investors a means to secure and accumulate wealth rather than a place to live in dignity, to raise a family, and thrive within a community."

"Housing has lost its currency as a human right," she said, noting that the amount of capital now being invested in housing is staggering. Global residential real estate is valued at \$163 trillion, more than twice the world's total gross domestic product (GDP). "Imagine if that capacity was harnessed for the realization of housing instead of for speculation and profit."

The impact of the commodification of housing and commodified housing markets is devastating, Farha added. Informal settlements are being razed to create space for luxury developments, communities are becoming devoid of human life as houses sit empty – mere vehicles for capital gain – and extreme unaffordability is pushing low- and moderate-income people out of city centres – all in the name of investment.

"Financialization has robbed housing of its function as a social good. In financialized housing markets, housing is no longer 'people-driven'. Decisions about housing – its use, its cost, where it will be built or whether it will be demolished – are made from remote boardrooms with little if any consideration of the outcome," she said.

Housing as commodity

In her report to the Human Rights Council, the rights expert referred to the financialization of housing as structural changes in housing and financial markets and global investment whereby housing is treated as a commodity, a means of accumulating wealth and often as security for financial instruments that are traded and sold on global markets.

It refers to the way capital investment in housing increasingly disconnects housing from its social function of providing a place to live in security and dignity, and hence undermines the realiza-

tion of housing as a human right.

"It refers to the way housing and financial markets are oblivious to people and communities, and the role housing plays in their well-being."

The report noted that housing and real estate markets have been transformed by corporate finance, including banks, insurance and pension funds, hedge funds, private equity firms and other kinds of financial intermediaries with massive amounts of capital and excess liquidity. The global financial system has grown exponentially and now far outstrips the so-called real "productive" economy in terms of sheer volumes of wealth, with housing accounting for much of that growth.

"Housing and commercial real estate have become the 'commodity of choice' for corporate finance and the pace at which financial corporations and funds are taking over housing and real estate in many cities is staggering."

The value of global real estate is about \$217 trillion, nearly 60% of the value of all global assets, with residential real estate comprising 75% of the total. In the course of one year, from mid-2013 to mid-2014, corporate buying of larger properties in the top 100 recipient global cities rose from \$600 billion to \$1 trillion.

"Housing is at the centre of an historic structural transformation in global investment and the economies of the industrialized world with profound consequences for those in need of adequate housing," said Farha.

In "hedge cities", prime destinations for global capital seeking safe havens for investments, housing prices have increased to levels that most residents cannot afford, creating huge increases in wealth for property owners in prime locations while excluding moderate- and low-income households from access to home ownership or rentals due to unaffordability. Those households are pushed to peri-urban areas with scant employment and services.

"Elsewhere, financialization is linked to expanded credit and debt taken on by individual households made vulnerable to predatory lending practices and the volatility of markets, the result of which is unprecedented housing precarity."

According to the Special Rapporteur, financialized housing markets have caused displacement and evictions at an unparalleled scale: in the United States over the course of five years, over 13 million foreclosures resulted in more than 9 million households being evicted. In Spain, more than half a million fore-

closures between 2008 and 2013 resulted in over 300,000 evictions. There were almost 1 million foreclosures between 2009 and 2012 in Hungary.

"In many countries in the global South, where the majority of households are unlikely to have access to formal credit, the impact of financialization is experienced differently, but with a common theme – the subversion of housing and land as social goods in favour of their value as commodities for the accumulation of wealth, resulting in widespread evictions and displacement. Informal settlements are frequently replaced by luxury residential and high-end commercial real estate."

According to the rights expert, millions of foreclosures, evictions and displacements and more than a billion people living in grossly inadequate housing conditions and homelessness worldwide signal, among other things, the failure of states and of the international community to manage the interaction between financial actors and housing systems in accordance with the right to adequate housing.

Impact of financialization

According to the report, the financialization of housing has its origins in neoliberalism, the deregulation of housing markets, and structural adjustment programmes imposed by financial institutions and agreed to by states. It is also tied to the internationalization of trade and investment agreements which make states' housing policies accountable to investors rather than to human rights.

The financialization of housing is also the result of significant changes in the way credit was provided for housing and, more specifically, of the advent of "mortgage-backed securities".

The 2008 global financial crisis revealed the fragility, volatility and predatory nature of financialized housing markets and the potential for catastrophic outcomes both for individual households and for the global economy. In the United States, there were an average of 10,000 foreclosures per day in 2008, and as many as 35 million individuals were affected by evictions over a five-year period.

"Many expected that the global financial crisis and its impact on the human rights of millions of households would act as an alarm bell, forcing States and international financial institutions to reassess the value of unbridled financialization and introduce reforms to ensure that the financial system ad-

dressed rather than exploited the housing needs of low-income households," said Farha.

Unfortunately, it seemed to have the opposite effect. Individuals and families who were affected by the crisis were often blamed for taking on too much debt, and new rules and regulations were put in place to restrict their access to mortgages. Austerity measures cut programmes on which they had relied for access to housing options, and the march towards the financialization of housing continued.

States have continued to focus on attracting capital and wealthy investors with reduced taxes and other benefits. Countries like Cyprus, Greece, Portugal and Spain, where harsh austerity measures have been implemented, have enacted policies to entice foreign investors into their domestic markets.

The report said the amount of money involved in the purchase of housing and real estate is almost impossible to digest. Cushman and Wakefield, an American global real estate services firm engaging in \$90 billion worth of real estate sales per year, publishes an annual report entitled "The Great Wall of Money" which includes a calculation of the amount of capital raised each year for trans-border real estate investments. The total in 2015 was a record \$443 billion, with residential properties representing the largest single share.

"Housing and urban real estate have become the commodity of choice for corporate finance, a 'safety deposit box' for the wealthy, a repository of capital and excess liquidity from emerging markets and a convenient place for shell companies to stash their money with very little transparency."

Housing prices in so-called "hedge cities" like Hong Kong, London, Munich, Stockholm, Sydney and Vancouver have all increased by over 50% since 2011, creating vast amounts of increased assets for the wealthy while making housing unaffordable for most households not already invested in the market.

