

THIRD WORLD *Economics*

TRENDS & ANALYSIS

Published by the Third World Network KDN: PP 6946/07/2013(032707) ISSN: 0128-4134 Issue No 650 1 – 15 October 2017

Continuing divisions mark countdown to MC11

The outcome of the WTO's eleventh Ministerial Conference (MC11), to be held in Buenos Aires on 10-13 December, remains shrouded in uncertainty, with little time left ahead of the meeting and still much to resolve. Deep-seated differences persist among WTO member states in many key areas where decisions at Buenos Aires are targeted, not least on agriculture, where issues such as farm subsidies and public food stocks are proving stubbornly divisive.

- Talks in final stretch with limited time before MC11, says agri chair – p2
- US cherry-picking MC11 outcomes, holds members hostage – p5
- No outcome likely at MC11 on domestic regulation in services – p7
- US transparency proposal criticized at WTO Goods Council – p8

Also in this issue:

*Sharing national experiences in
use of compulsory licences* p11

Finance following growth

p14

Contents

CURRENT REPORTS

- 2 Talks in final stretch with limited time before MC11, says agri chair
- 5 US cherry-picking MC11 outcomes, holds members hostage
- 7 No outcome likely at MC11 on domestic regulation in services
- 8 US transparency proposal criticized at WTO Goods Council
- 9 US doubts WTO's pre-eminence in multilateral trade liberalization
- 11 Sharing national experiences in use of compulsory licences

OPINION

- 14 Finance following growth

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).

● **Annual subscription rates:** Third World countries US\$75 (airmail) or US\$55 (surface mail); India Rs900 (airmail) or Rs500 (surface mail); Malaysia RM110; Others US\$95 (airmail) or US\$75 (surface mail).

● **Subscribers in India:** Payments and enquiries can be sent to: The Other India Bookstore, Above Mapusa Clinic, Mapusa 403 507, Goa, India.

● **Subscribers in Malaysia:** Please pay by credit card/crossed cheque/postal order.

● **Orders from Australia, Brunei, Indonesia, Philippines, Singapore, Thailand, UK, USA:** Please pay by credit card/cheque/bank draft/international money order in own currency, US\$ or euro. If paying in own currency or euro, please calculate equivalent of US\$ rate. If paying in US\$, please ensure that the agent bank is located in the USA.

● **Rest of the world:** Please pay by credit card/cheque/bank draft/international money order in US\$ or euro. If paying in euro, please calculate equivalent of US\$ rate. If paying in US\$, please ensure that the agent bank is located in the USA.

Visit our web site at <http://www.twn.my>.

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

© Third World Network

Talks in final stretch with limited time before MC11, says agri chair

WTO meetings on 10 and 13 November revealed continued divisions among member states on key issues of agricultural trade reform with only a month to go before the WTO's eleventh Ministerial Conference.

by Kanaga Raja

GENEVA: With just about a month until the eleventh WTO Ministerial Conference (MC11), which will take place in Buenos Aires on 10-13 December, the chairperson of the agriculture negotiations at the WTO reported on 10 November on the state of play on the issues of domestic support, cotton, export restrictions and agricultural market access.

At an informal meeting on 10 November, the chair of the Special Session of the WTO Committee on Agriculture, Ambassador Stephen Karau of Kenya, said: "We are in the final stretch of our Geneva-based negotiations with very limited time left before MC11."

He told members that his objective as chair was "to be in a position to present the contours of a possible package on agriculture with a limited number of issues for the consideration of Ministers at MC11".

According to Karau, "the best way to ensure success at MC11 would of course be for members to fully agree on a package in Geneva before leaving for Buenos Aires".

"Depending on the issue, the envisaged outcome could be a substantive one, a post-MC11 work programme or a combination of the two," the chair said.

A dedicated session was subsequently held on 13 November on the agriculture issues of public stockholding (PSH) for food security purposes and the Special Safeguard Mechanism (SSM), with the chair providing an update on the negotiations on both these issues (see below).

Domestic support

According to trade officials, at the 10 November informal meeting, the chair circulated a revised version of a compilation document aimed at facilitating text-based negotiations. The revised document reflects all the proposals that are being discussed in the run-up to MC11. It also contains several new proposals tabled by members over the past fortnight.

According to trade officials, on the issue of domestic support, Karau said that it remains the priority for the vast majority of members. "It is the pillar that has gotten a lot of attention in all our meetings thus far, as well as in my consultations with members," he said. "We now have six proposals reflected in the compilation document."

Despite the high level of engagement, the chair said that members' positions remain divided, with one group favouring an overall limit to trade-distorting domestic support and another calling for the elimination of the Aggregate Measurement of Support (AMS) entitlements by MC11 or at a later stage. "While both approaches aim to limit trade-distorting support, points of departure differ," the chair said.