Corporate finance not only profits from inflated prices in hedge cities, it also profits from housing crises. The global financial crisis created unprecedented opportunities for buying distressed housing and real estate debt, which was sold off at firesale prices in countries such as Ireland, Spain, the United Kingdom and the United States.

The Blackstone Group, the world's largest real estate private equity firm, managing \$102 billion worth of property, spent \$10 billion to purchase repossessed properties in the United States at court-

houses and in online auctions following the 2008 financial crisis, emerging as the largest rental landlord in the country. Other major institutional players invested \$20 billion to purchase approximately 200,000 single-family homes in the United States between 2012 and mid-2013.

“What is so stark about the pouring of those vast amounts of money into housing is that hardly any of it is directed towards ameliorating the insufferable housing conditions in which millions live,” the rights expert noted.

If even a portion of those amounts was directed towards affordable housing and access to credit for people in need of it, target 11.1 of the Sustainable Development Goals, to ensure adequate housing for all by 2030, would be well within reach.

Financialization under current regimes, however, creates the opposite effect: unaccountable markets that do not respond to housing need, and urban centres that become the sole preserve of those with wealth.

According to Farha, financialized housing markets respond to preferences of global investors rather than to the needs of communities. “The average income of households in the community or the kinds of housing they would like to inhabit is of little concern to financial investors, who cater to the needs or desires of speculative markets and are likely to replace affordable housing that is needed with luxury housing that sits vacant because that is how best to turn a profit quickly.”

The report noted that more than 36,000 properties in London are held by shell companies registered in offshore havens such as Bermuda, the British Virgin Islands, the Isle of Man and Jersey. “Many residential rental properties are now owned by bondholders or holders of public stock with no direct connection to properties. It is difficult to know who is accountable for human rights when the owner of housing is a multi-billion dollar fund, bondholders, public stockholders or a nameless corporate shell.”

The report said that increased prices of housing and real estate assets have become key drivers in the creation of greater wealth inequality. Those who own property in prime urban locations have become richer, while lower-income households confronting the escalating costs of housing become poorer.

“Patterns of inequality are often starkest in developing countries. In Africa, if current trends continue, the number of households living in informal settlements will continue to increase

while the number of ultra-high-net-worth individuals is predicted to rise by almost 50 per cent in the next decade.”

Skewed accountability

The financialization of housing has dramatically altered the relationship of states to the housing sector and to those to whom they have human rights obligations. Rather than being held accountable to residents and their need for housing, states’ housing policies have often become accountable to financial institutions and seem to pander to the confidence of global credit markets and the preferences of wealthy private investors.

“Given the predominance of housing-related credit in many economies, domestic housing policy becomes intertwined with the priorities and strategies of central banks and international financial institutions, which are themselves rarely held accountable to States’ human rights obligations to ensure access to adequate housing and do not meaningfully engage with rights-holders.”

Accountability to global finance rather than to human rights has been rigorously imposed by the International Monetary Fund (IMF) and other creditors when governments have faced foreign debt crises. Decisions made by central banks and finance ministers in consultation with international financial institutions are rarely informed by input from stakeholders or those involved with housing policy and programmes.

In circumstances where governments should be relying on positive measures and resource allocation to provide housing to households affected by economic downturns and widespread unemployment, many have been held accountable to austerity measures imposed by creditors. They have agreed to dramatically reduce or eliminate housing programmes, privatize social housing and sell off massive amounts of housing and real estate assets to private equity funds.

In many developing and emerging economies, said the report, the World Bank and other international and regional financial institutions continue to actively promote the financialization of housing as the dominant strategy for addressing the critical need for housing, despite evidence that such strategies fail to provide housing options to the households that are most in need and lead to greater socioeconomic inequality.

The report further pointed out that there are currently almost 2,500 bilateral investment treaties in force and almost 300 treaties with investment provisions.

Provisions in investment treaties generally provide protection for investors from actions by states without imposing obligations on them to uphold human rights.

Investors are guaranteed fair and equitable treatment, protection from direct or indirect expropriation, and other protections, and have access to an investor-state dispute settlement procedure to seek damages for breaches of those provisions.

Claims have recently been brought against the Dominican Republic and Panama, for example, on the basis that government decisions to cancel planned luxury developments in order to protect indigenous territories or environmental resources violated investors’ rights under bilateral investment treaties.

The government of Mauritius is currently being taken to arbitration by a group of property development companies from the United Kingdom that invested in luxury real estate developments in Mauritius and are now seeking damages for a decision on the part of the government to change its planning policy to restrict such developments.

“The mere threat of those kinds of claims can have a directive effect on State housing policy. Investment treaty arbitration frequently involves millions of dollars in damages, and thus acts as a disincentive for States to enact and enforce any regulatory measures restricting the profitability of housing or real estate assets purchased by foreign investors,” said Farha.

In some instances, courts have played an important role in holding financial institutions liable for predatory and discriminatory lending practices, albeit without reference to international human rights obligations. In a recent case, the Eleventh Circuit Court of Appeals in the United States ruled in favour of a lawsuit brought by the city of Miami against Bank of America and Wells Fargo for discriminatory predatory lending practices linked to the mortgage crisis.

“Policy responses to the financialization of housing have tended to prioritize support for financial institutions over responding to the needs of those whose right to adequate housing is at stake. Spending on bailouts of banks and financial institutions after the 2008 financial crisis far outstripped spending to provide assistance to the victims of the crisis.”

Nonetheless, a number of sub-national and national governments have started to address the effects of excess capital flows and financialization on affordability and access to housing for

low-income households. Initiatives have been advanced at both national and sub-national levels providing a number of tools that can at least curb the excesses of financialization and mitigate its effects.

The report cited the fact that a number of states, including Austria, China, the Philippines, Thailand and Vietnam, have instituted restrictions on foreign purchasers of residential real estate.

Conclusions

"What is lacking is for States to reclaim the governance of housing systems from global credit markets and, in collaboration with affected communities and with cooperation and engagement by central banks and financial institutions, redesign housing finance and global investment in housing around the goal of ensuring access to adequate housing for all by 2030," said the rights expert.

Many states have been too deferential to the dynamics of unregulated markets and have failed to take appropriate action to bring private investment into line with the right to adequate housing. By providing tax subsidies for home ownership, tax breaks for investors, and bailouts for banks and financial institutions, states have subsidized the excessive financialization of housing at the expense of programmes for those in desperate need of housing.

"There seems to be a gross imbalance between the attention, mechanisms and resources that States have developed to support the financialization of housing and the complete deficit of housing for the implementation of the right to adequate housing."

The Special Rapporteur suggested that the way forward requires a shift to take hold so that states ensure that all investment in housing recognizes its social function and states' human rights obligations in that regard. That requires a transformation of the relationship between the state and the financial sector, whereby human rights implementation becomes the overriding goal, not a subsidiary or neglected obligation.

The Special Rapporteur believes that can be achieved with more constructive engagement and dialogue between states, human rights actors, international and domestic financial regulatory bodies, private equity firms and major investors.

The rights expert recommended, amongst others, that an international high-level meeting of states, international financial institutions, human

(continued on page 16)

Negotiating a 'Development Agenda' for the World Intellectual Property Organisation (WIPO)

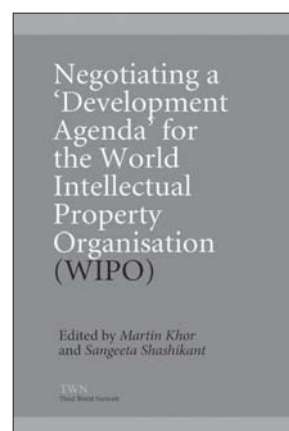
Edited by Martin Khor and Sangeeta Shashikant

The World Intellectual Property Organisation (WIPO), a UN agency that deals with issues of intellectual property rights, has been undergoing an interesting change in recent years. In 2004, many developing countries initiated a process of reform to make WIPO development-oriented, which they consider to be important for a UN agency. The initiative, which is known as the 'Development Agenda', has since snowballed into a movement to review the role of intellectual property rights in the process of development.

According to developing countries, NGOs and experts, WIPO has been too much oriented towards promoting IP at the expense of the wider development concerns and public interest.

Whether the Development Agenda movement succeeds in reorienting WIPO remains to be seen especially since this initiative has been resisted by developed countries, that want to cling on to the status quo.

On the 'Development Agenda' initiative, this book is an eyewitness account of the twists and turns of the Development Agenda movement. It is indispensable for those who want to understand the origins, rationale and history of the Development Agenda at WIPO.



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“Investment facilitation” could intrude on policy space, cautions paper

Measures taken to promote “investment facilitation”, a subject of discussion in various national and international fora, should not impinge on states’ regulatory and policymaking flexibility, says a new paper published by a developing-country think-tank.

by Kanaga Raja

GENEVA: Regulations related to investment comprise a very broad category of measures that are closely intertwined with the development levels of a country as well as the sector concerned, and addressing such a broad category of regulations through rules that are designed at the multilateral level to fit various countries and sectors under a “one-size-fits-all” approach would be intrusive on regulatory space.

This is one of the main conclusions highlighted in a policy brief published by the South Centre in March titled “Reflections on the Discussion of Investment Facilitation”. The paper was written by Kinda Mohamadieh, Senior Researcher with the Centre’s Global Governance for Development Programme.

According to the policy brief, while “investment facilitation” requires progress towards better linkages between investment flows and development and industrialization objectives, the answer does not lie in hard rules that establish additional pressures on policy and regulatory space.

Dialogue and exchange at the multilateral level, with the aim of clarifying the concept of investment facilitation and enhancing exchange of experiences among countries, could feed more effectively into national processes and, where appropriate, regional-level processes, in order to boost institutional and policymaking frameworks.

“Consequently, it is not advisable to proceed towards a rule-making process on ‘investment facilitation’, such as at the World Trade Organization,” said the South Centre paper.

Meanwhile multilateral discussions on investment facilitation in other fora ought to preserve a flexible approach that guards the ability of countries to adapt proposed actions in accordance with national development frameworks and needs.

Broad concept

According to the policy brief, the concept of investment facilitation is broad and could cover a variety of approaches and suggestions made by countries and multilateral institutions. Conceptually, it covers a broad set of regulatory actions, institutional roles and administrative procedures that are usually closely interlinked with policies and regulations that shape national developmental processes.

As proposed in different fora, the investment facilitation concept covers principles of “predictability and consistency”, “transparency” of processes and engagement with stakeholders, including establishing a mechanism to provide “interested parties” with an opportunity to comment on proposed new laws, regulations and policies or changes to existing ones prior to their implementation.

“Emphasizing ‘predictability’ in the regulatory environment without recognizing the need for differentiated approaches in the regulatory processes among countries and the dynamism that may be required in the regulatory process in order to attend to changes at the national, regional and global levels, could result in making such regulatory processes unable to respond to the regulatory needs posed by a highly globalized and dynamically changing economic context,” said the policy brief.

Embedding a deep transparency model, which includes an obligation of prior consultation with “interested parties”, under the umbrella of investment facilitation could amplify existing problematic aspects of investment treaties, especially those pertaining to the ability of private investors to influence domestic policy and regulatory processes, leading to a situation of “regulatory chill” in some cases, said the paper.

While the narrative on investment

facilitation draws links with mobilizing and channelling investment towards sustainable development, an investment facilitation model that adversely affects regulatory and policy space would run counter to national efforts directed towards building linkages between foreign direct investment (FDI) and sustainable development processes.

In the way forward in the discussion of investment facilitation, it is important to focus on the implications of the means by which action on investment facilitation is to be taken with respect to policy and regulatory space. Such implications are likely to significantly vary depending on the scenario chosen.

Multilateral convergence over voluntary guidelines that would be implemented as appropriate by developing countries, taking into account their national contexts in accordance with development, regulatory and institutional priorities, would carry significantly different implications compared with negotiating and having “one-size-fits-all” multilateral hard rules that would apply to both developing and developed countries across varying sectors.

The policy brief emphasized that ensuring that investment facilitation efforts are appropriate to and situated within the framework of a host state’s development policies and objectives is a key element to consider in pursuing more efforts in this area.