According to trade officials, Argentina, which will be hosting MC11, introduced its proposal on domestic support, which it referred to as a "compromise text". It maintained that the proposal does not reflect Argentina's national position but rather represents an effort to achieve common ground.

Argentina said that it does not view the overall trade-distorting domestic support (OTDS) and AMS reductions as two opposing objectives, and thus proposed a limit that seeks to cut AMS and addresses overall limits. (For details of the Argentine proposal, see the following article.)

Argentina said that its proposal is not set in stone, and it is open to incorporating members' comments in further versions.

However, some members voiced strong concerns over the uneven level of concessions that the Argentine proposal implies.

Mexico expressed concern over the significant concessions that it would have to make under the proposal, saying that it would have to cut its domestic support by 50-97% under the options that have been proposed by Argentina. Any contribution should be proportional, Mexico said, adding that it "can-

not accept contributions that are greater than that of some developed countries”.

According to trade officials, the EU also expressed similar concerns, saying that while the submission by Argentina purports to represent convergence of the submissions currently on the table, in reality it is nothing of the kind.

The EU pointed out that under the first option in the Argentine proposal, only around 30 members are expected to take cuts to their existing limits on trade-distorting support, while the second option would mean that members which have not reformed their policies will be allowed to continue with their policies or even increase trade-distorting support. Under the third option, more than half of the membership – including the proponents – would actually be given a significantly larger ceiling for trade-distorting support.

The US said the Argentine proposal does not overcome the reality of deep divergences among the members. Members should focus on continuing the agriculture reforms after Buenos Aires, it suggested. “Continuing to ignore the reality of where we are, and to press for outcomes against significant odds will lead to a dynamic that will be deeply unhelpful to a shared long-term goal of making progress,” the US said.

The US called on members to start by fulfilling their notification requirements, in order to “fully understand the state of agriculture policies and trade today to be able to inform us of how we might move forward.”

Switzerland, on behalf of the G10 coalition (Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Norway, Switzerland and Chinese Taipei), said that only a modest outcome can be considered for MC11.

Commenting on the Argentine proposal, Switzerland said that “we doubt that the divergent views on domestic support could be reconciled under this proposal.” It pointed out that many of the G10 members would still have to contribute in a disproportionate way compared with those members whose subsidies impact world markets the most.

Other members of the G10, including Japan, Korea and Norway, expressed support for the statement made by Switzerland.

Norway noted that the red lines of some major members are clearly not matching. On the Argentine proposal, Norway said that the required cuts for some members are “too big to defend to

their domestic stakeholders”.

According to trade officials, India underlined that its joint proposal with China (which calls for elimination of the AMS) had garnered support from most members.

China pointed out that the Argentine proposal does not address product-specific AMS limits. It noted that some developed members can provide product-specific AMS as high as hundreds of percent of the value of production, whereas developing members can only have access to the *de minimis*. Members can never achieve an equitable, development-oriented outcome on domestic support without tackling product-specific AMS, China emphasized.

Botswana, on behalf of the African, Caribbean and Pacific (ACP) Group of countries, said that the group’s proposal also calls for the elimination of the AMS.

Australia said that the exclusion of both Article 6.2 support (which allows developing countries additional flexibilities) and Blue Box support is not feasible. According to Australia, if members leave some elements unaddressed now, it will be very difficult to address them in the future.

Canada also said that both Article 6.2 and the Blue Box should be included in the limit.

Brazil noted some areas of convergence between the Argentine proposal and the joint EU-Brazilian proposal, saying that this could set the basis for “further incremental results for the future”.

Chinese Taipei, on behalf of the Article XII members (also the group of recently acceded members), said that members of the group made higher levels of concessions during their accession process to the WTO. It said that according to their simulations, some of the group’s members would need to further reduce their policy space under some of the domestic support proposals on the table.

Saudi Arabia, another Article XII member, voiced similar views.

While it welcomed the Argentine proposal, Pakistan said that it is not comfortable with the equal treatment of the AMS and *de minimis*. As a net food-importing developing country, it needs to maintain policy space to address food safety concerns, Pakistan underlined.

Ecuador said the proposal cannot be supported as the limited policy space under *de minimis* would be further reduced.

According to trade officials, Indonesia said that Option C in the Argentine

proposal would be problematic.

Chile, Colombia and Uruguay broadly supported the Argentine proposal, while Thailand also expressed support but said that it would like to see the Blue Box addressed.

Guatemala, speaking on behalf of the Small and Vulnerable Economies (SVEs), said that the group’s special conditions need to be respected.

El Salvador, Venezuela and Cuba supported the call for special and differential treatment for special groups.

Paraguay expressed caution over attempts to clean up the negotiations agenda before MC11, which it said could result in an “empty Christmas tree”. While the efforts made by Singapore with its proposal on export restrictions could be a side dish, it still trusts that “Argentine beef” will make a party in Buenos Aires, said Paraguay.