Investment facilitation, it said, is a concept repeated in discussions pertaining to investment policies and treaties, including those addressing the reform of investment treaties. The discussion on investment facilitation is taking place in various fora and contexts. Multilateral institutions such as the UN Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD) and the World Bank have been engaged in this discussion.

Investment facilitation has been on the agenda of the G20 as well. At the regional level, some country blocs, like the Asia-Pacific Economic Cooperation (APEC), have developed their Investment Facilitation Action Plan. Moreover, selected countries have chosen to address this issue bilaterally, such as through investment treaties. For example, Brazil adopted the Investment Cooperation and Facilitation Model.

The term “investment facilitation”, as used in different fora, remains broad

and unspecific, which allows it to encompass a variety of approaches and suggestions made by countries and multilateral institutions. This fluidity in the concept could provide space for discussing different approaches and thus for nurturing dialogue in regard to the concept.

However, the same conceptual fluidity could lead to lack of clarity or confusion, especially when participants are not on a level playing field in the discussion.

“While the term ‘facilitation’ holds an overall positive connotation, there may be multiple potential adverse implications for developing countries of the approaches and rules that could be developed in this area. Such implications are closely interlinked with the developmental context and institutional and regulatory frameworks existing in different countries,” said the paper.

Different approaches

The policy brief specifically discusses issues pertaining to whether there would be an added value from developing hard multilateral rules in the area of investment facilitation, and the potential implications of such rules on policy and regulatory space.

It noted that investment facilitation has been considered to encompass a broad set of regulatory actions, institutional roles and administrative procedures, and that different institutions and fora have chosen to focus on different angles and approaches to the concept.

For example, in its Policy Framework for Investment, the OECD includes under investment promotion and facilitation issues pertaining to the business environment and investment promotion, the role of investment promotion agencies and its performance and dialogue mechanisms, streamlining administrative procedures, the cost-benefit of investment incentives, issues pertaining to the promotion of investment linkages, drawing on international expertise, and information exchange networks in the area of investment.

UNCTAD’s Investment and Enterprise Division has developed a more detailed approach to investment facilitation under the Investment Facilitation Action Menu. It assesses that there is a systemic gap in both national and international investment policies when it comes to investment facilitation. UNCTAD points out that “[a]t the international level, in the overwhelming majority of the exist-

ing 3,300-plus international investment agreements (IIAs), concrete facilitation actions are either absent or weak”.

UNCTAD defines investment facilitation as encompassing transparent and predictable rules, efficient administrative procedures, efficient dispute prevention and resolution, effective stakeholder relations, and investor services to help deal with rules and procedures. It explicitly differentiates between investment promotion and facilitation. UNCTAD anchors promotion in actions of investment promotion agencies, image and marketing efforts, targeting of certain FDI projects and providing incentives.

The UNCTAD Investment Facilitation Action Menu includes 10 lines of action pertaining to transparency, regulatory process and policies, administrative procedures, relations with stakeholders, institutional framework, international cooperation and technical assistance.

According to the policy brief, UNCTAD does not specify a manner in which to advance the efforts pertaining to investment facilitation. It points out that the Action Menu, as an international policy instrument, reflects flexibility and options to pick and choose from, adapt and adopt for national and international policymaking. At the same time, UNCTAD proposes that “the package includes actions that countries can choose to implement unilaterally and options that can guide international collaboration or that can be incorporated in IIAs.”

In terms of the G20 major economies grouping, its 2016 ministerial meeting held in Shanghai had agreed a set of non-binding Guiding Principles for Global Investment Policy-making. The Principles also refer to investment facilitation, providing that “[p]olicies for investment promotion should, to maximize economic benefit, be effective and efficient, aimed at attracting and retaining investment, and matched by facilitation efforts that promote transparency and are conducive for investors to establish, conduct and expand their businesses”.

At a regional level, APEC had adopted an Investment Facilitation Action Plan, under which “investment facilitation refers to actions taken by governments designed to attract foreign investment and maximize the effectiveness and efficiency of its administration through all stages of the investment cycle ... Transparency, simplicity and predictability are among its most important

principles”.

Investment facilitation has also been linked to facilitating trade, specifically efforts under the WTO-led Aid for Trade Initiative and the recently adopted WTO Trade Facilitation Agreement. Under this context, it is proposed that the Aid for Trade Initiative could be expanded to cover investment, or that the Trade Facilitation Agreement could be expanded into an Investment and Trade Facilitation Agreement.

The policy brief also highlighted the practices of selected developing countries such as Brazil and South Africa.

In the context of presenting an alternative to the traditional international investment treaty model, Brazil developed a model treaty entitled the Investment Cooperation and Facilitation Model. The model focuses on a best-endeavour approach to investment facilitation that is in line with domestic laws. For example, it provides for provisions on exchange of information between parties “when-ever possible and relevant to reciprocal investments”.

It also anchors transparency requirements in best-endeavour language, whereby the provisions require the administering of “measures that affect investment” in a “reasonable, objective and impartial manner, in accordance with [Parties’] domestic law”.

The policy brief noted that the Brazilian model does not provide for a system of investor-state dispute settlement, but sets in place a system of focal points and joint committees to prevent, manage and resolve disputes, and a mechanism of arbitration between the states as a last resort if other means do not work.

In the South African experience, the investment framework includes sectoral programmes and investment facilitation as two core elements. This framework was developed after South Africa withdrew from its bilateral investment agreements and adopted a revised national investment law as an alternative.

Sectoral programmes are part of South Africa’s industrial policy, which creates an environment that will attract investors in particular sectors. South Africa coupled this with actions to facilitate the entry of targeted investors in the sectoral programmes and to facilitate investments in these sectors. A committee chaired by the President oversees the work of the investment agency. It coordinates with legislative bodies’ committees and sets targets for decision-making.

Principles of investment facilitation

The policy brief said the propositions pertaining to the investment facilitation concept encompass principles of “predictability and consistency”, “transparency” of processes and engagement with stakeholders, including establishing a mechanism to provide interested parties with an opportunity to comment on proposed new laws, regulations and policies or changes to existing ones prior to their implementation.

It noted that predictability and consistency are emphasized in the narrative on investment facilitation. These two principles could be evaluated in multiple ways.