Cotton

Also at the 10 November informal meeting, the chair reported that domestic support on cotton remains the central and most controversial issue and that views remain far apart on what could constitute a possible outcome in this area.

According to Karau, several delegations consider that the proposal from the Cotton Four (C4) group – comprising Benin, Burkina Faso, Chad and Mali – cannot constitute a realistic basis for an outcome on cotton domestic support at MC11.

“No participant, for example, has indicated support for the idea that further disciplines on Green Box direct payments granted to cotton producers could be part of an outcome at MC11,” the chair maintained.

“As regards the other components of Cotton – Market Access, Export Competition, implementation and follow up as well as development assistance – delegations reaffirmed the continued relevance of the Nairobi Decision,” the chair further said.

According to trade officials, Mali, speaking on behalf of the C4, said that it was surprised to hear the chair’s report, while Benin, another C4 member, voiced strong objections to the notion that further disciplines on Green Box direct payments granted to cotton producers run counter to the objective of the reform process in agriculture.

Pakistan pointed out that members have a mandate to address the cotton issue and the negotiations on cotton must

lead to significant reductions of domestic support. It however said that the disciplines on the Green Box suggested in the C4 proposal, though desirable, will not be realistic. In the current environment, the EU-Brazilian proposal can be a realistic basis, while for future work, the C4 proposal is the most complete proposal, it added.

The EU and Brazil highlighted their joint proposal to address cotton, with Brazil saying that it offers the only real path to a comprehensive outcome on domestic support, public stockholding and cotton.

The EU maintained that it was a leader in implementing cotton reforms and it is committed to making progress.

On the issue of export restrictions, the chair reported that the discussions confirmed that many members support a limited outcome, mainly focused on enhancing transparency in export prohibitions and restrictions. They also confirmed the wide support for the exemption from such export restrictions of food-stuff purchases by the World Food Programme for humanitarian purposes.

Singapore presented its revised proposal on export prohibitions and restrictions, saying: "We are not seeking to change any existing WTO agreement, but rather to enhance and clarify the transparency provisions."

According to trade officials, while the proposal was generally welcomed, some members including India emphasized the view that notification requirements should not become too burdensome for developing countries. It was also pointed out that the requirement to have further advance notice before applying export prohibitions or restrictions can lead to speculation.

On agricultural market access, Karau reported that members are not targeting a substantive outcome at MC11 but rather are seeking to achieve a collective agreement on a work programme to guide market access negotiations post-MC11.

Some members cautioned against an excessively detailed work programme or any selective approach that might potentially lead to picking and choosing among the various market access issues, the chair said.

Tunisia introduced its proposal on tariff simplification, saying that despite 20 years of the WTO Agreement on Agriculture, the market access pillar of agricultural reform is still harmed by complex tariffs.

Paraguay introduced its proposal, co-sponsored by Argentina, Brazil, Chile, Thailand and Uruguay, on a post-MC11

work programme on market access.

Paraguay said market access is an important pillar in agriculture and has the potential of boosting international trade if it is properly addressed. "The proposed work programme is not aiming at prejudging any results or approach," said Paraguay.

It pointed out that the average tariffs on agricultural products remain over eight times higher than tariffs on industrial products, and tariffs of more than 300% are not uncommon.

According to trade officials, many members supported the proposed work programme as an incremental step in addressing the market access pillar. However, some members including the G10 suggested that the language of the work programme should remain simple and non-controversial.

Some members including the EU voiced caution against cherry-picking individual issues in the absence of a wider market access package covering both agricultural and non-agricultural products.

The chair reported that the issue of elimination of the special agricultural safeguard (SSG) – which allows some members to temporarily increase import tariffs on specific agricultural products in cases of import surges or price drops – has also been raised specifically by some members.

The Philippines introduced a new proposal aimed at gradually phasing out the SSG. Some members however called for it to be maintained.

Canada, Chile and Switzerland circulated a proposal on export competition. Introducing the proposal, Canada said that there is still room for improvement to the Nairobi decision on export competition to ensure that other measures do not threaten to circumvent elements in that decision.

Argentina expressed support for the proposal and hoped to be a co-sponsor.

Brazil said that it would submit a proposal on sanitary and phytosanitary measures (SPS). "We have adjusted our ambition," Brazil said, adding that "we will essentially propose a place-holder for SPS issues in an agenda for future work, without prejudging the agenda nor the results of such future work."

Public stockholdings

At the dedicated session on 13 November, the chair provided an update on the status of the negotiations on PSH and on the SSM.

According to trade officials, the chair reported that he found members' en-

gagement increasingly encouraging. "While I can't say that we are close to a consensus, I have seen genuine efforts to attempt to narrow the gaps in Members' positions," Karau said.

The chair provided a detailed report on the individual components of a permanent solution for PSH.

On the core provision, the chair said that the main issue has been which approach to take. Members' views differ between an exemption from the AMS calculation or a Bali-type solution shielding PSH programmes against legal challenges, with an increasing number of views expressed in favour of a Bali-type solution.

On product coverage, the chair reported that some members want the current language in the Bali decision to be replaced by "foodstuffs", while others have expressed a strong preference for maintaining the phrase "traditional staple food crops" in the Bali decision. It was pointed out that the current language resulted from intensive consultations among members in the run-up to the 2013 Bali Ministerial Conference, he said.

On country and programme coverage, the chair reported that members generally agree that the permanent solution should cover other developing countries. The main difference comes from the fact that some would like to extend the solution to all developing countries, while others suggest extending it only to "small" programmes, defined as programmes under which the procurement remains below a certain percentage of the value of production or of the quantity produced. There is nevertheless an agreement from both sides that the coverage should be extended to include least developed countries (LDCs), said the chair.

Regarding transparency, the members of the G33 coalition are of the view that the conditions – such as the requirement to be up to date with notifications and to notify in advance a breach or a potential breach – are too onerous. According to the chair, several others considered however that a member with a capacity to run big programmes should be able to provide the required information; one member suggested that the transparency requirements should be proportional to the size of the programme, meaning that there should be enhanced transparency for bigger programmes.

Safeguards remain probably the most contentious element, Karau said. The preferences are divided between: (1) unmodified Bali safeguards; and (2)

"Bali-plus" safeguards, meaning strengthening the safeguards by adding some conditions, notably regarding the prohibition of direct and indirect exports from the procured stocks.

Russia presented a new proposal it had jointly tabled with Paraguay, saying that the proposal is based on the Bali decision and represents a delicate balance.

Russia maintained that both existing and new PSH programmes are covered in the proposal, while LDCs are exempted and strong safeguards are introduced to ensure the stocks are not leaked to export markets. The transparency requirement in the proposal will help members that apply the programmes to share data and thus avoid misunderstanding, it said.

According to trade officials, Indonesia, speaking on behalf of the G33, reiterated the group's position that the PSH issue should not in any way be linked with domestic support and that any linkage would prevent members from achieving an outcome in Buenos Aires.

Indonesia pointed out that food security programmes should not be counted as AMS; a permanent solution should cover both current and new programmes; and that transparency requirements should not be too onerous, especially ex ante requirements to notify in advance a breach or a potential breach, which would not be feasible.

Indonesia said that the G33 is willing to discuss safeguard provisions.

According to trade officials, India underlined that there cannot be any substantive outcome at MC11 without a solution on PSH.

It said that a permanent solution ought to provide legal certainty, and that the product coverage should be "food-stuffs", noting that this is the terminology used in the Agriculture Agreement. As for the transparency requirement, India reiterated that members should only be asked to provide information after the implementation of such programmes. On safeguards, India asked members which have concerns to provide text-based suggestions based on the latest G33 proposal.

According to trade officials, the US said that it does not welcome expanding the scope of the interim solution on PSH.

Canada raised a number of questions on the transparency requirement and safeguards. It said that some members have increased import tariffs after releasing stocks, causing disruption in the global market. This is why a permanent solution should include ex ante transparency requirements and safe-

guards should be in place to ensure that countries should not increase applied tariffs for the products procured under PSH programmes, Canada said.

According to trade officials, El Salvador, Ecuador, China, Chinese Taipei, Turkey, Nigeria and Egypt (for the African Group) voiced similar views to the G33 group.

Egypt said that setting a limit based on value of production would not be favourable to African countries as most of them have small agriculture production. It said that the proposed condition that countries using PSH programmes should not increase their import tariffs beyond certain limits sets out a linkage between public stockholding and market access, and cannot be accepted.

Pakistan said that while many countries have legitimate welfare and livelihood concerns, these should not be construed to create distortions in agriculture trade. It maintained that various PSH programmes have serious unintended consequences and can affect the food security and livelihood of other farmers, and therefore uncapped provisions without adequate safeguards cannot be an outcome for MC11.

Expressing support for the Russia-Paraguay proposal, Thailand said that strong transparency and safeguard provisions are needed.

The EU said that the elements in its

own proposal should be maintained. And a standalone outcome on PSH, without domestic support, would not be acceptable, it added.

Special Safeguard Mechanism

On the SSM, the chair reported at the 13 November session that he had not heard anything different from members. The issue continues to be very important for a number of members which have called for a substantive outcome on the SSM, whereas some other members do not consider that a substantive outcome at MC11 is realistic in the absence of a broader market access outcome.

"The only development that I could see in the recent discussions is that one particular member for whom a substantive outcome on SSM at MC11 is very important, even if a partial one, has started to explore the feasibility of linking the proposed mechanism to the existing SSG to address its specific concerns," the chair said.