For example, predictability and consistency could be required from the time of instituting a certain measure, whereby a consecutive change induced by new evidence, such as environmental or health assessments or an exogenous crisis such as a financial crisis, would be considered a retreat from maintaining “predictability and consistency”.

Another approach could be to evaluate the predictability of a country’s measures based on practices by other countries, irrespective of the domestic developmental context, including institutional framework, within a country.

Understanding “predictability” as the expectation that a certain country will follow the regulatory practice of other countries or follow international standards would impose a “one-size-fits-all” approach that carries tensions with developmental considerations. Indeed, said the paper, there is concern about the potential burden on developing countries when rules that require converging to a practice considered “best practice” at the international level are imposed.

“In developing countries, where regulatory frameworks and institutions are still in the process of evolving, and as the government’s capacity to regulate and the economy and society change, such requirements would put strong constraints on the right of the State to regulate. Overall, this approach would contradict the nature of regulations, which are supposed to evolve with the changing local, national, and global contexts.”

On the other hand, limiting the requirement of consistency to the application of investment regulations across relevant institutions, which is the approach adopted under the UNCTAD Action Menu, could be less intrusive on policy space if it does not require consistency

over an unlimited timeframe.

Thus, emphasizing “predictability” in the regulatory environment without recognizing the differentiated approaches in the regulatory process among countries and the dynamic changes required in the regulatory process in order to attend to changes at the national, regional and global levels, such as an unexpected financial crisis or arising climate action, would be detached from the regulatory needs posed by a highly globalized and dynamically changing global economic context.

The investment facilitation narrative also includes broad approaches to transparency and stakeholder involvement. This encompasses publishing laws, regulations, judicial decisions and administrative rulings; setting a centralized registry of laws and regulations and single window or special enquiry points; allowing investors to choose their form of establishment within legislative and legal frameworks; providing investors with clear and up-to-date information and timely and relevant advice on changes in procedures, applicable standards, technical regulations and conformance requirements; providing advance notice of proposed changes to laws and regulations; and making available screening guidelines and clear definitions of criteria for assessing investment proposals.

Besides, it includes proposals for setting a requirement that “interested parties”, including the business community and investment stakeholders, be provided with an opportunity to comment on proposed new laws, regulations and policies or changes to existing ones prior to their implementation.

The category of “interested parties” is an undefined open-ended category, which could include private entities beyond the investors directly concerned with a specific investment in a specific country.

“Given the significant capacities of private entities, including multinational corporations, to organize lobbying strategies, such obligations of prior consultations could have an undue influence on national regulatory and legislative processes. It could skew the pressure on the regulatory and legislative processes towards interests defined primarily by private profit and away from the concerned public interest,” said the policy brief.

In this regard, it noted that a similar requirement was negotiated under the WTO Trade Facilitation Agreement

(TFA). This was a contested issue; many developing countries were not supportive of inserting such obligations under the agreement. The negotiations ended with a best-endeavour provision.

The policy brief further underlined that the TFA category of “laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit” is more limited than the category of laws and regulations related to investment. Thus, such transparency requirement would potentially be more burdensome on the institutional capacities and regulatory processes of developing countries.

“Setting an obligation on countries to guarantee the participation of interested parties could potentially serve as another space for foreign investors to influence domestic policy making, besides their ability to challenge policy and regulatory steps through investor-State dispute settlement (ISDS) mechanisms,” the paper cautioned.

Investors already use the ISDS mechanism to bring or threaten to bring costly cases against states in an attempt to prevent new legislation and other measures from being adopted or applied, thus effectuating a “chilling effect” on the regulatory process.

“Embedding an intrusive transparency model that includes an obligation of prior consultation with ‘interested parties’ under the umbrella of investment facilitation would enhance existing problematic aspects of investment treaties in regard to investor-State relations and investor’s conduct.”

Investment and sustainable development

Overall, said the policy brief, the narrative on investment facilitation seeks to link the concept to efforts in support of mobilizing and channelling investment towards sustainable development, including building of productive capacities and critical infrastructure.

However, building linkages between FDI and sustainable development processes is not a laissez faire endeavour, but requires active policy interventions by governments. An investment facilitation model that is intrusive on regulatory and policy space would run counter to efforts directed towards building such linkages.

“Moreover, investment facilitation interventions that are not associated with reform to the content of the existing in-

vestment protection treaties and investor-state dispute settlement mechanism would be futile in terms of spilling positively onto the sustainable development front.”

In the way forward in discussing investment facilitation, the policy brief said, it is important to delineate the potential implications of various means by which action in this regard could be taken. Indeed, the implications on policy and regulatory space would significantly vary depending on the scenario chosen for the way forward.

A scenario where multilateral dialogue seeks convergence over voluntary guidelines that would be implemented in national contexts in accordance with development, regulatory and institutional contexts would carry significantly different implications in comparison with “one-size-fits-all” multilaterally binding hard rules established to apply to both developing and developed countries across varying sectors. Indeed, turning non-binding principles into binding rules and commitments could become too intrusive on policy and regulatory space.

Regulations related to investment are a very broad category of measures that is closely intertwined with the development levels of a country as well as the sector concerned. Moreover, the difference in institutional capacities is a major determinant of the way countries design and implement regulations. “Accordingly, addressing such a broad category of regulations through rules that are designed on the multilateral level to fit various countries and sectors, across the board, under a ‘one-size-fits-all’ approach would be intrusive on regulatory space.”

Considering the diversity of the regulations related to investment, and which are embedded in a country’s development levels, focusing on prioritizing efficiency, predictability and consistency from an investor perspective and minimizing costs of the investor could imply shrinking the regulatory space that countries require in order to take into account developmental elements, including social, economic, and environmental and sustainability implications.

The policy brief said that the way forward in investment-related policy-making should focus on the nature of needed reforms that will help reshape investment law and policy to be more conducive to and supportive of development and industrialization prospects in

developing countries. These reforms should help establish conditions where FDI could provide a stable source of support to industrialization and development, including through supplementing domestic resources, enhancing productive capacity, and supporting technological progress and industrial upgrading.