According to trade officials, Indonesia (for the G33), the Philippines, India, China, Turkey, Nigeria and Chinese Taipei expressed support for the SSM, reiterating that an effective and pro-development SSM would help small-scale farmers overcome price volatility. The G33 proposal should be the basis for work, they said. (SUNS8578) □

US cherry-picking MC11 outcomes, holds members hostage

The fate of the WTO ministerial meeting will hinge to a large extent on the US, which has thus far been determinedly selective on the subjects to negotiate and advance for Buenos Aires.

by D. Ravi Kanth

GENEVA: The United States continues to cherry-pick outcomes for the WTO's eleventh Ministerial Conference in Buenos Aires.

The US has indicated its willingness to negotiate a deliverable for prohibiting subsidies to vessels that contribute to illegal, unreported and unregulated (IUU) fishing while categorically ruling out a work programme on domestic farm subsidies, trade envoys told the *South-North Development Monitor* (SUNS).

It has adopted an ambiguous position on retaining the transparency and safeguard provisions in the Bali interim decision on public stockholding programmes for food security, according to trade envoys familiar with the devel-

opment. Meanwhile in the area of services, it has rejected an outcome on domestic regulation for trade in services.

The diametrically opposite positions adopted by the US came into full display during two meetings at the WTO on 14 and 15 November on the domestic support reduction commitments for farm products and on fisheries subsidies respectively.

On 14 November, the chair of the Doha agriculture negotiations, Ambassador Stephen Karau of Kenya, held a meeting on domestic support with 15 countries. The meeting was specifically convened to accelerate discussions on a so-called compromise proposal issued by Argentina, the host country of MC11.

Argentine proposal

The proposal, which aims to forge “convergence for an outcome at MC11”, suggests an overall “limit” (cap) on overall trade-distorting support with several elements. Under the proposal, members shall not provide trade-distorting domestic support which taken in aggregate exceeds a monetary limit (or base cap).

The base cap shall be no greater than the larger of:

Option A: Double the member’s *de minimis* percentage of its average value of total agricultural production in the period [2011-15];

Option B: [110%] of the average Articles 6.3 and 6.4 support notified by the member for [the most recent three notified years at the date of adoption]; or

Option C: For developing-country members, [\$2.0 billion] or equivalent in local currency.

Argentina proposed that “the base cap shall apply to trade-distorting domestic support referred to in Articles 6.3 and 6.4 of the Agreement on Agriculture.”

Under the proposal, members that do not notify their preferred option above within one year of the decision shall be considered to have chosen Option C in the case of developing countries and Option B in the case of developed countries.

In an attempt to satisfy China and India, which have demanded the elimination of the Aggregate Measurement of Support (AMS) or the most trade-distorting domestic support, Argentina also proposed a tiered formula for “Final Bound Total AMS”. The formula suggests that:

(i) Where the Final Bound Total AMS is greater than \$40 billion, or the equivalent in the monetary terms in which the binding is expressed, the reduction shall be [30%];

(ii) Where the Final Bound Total AMS is greater than \$15 billion and less than or equal to \$40 billion, or the equivalent in the monetary terms in which the binding is expressed, the reduction shall be [21%];

(iii) Where the Final Bound Total AMS is less than or equal to \$15 billion, or the equivalent in the monetary terms in which the binding is expressed, the rate of reduction shall be [15%].

Argentina called for developed countries to be required to reduce their Final Bound Total AMS in three equal instalments over two years, commencing

on the first day of implementation.

For developing countries, the reduction in Final Bound Total AMS shall be two-thirds of the reduction applicable for developed countries. They will reduce their Final Bound Total AMS in five equal annual instalments over four years, commencing on the first day of implementation. Developing countries with Final Bound Total AMS levels at or below \$100 million will not be required to undertake reductions under the proposal.

Argentina also proposed in its draft decision that members “agree to establish a work programme with the objectives of reducing the Overall Trade-Distorting Support limit (i.e. base cap) as set out in this Decision, including Blue Box support (Article 6.5)”, and “addressing subsidy concentration, with negotiations to be held in dedicated sessions of the Committee on Agriculture in Special Session with outcomes to be adopted by the [twelfth] Ministerial Conference.”

Even though the Special Sessions on agriculture are conducted under the mandate of the WTO’s Doha work programme, the chair and the proponents have shied away from mentioning the Doha Development Agenda, particularly the revised 2008 draft agriculture modalities, lest it be opposed by the United States.

Other members’ reactions

At the 14 November small group meeting, the US fiercely opposed the Argentine proposal and insisted that it will not agree to any outcome on domestic support at the Buenos Aires meeting due to the continued divergences among members, including on the Argentine proposal.

The US maintained that enhanced transparency and notification requirements are essential before commencing work on domestic support. It called for an outcome at Buenos Aires on its proposal on transparency and notification. (For more on the US proposal, see the article “US transparency proposal criticized at WTO Goods Council” in this issue.)

The US stand on domestic support created a serious impasse, said one trade envoy who asked not to be quoted.

It also created confusion on the next steps as the US insisted that there should be a one-line statement at Buenos Aires for continuing work after the Ministerial Conference without any specific agenda, said a participant who took part in the

14 November meeting.

The Argentine proposal was also opposed by China, India, and the coordinators of the African and ACP (African, Caribbean and Pacific) Groups.

The four participants said their proposal to eliminate the most trade-distorting domestic support or the AMS should be the starting point for any discussion on domestic support, and not the Overall Trade-Distorting Domestic Support (OTDS) as demanded by Argentina.

Farm defensive countries – Japan, Switzerland and Mexico – adopted a nuanced position demanding “proportionality” in the domestic support reduction commitments. The three countries said that the only way to commence work on domestic support is to start from the scheduled commitments and not existing levels of support.

In short, the 14 November meeting ended in disarray without any clarity as to what Argentina is planning to do given the opposition from its ally in Washington.

Fisheries subsidies

Meanwhile, the prospects for agreement to prohibit subsidies to vessels engaged in IUU fishing appeared bright after the US suggested compromise textual language.

During a small group meeting on 15 November among 10 countries, the US apparently provided some textual language for addressing concerns raised by the South American proponents for an outcome to prohibit subsidies for vessels that contribute to IUU fishing on the high seas.

However, there are other big issues involving overfishing and overfished stocks to be addressed, according to a negotiator familiar with the consultations.

For example, the proposed language on these two issues remains in square brackets, which indicate a lack of agreement. The language on “overfished discipline” suggests that:

“Subsidies for fishing [and fishing related activities] [outside the territorial sea] [that negatively affect]/[of] [targeted] fish stocks that are in an overfished condition.

“[The negative effect of such subsidies shall be determined] [by the subsidizing Member] based on the [best] scientific evidence [available to] [recognized by][that Member.]”

Similarly, “[a fish stock is overfished

if

[ALT1: it has not been assessed or has been assessed to be in an overfished condition. NZ/ICE/PAK]

[ALT2: it is recognized as such by the Member in whose national jurisdiction the fishing is taking place or by a Regional Fisheries Management Organization [or Arrangement][after taking due account of the objections, if any, of the concerned Member] based on [best] scientific evidence available to [and recognized by] them.]

[ALT3: the stock is at such a low level that mortality from fishing needs to be restricted to allow the stock to rebuild to a level that produces maximum sustainable yield or [alternative][other] reference points based on the [best] scientific evidence available [to the Member within its jurisdiction or to the relevant RFMO] [and with no effective management plan in place] [..][Fish stocks that are][as] recognized [as overfished] by the national jurisdiction where the fishing is taking place or by a relevant fisheries management organization or arrangement [shall also be considered overfished.]] [In the cases of straddling and highly migratory fish stocks, shared among Members, the evaluation related to the fish stocks in the fishery for which the subsidy is provided shall be made pursuant cooperation of the Members involved.]]

[In the absence of sufficient data to make such a determination, the stock shall be presumed to be in an overfished condition. EU].”

“There is a slim chance and some light at the end of the tunnel,” the negotiator said, suggesting that three elements are coming together. The three elements involve a “downpayment” at the Buenos Aires meeting for prohibiting fisheries subsidies for vessels that contribute to IUU fishing, a work programme for addressing issues concerning overfishing and overcapacity, and the chair’s vertical text remaining as the basis for work between the eleventh and twelfth Ministerial Conferences.

“It is too early to suggest a clear outcome but the US language is bridging the gaps,” said another negotiator.

However, the US suggestions, if linked with the transparency and notification requirements for fisheries subsidies, could pose problems, the negotiator added.

The US also remained silent on the special and differential treatment provisions demanded by many developing countries, including India for its artisanal

fishermen.

There is also an issue stemming from China’s demand for disputed areas on high seas not to be brought under any disciplines.

Meanwhile, the Philippines on 16 November circulated a draft ministerial decision which stated that “a member shall not provide subsidies to fishing and related activities in waters and areas that are claimed by more than one member at the time of this decision, unless the

member involved have agreed inter se to do so through a joint notification to the WTO. For purposes of this provision, the member shall cease from providing subsidies not later than [2020].”

In crux, the outcomes for the eleventh Ministerial Conference in Buenos Aires are sought to be determined by the US while the remaining 163 countries are being held hostage to the demands made by Washington, said a trade envoy who asked not to be quoted. (SUNS8578) □

No outcome likely at MC11 on domestic regulation in services

A proposed Buenos Aires outcome to discipline domestic regulation of services trade has met with widespread opposition from countries concerned, among others, that it would undermine their right to regulate.

by D. Ravi Kanth

GENEVA: A large majority of developing and least developed countries rejected on 7 November a revised draft negotiating proposal for an outcome on disciplines on domestic regulation of trade in services at the upcoming WTO ministerial meeting in Buenos Aires.