Ensuring an appropriate balance between the rights and obligations of investors, safeguarding the right to regu-

late, and ensuring that investment promotion and facilitation efforts are appropriate to and situated within the framework of a host state’s development policies and objectives are elements that form key aspects of such needed reforms, said the policy brief. (SUNS8421) □

The policy brief is available at: <https://www.southcentre.int/investment-policy-brief-8-march-2017/>

ICs intensify efforts on e-commerce negotiations at WTO

Industrial countries are persisting with a contentious push for negotiations at the WTO to craft rules on electronic commerce.

by D. Ravi Kanth

GENEVA: Major developed countries have decided to intensify their efforts for launching negotiations on several controversial issues in electronic commerce at the World Trade Organization’s eleventh Ministerial Conference in Buenos Aires this December, trade envoys told the *South-North Development Monitor* (SUNS).

Despite the setback suffered by these countries at a recent meeting of trade officials from the G20 major economies – after India and South Africa firmly opposed a concerted move by Australia to include language for negotiating e-commerce rules at the WTO – fresh efforts are being mounted all over again to bring the issue back, according to a trade envoy who asked not to be quoted.

Australian proposal

At the meeting of the G20 sherpas on 2 March in Berlin, Australia along with Canada and Singapore had insisted on including language in the outcome document of this year’s G20 summit for negotiating rules/disciplines on e-commerce at the WTO.

A week before the Berlin meeting, Australia had circulated a two-page non-paper in which it listed the issues that must be incorporated in the G20 leaders’ statement from their summit later this year. The non-paper, reviewed by SUNS, set out issues ranging from declaring permanent a prohibition on customs duties on electronic transmissions, to a list of “in-principle actions” that governments could take to support digital frameworks.

Australia argued how G20 countries

must play an important role in “improving the environment for digital trade – by identifying ways to lower the cost of digital trade for business and consumers, enabling more reliable and resilient digital frameworks and networks, and building greater confidence in e-commerce and ICT [information and communications technology] systems.”

It called on G20 members to acknowledge the need for enabling “greater participation in the digital economy, including micro, small, and medium enterprises (MSMEs) and consider how to support digital trade in a development context.”

The G20 initiatives, according to Australia, must include “trade facilitation through improved cooperation on compliance” such as G20 countries agreeing in principle to “international cooperation on non-discriminatory compliance requirements relating to digital trade.”

Canberra argued that “G20 cooperation on WTO-consistent compliance requirements will strengthen the international e-commerce frameworks and facilitate greater confidence and predictability in the trade environment for consumers, producers and governments and allow sustainable improvements in trade facilitation outcomes.”

For example, Australia suggested, “cooperation on compliance in transaction standards would improve reliability and consumer confidence in goods and services acquired through digital means.”

Australia urged the G20 to “recommend that the WTO make the e-commerce moratorium permanent” as “the

Azevedo gets second term as WTO DG

GENEVA: The WTO's governing General Council on 28 February formally reappointed Roberto Azevedo to a second four-year term as Director-General of the WTO.

Azevedo, the sole candidate for the position when nominations closed on 31 December 2016, will begin his second term of office on 1 September 2017.

The General Council also approved by consensus Ambassador Xavier Carim of South Africa as its Chair for 2017, and Ambassador Junichi Ihara of Japan as the Chair of the WTO Dispute Settlement Body (DSB).

However, the outgoing Chair of the General Council, Ambassador Harald

Neple of Norway, reported that there was a blockage with respect to the entire slate of chairpersons of the other regular WTO bodies for this year.

According to trade officials, the Council Chair also reported that it has been difficult to secure a replacement for Ambassador Vangelis Vitalis of New Zealand, who has left Geneva, as the Chair of the Agriculture Committee in Special Session. A replacement has not yet been found.

This is the first time that there has been a blockage on the entire slate of chairs of the regular bodies apart from the General Council and the DSB, according to trade officials. (*Kanaga Raja/SUNS8413*)

moratorium on customs duties is a political undertaking by all WTO Members not to impose tariffs on electronic transmissions."

The current moratorium, which has been in place since 1998, will expire in December 2017 unless renewed by the WTO Ministerial Conference in Buenos Aires.

"The permanent moratorium would increase certainty and facilitate the continued growth of e-commerce, including MSMEs," Australia maintained.

On "flow of data, privacy and security," Australia has urged the G20 countries to take a list of "in-principle actions that governments could take to support digital frameworks" such as "promoting the flow of information across borders, respect for privacy frameworks and data protection, intellectual property rights and security."

The G20 must take next steps for policy options relating to "cross-border data flows and associated cyber security, privacy and consumer protection risks, localization barriers, and the threats to a reliable and resilient digital environment," Australia emphasized.

Relevant international organizations such as the WTO must consider policy options and their impacts, including on MSMEs, according to the non-paper.

The G20 must agree on a set of principles that "go beyond the Trade Facilitation Agreement to guide Members on the application of paperless trading, electronic documentation and e-signatures and authentication," Australia argued.

"Such principles could inform broader WTO discussion on the development of future commitments in this area," Canberra maintained.

Australia also urged the G20 to continue to encourage ratification of the Trade Facilitation Agreement by as many WTO members as possible and support WTO members taking on commitments, even those which are required only on a best-endeavour basis.

Rejection

At the Berlin meeting of the G20 sherpas, Australia along with Canada and Singapore pressed for including the language as set out in the non-paper.

However, India and South Africa firmly rejected the Australian move on the grounds that negotiating "rules" for e-commerce at the WTO is outside the trade body's 1998 work programme on this issue.

Both India and South Africa maintained that the G20 must not suggest language that is well outside the current work programme, according to people who attended the meeting.

The final compromise agreed by officials at the meeting suggests that G20 members will constructively engage in the discussion on e-commerce at the WTO with the eleventh Ministerial Conference in view, as suggested by Singapore, according to people familiar with the development.

Under the Nairobi Ministerial Declaration of 2015, WTO members are re-

quired to report progress on the e-commerce work programme as agreed in 1998.

The Australian non-paper, according to participants, almost reflected the issues raised in the WTO secretariat's presentation at a meeting of the G20's Trade and Investment Working Group in February. The secretariat made a PowerPoint presentation on e-commerce in which it argued for concrete outcomes at the WTO.

In the slide on "further discussions towards a multilateral outcome," the WTO secretariat official concerned made 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]. Greater coherence; certainty; consumer confidence.