In rejecting the proposal, the countries said the draft is replete with divergences among the sponsors and misinterprets Article VI.4 of the WTO’s General Agreement on Trade in Services (GATS), participants told the *South-North Development Monitor* (SUNS).

The proposal was opposed by members of the African Group, the African, Caribbean and Pacific (ACP) Group, the least developed countries (LDCs), India, Bolivia, Cuba and Venezuela, among other countries. The United States also rejected the proposal.

Revised proposal

The proposal covers several areas concerning administration of measures, transparency, technical standards, development of measures, gender equality and necessity test. Its sponsors include Argentina, Australia, Canada, Chile, Colombia, Costa Rica, the European Union, Hong Kong (China), Iceland, Israel, Japan, Kazakhstan, Korea, Liechtenstein, Mexico, Moldova, New Zealand, Norway, Switzerland, Chinese Taipei, Turkey, Ukraine and Uruguay.

At a meeting of the WTO Working Party on Domestic Regulation on 7 November, the sponsors said their revised

proposal took on board the concerns raised by several members on specific improvements on domestic regulation. They said they were encouraged by “the level of engagement on the proposed Disciplines on Domestic Regulation”.

The sponsors said they “have taken note of the comments [WTO] Director-General [Roberto] Azevedo delivered in Marrakesh [at a meeting of selected trade ministers in October] on the need to intensify work on domestic regulation as a prospective deliverable for MC11, and in particular the need for proponents to address questions and concerns.”

The sponsors maintained that, following the last meeting of the Working Party on Domestic Regulation on 2-4 October, they made intense efforts to reach out to a broad range of members. Their latest revised draft text “responds to concerns and accommodates text proposals from other members.” The proposed improvements in the revised text, they said, aim at simplifying the disciplines on domestic regulation in services.

The changes in the draft include the creation of one nodal authority in each country for applications relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services where specific commitments are undertaken by members.

The revised draft text, according to the sponsors, reveals how they have accommodated changes to their original proposal by improving the language on the general provisions, administrative

measures, transparency, technical standards and development of measures.

The draft text also includes a proposal from Albania, Argentina, Australia, Canada, Chile, Colombia, the European Union, Iceland, Kazakhstan, Liechtenstein, Moldova, Montenegro, Norway, Panama and Uruguay for an outcome on gender equality.

In addition, several countries – Chile, Hong Kong (China), Moldova, Peru, New Zealand and Switzerland – proposed language for an outcome on the “necessity test”, under which each member is required to ensure that measures relating to authorization for the supply of services are not burdensome.

“Systemic” concerns

Commenting on the revised proposal, Rwanda, on behalf of the African Group, said it was encouraged to “hear so many new voices join this conversation and express similar views and concerns as the African Group has been doing for the last eight months.”

In one of the sharpest critiques of the proposal, the African Group said its “views and concerns are systemic”, underscoring the need for “a deeper, more fulsome, conceptual discussion on GATS Article VI.4.”

Article VI.4 of the GATS requires the WTO’s Council for Trade in Services, or appropriate bodies the Council might establish, to develop any necessary disciplines so as to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.

The African Group maintained that it cannot be expected to resolve numerous divergences in the draft text in one month “when the entire genesis of the proposals and consolidated texts are problematic, and there is no common understanding and agreement on the GATS Article VI.4 mandate.”

It maintained that “the GATS Article VI.4 mandate has been misinterpreted and imprecisely operationalized in the consolidated texts and proposals we have on the table today.”

One of the most fundamental concerns, according to the African Group, is “how the proposals create a framework to facilitate ability of foreign governments, and their service providers, to intervene more directly in the future in our domestic policy-making processes. It is the concept of, and implications for our governments, on the sovereign ‘right to regulate’”.

Further, “too much emphasis is being placed on the institutional and procedural approach to domestic regulation”, the African Group said.

More disturbingly, the draft text is based on “an underlying assumption that there is a one-size-fits-all approach or model to regulation”, the African Group said.

“In the short time that is left to MC11, it is not possible to bridge historically sensitive matters because no amount of best endeavour language or transition periods being characterized as Special and Differential Treatment could make up for taking away sovereign right of African governments to regulate,” the African Group maintained.

Lastly, the African Group said, members must move “away from texts that have cherry-picked some issues over others, and start assessing how proponents intend to address the African Group’s concerns and what the starting point for

discussions will be when we come back from Buenos Aires.”

India said it had already sought several clarifications on the draft text, suggesting that it remains concerned that the text is not in accordance with the texts issued by the chairs in 2009 and 2011.