At an informal heads-of-delegation meeting at the WTO on 23 February, India denounced the WTO secretariat for presenting its views on e-commerce, which "remains a highly contentious area in the WTO."

"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.

More importantly, "were the contents of these presentations [on investment facilitation as well as 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 investment policy coherence or that there should be further discussions towards a multilateral outcome on e-commerce," India asked.

The Indian representative said the presentations by the secretariat "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."

Against this backdrop, the developing countries must stay on guard against efforts made by the likes of Australia and the WTO secretariat to bring in e-commerce through the backdoor at various fora, said a trade envoy who asked not to be quoted. (*SUNS8420*)

Ugly dance of global hegemon, source of concern and confusion

The new US administration may have threatened to turn its back on the WTO, but the fact is that the multilateral trade body has served its interests well over the years, writes *D. Ravi Kanth*.

The ugly dance of the global hegemon remains a source of concern as well as confusion. It wants to regenerate industrialization by bringing back all those manufacturing industries that left its shores. More importantly, it seems determined to rejig its trade policy by opting for bilateral free trade agreements and by asserting its sovereign trade policy decisions in contingency measures such as anti-dumping, countervailing (anti-subsidy) measures and safeguard actions – regardless of the multilateral rules it had framed since 1948.

On the face of it, the global hegemon is determined to pursue an aggressive version of the “open door” policy that was first implemented in 1898. That policy began under the dubious slogan of saving Cuba from the clutches of Spanish rule. Several years after the Cuban war, the head of the Bureau of Foreign Commerce of the US Department of Commerce wrote: “The Spanish-American war was but an incident of a general movement of expansion which had its roots in the changed environment of an industrial capacity far beyond our domestic powers of consumption. It was seen to be necessary for us not only to find foreign purchasers for our goods, but to provide the means of making access to foreign markets easy, economical and safe” [cited in Howard Zinn (2013), *A People's History of the United States*, 3rd edition, Routledge, p. 306].

The “open door” policy continued to manifest itself under different masks but beneath the surface there remained continuity, regardless of the destruction and violence it wrought in various countries. It wore, for example, a reformist mask since the setting up of the United Nations, the Bretton Woods institutions of the International Monetary Fund (IMF) and World Bank, and followed by the General Agreement on Tariffs and Trade (GATT) in January 1948.

During the last seven decades, the United States, the most powerful nation in history, went on to refine the “open door” policy in ways that suited its overall trade/economic interests and strategic considerations, including its immediate military and trade priorities, according to several studies by historians

and economists.

The creation of the World Trade Organization (WTO) in 1995 following the Uruguay Round of trade negotiations was an apogee of that onward march which had begun almost a century ago. Although the Uruguay Round started in 1986 when the US was under a Republican administration, it was concluded by a Democratic president at the official level in December 1993.

Unsurprisingly, there is an underlying chain of continuity in the economic and trade policies followed by the global hegemon since the late 19th century. The US control over the so-called multilateral trade and financial institutions is pervasive in almost all aspects. Barring some minor hiccups here and there, Washington has ensured a brutal grip on decisions taken at the IMF, the World Bank and the WTO.

Little wonder then that before entering the Director-General's office at the WTO headquarters in Geneva, one has to cross the room of a Deputy Director-General which remained occupied by successive US nominees. Indeed, every decision big or small at the WTO has to be vetted by that Deputy Director-General, who is the link between the US embassy in Geneva and the Director-General's office, according to several past and present trade envoys.

Trump trade policy agenda

Against this backdrop of continued influence and control over the WTO by the world's sole superpower, it appears somewhat bizarre to assume that the US under the leadership of Donald Trump will turn the multilateral trade body upside down, notwithstanding the White House's latest trade policy agenda report which was submitted to the US Congress on 1 March.

“The Trump Administration will aggressively defend American sovereignty over matters of trade policy,” the report says, insisting that the “overarching purpose of our trade policy – the guiding principle behind all our actions in this key area – will be to expand trade in a way that is freer and fairer for all Americans.”

“Every action we take with respect to trade will be designed to increase our economic growth, promote job creation in the United States, promote reciprocity with our trading partners, strengthen our manufacturing base and our ability to defend ourselves, and expand our agricultural and services industry exports,” it claims.

The four major priorities of the Trump administration, according to the document, are “(1) defend US national sovereignty over trade policy; (2) strictly enforce US trade laws; (3) use all possible sources of leverage to encourage other countries to open their markets to US exports of goods and services, and provide adequate and effective protection and enforcement of US intellectual property rights; and (4) negotiate new and better trade deals with countries in key markets around the world.”

It goes on to say that “the Trump Administration will act aggressively as needed”, suggesting that trade remedies such as anti-dumping and countervailing measures will be implemented as per American interests.

The US, which is a major user of the WTO's dispute settlement system, has accused the system's panels and Appellate Body of issuing rulings that went far beyond their remit.

The US has also said it was cheated by its trading partners through unfair trade practices like currency manipulation and non-implementation of decisions. Peter Navarro, the top trade advisor to President Trump, has accused Germany of using a “grossly undervalued” euro to “exploit” the US and its EU partners, the *Financial Times* has reported. Navarro wants Germany to enter into bilateral negotiations to reduce the US trade deficit.

As the Trump administration sees it, the continued ballooning of the US trade deficit (which touched \$648 billion in manufactured goods last year) and the loss of 5 million jobs during the last 16 years demonstrate that multilateral, regional and even bilateral trade agreements have only brought deindustrialization and destruction.

In short, the US is suggesting that its ever-increasing trade deficits are an offshoot of the manner in which it was duped by its trading partners which refused to play by the rules governing so-called “fair and free trade.”

“Plainly, the time has come for a major review of how we approach trade agreements,” says the president's trade policy agenda report, which emphasizes that “going forward, we will tend to fo-

cus on bilateral negotiations.”

Non-implementation of WTO rulings

The report speaks incessantly about “sovereignty” but doesn’t quite say that Washington would not abide by WTO rules or rulings it doesn’t like. (The US has charged that several WTO rulings have crossed their remit.)

However, even a cursory look at the litany of so-called trade crimes perpetrated by the US at the WTO indicates that Washington has consistently followed a practice of not implementing adverse WTO rulings since 1995. Barring a couple of decisions involving the EU, the US has largely frustrated the developing and the poorest countries in a variety of trade remedy disputes by not fully implementing the WTO Dispute Settlement Body’s recommendations. Indeed, the US has virtually created a mega-industry for imposing illegal anti-dumping and countervailing measures, including the infamous Byrd Amendment, over the past 20 years.

[The US’ anti-dumping actions are based on the “zeroing” methodology. Under this practice – which has been condemned time and again by the WTO Appellate Body – negative dumping margins (arising from higher export price as compared with normal value) are either excluded from the calculation of the weighted average or included with a value of zero by the US anti-dumping investigating authorities.]

A simple glance at the number of disputes it won and lost proves that what Washington is saying about being conned or cheated would be tantamount to “fake news”. So far, the US has launched more than 100 trade disputes against other WTO members while facing more than 125 disputes against its allegedly unfair trade practices. Every month, the US is criticized for not implementing rulings in a half-dozen cases for over 10 years. Moreover, the US’ measures in a range of trade-distorting cases were condemned by the Appellate Body. The US ranks first among countries in not implementing the WTO’s rulings by bringing its laws and regulations into compliance, thereby causing “systemic” shocks with “chilling” effects.

The US deserves kudos for having created “lawlessness” for failing to implement rules it had crafted during the Uruguay Round. Besides, the US is the major subsidizer of agriculture and even hi-tech exports.

Successive US administrations have

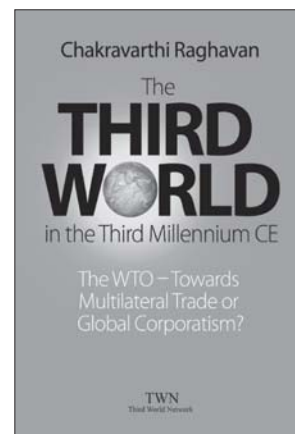
The Third World in the Third Millennium CE

The WTO – Towards Multilateral Trade or Global Corporatism?

By Chakravarthi Raghavan

THE second volume of *The Third World in the Third Millennium CE* looks at how the countries of the South have fared amidst the evolution of the multilateral trading system over the years. Even at the General Agreement on Tariffs and Trade (GATT) gave way to the World Trade Organization (WTO) as the institution governing international trade, this book reveals, the Third World nations have continued to see their developmental concerns sidelined in favour of the commercial interests of the industrial countries.

From the landmark Uruguay Round of talks which resulted in the WTO’s establishment to the ongoing Doha Round and its tortuous progress, the scenario facing the developing countries on the multilateral trade front has been one of broken promises, onerous obligations and manipulative manoeuvrings. In such a context, the need is for the countries of the Third World to push back by working together to bring about a more equitable trade order. All this is painstakingly documented by *Chakravarthi Raghavan* in the articles collected in this volume, which capture the complex and contentious dynamics of the trading system as seen through the eyes of a leading international affairs commentator.



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criticized the WTO dispute settlement panels and Appellate Body whenever they lost trade disputes. Last year, the US even blocked a second term for a sitting Appellate Body member Seung Wha Chang on the grounds that his rulings went beyond the WTO's covered agreements. It is easy for the US to claim that every deal it did till now is a dog, but Washington also succeeded in imposing unilateral trade deals for more than a century.

DG's response

Nevertheless, the WTO Director-General Roberto Azevedo appears ready to appease the new US administration and acquiesce to its threats to ignore the Dispute Settlement Body decisions. "It is clear that the United States has a variety of trade concerns, including about the WTO dispute settlement system," Azevedo said on 28 February, after securing a second four-year term. "I am ready to sit down and discuss these concerns and any others with the trade team in the US whenever they are ready to do so."

It is shocking that the WTO's Director-General is ready to discuss the Dispute Settlement Body rulings with the new trade administration in Washington, said a trade envoy who asked not to be quoted. "Instead of maintaining distance from the independent and impartial Dispute Settlement Body mechanism, the Director-General is signalling that he is ready to address Washington's concerns," the envoy said.

However, given his track record of ensuring that American trade demands are realized, such as the Trade Facilitation Agreement or the continued use of trade-distorting export credits for farm products and food aid, it would not be a surprise if Azevedo chose to prostrate himself before the US trade administration, according to another trade envoy.

Significantly, the billionaire new US Commerce Secretary Wilbur Ross has made it clear that despite the criticism levelled against the multilateral trade body, the WTO "in some ways" is necessary as an arbiter of global trade.

Effectively, the Trump administration would use the WTO's Dispute Settlement Body because of the rules it had framed during the previous Uruguay Round, while turning its back on any future change in the multilateral trade rules.

In conclusion, the trade policy missiles being fired by President Trump will continue to form part of the arsenal built by successive American administrations

since President William McKinley (1897-1901).

The only difference is that Trump appears somewhat like the notorious Robespierre of the French Revolution who had followed a policy of "we must smother the internal and external enemies of the Republic or perish with them." (SUNS8419) □

(continued from page 8)

rights bodies, civil society organizations and relevant experts be organized to design a strategy for engaging financial regulatory bodies and actors in the realization of the goal of adequate housing for all by 2030. (SUNS8414) □

PUTTING FOOD FIRST

Towards a Community-Based Food Security System in Indonesia

by Hira Jhamtani

Ensuring that every person in one of the world's largest and most populous nations has enough food on the table is understandably an undertaking of great import.

Putting Food First examines the food security situation in Indonesia with a view to determining how this can be done.

This book draws attention to serious shortcomings in food production and distribution in the country, which led to many cases of malnutrition, especially among children, in 2005. These flaws are ultimately rooted in policy failures, not only in the agriculture sector per se but also in the related spheres of trade, industrialization, rural development and environmental and natural resource management.

Recognizing the multidimensional nature of the problem, the author puts forward a set of short-and long-term policy recommendations aimed at attaining food security within a broader national framework of sustainable development. Realization of this goal will entail a shift from the existing industrial, monoculture-oriented farming system to a community-based and ecologically sound agriculture which indeed "puts food first".



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