The US said the draft text on which members are interacting cannot be taken to Buenos Aires because of sharp divergences. The US said an outcome for improving the disciplines on domestic regulation cannot be presented to trade ministers given the differences on almost all issues in the text, according to a negotiator present at the 7 November meeting.

In short, the writing on the wall is clear that there cannot be any outcome on disciplines on domestic regulation at Buenos Aires, given the overwhelming opposition from members across all sides, a participant said after the meeting. (SUNS8571) □

US transparency proposal criticized at WTO Goods Council

Several WTO members have expressed concern over a US proposal which envisages punitive action against countries that run afoul of notification requirements at the trade body.

by Kanaga Raja

GENEVA: A United States proposal setting out stringent procedures on transparency and notification requirements under the WTO agreements, including penalties, was criticized at a meeting of the WTO Council for Trade in Goods on 10 November by over a dozen WTO members, both developed and developing.

According to trade officials, these members voiced concern over the “punitive” nature of the proposal and how it could impact on members which are already struggling to meet notification requirements.

US proposal

The US had formally introduced its proposal on procedures to enhance transparency and strengthen notification requirements under WTO agreements at the Goods Council meeting. The proposal includes a draft ministerial decision that sets out “proposed actions intended to improve compliance with, and the quality and effectiveness of, notification requirements in general, as well

as under specific agreements.”

The US submitted its proposal to both the Goods Council and the WTO General Council.

The US has proposed that members consider adopting the decision at MC11, and if timing does not permit agreement at MC11, that members consider continuing work on the proposal as part of broader institutional reform post-MC11.

The US proposal on notification requirements covers the following WTO agreements: Agreement on Agriculture; Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping); Agreement on Subsidies and Countervailing Measures; Agreement on Safeguards; Understanding on the Interpretation of Article XVII of the GATT 1994 (State Trading); Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation); Agreement on Import Licensing Procedures; Agreement on Rules of Origin; Agreement on Pre-shipment Inspection; Decision on Notification Procedures for Quantitative Restrictions (G/L/59/Rev.1); Agreement on Trade-Related In-

vestment Measures; Agreement on the Application of Sanitary and Phytosanitary Measures; and Agreement on Technical Barriers to Trade.

Among the key elements cited by the US in its proposal are:

(1) Employing “administrative measures” already implemented by other parts of the WTO, and promoting the use of counter-notifications of members’ policies that should have been notified, as provided for in the Agreement on Agriculture, are some mechanisms that could enhance the effectiveness of WTO transparency requirements.

(2) Regarding fisheries subsidies, the US has proposed that ministers take a decision at MC11 to re-commit to complying with their existing notification obligations under the Agreement on Subsidies and Countervailing Measures, and agree on additional new categories of information to be reported.

(3) On agriculture, the US has proposed that ministers take a decision at MC11 to re-commit to complying with their existing notification obligations under the Agreement on Agriculture and to commit to further strengthening the Committee on Agriculture as a forum to discuss members’ implementation of agricultural policies.

(For more details of the US proposal, see *TWE* No. 649.)

In introducing its proposal at the Goods Council meeting on 10 November, the US said: “Compliance with notification requirements of the various WTO Agreements is inadequate. For example, the most recent report by the WTO Secretariat indicates that less than half of the WTO members have provided their 2015 subsidy notification.”

“This lack of transparency is problematic for traders and it undermines the proper functioning and operation of the WTO Agreements. From a systemic perspective, it is also very difficult to develop, evaluate, and assess negotiating proposals to improve the operation of various WTO agreements without the information that should have been provided under existing WTO notification obligations,” the US said.

Concerns over punitive approach

According to trade officials, members that took the floor agreed that enhancing transparency and improving members’ compliance with notification

requirements were important objectives. However, some expressed reservations over the US proposal, pending further study. Others were plainly critical of the punitive approach, and stressed the need to distinguish between wilful default and non-compliance because of inherent capacity constraints.

Canada, the European Union, Switzerland, New Zealand, Singapore, Japan, Russia, Australia and Korea said that they needed to study the proposal further.

According to trade officials, some 13 members raised concerns over the punitive nature of the proposal and how it could impact members which are genuinely struggling to meet the notification requirements. These countries were New Zealand, Norway, Brazil, Hong Kong-China, China, India, South Africa, Egypt, Ecuador, Bolivia, Cuba, Chile and Ghana.

New Zealand said that there is a need to make sure that the incentives are right and that they do not end up reinforcing disengagement, while Norway believed that positive incentives may be more effective than punitive actions to achieve the improvements members are seeking.

Brazil said that the approach could have harmful and unintended consequences to the functioning of the WTO with no assured benefits.

According to trade officials, India said there must be recognition of the dif-

ference between wilful default on notification obligations and a default due to inherent constraints. In spite of their willingness to notify on time, developing countries may not be able to do so, it added.

South Africa said compliance with notification requirements cannot be enhanced by punitive measures. This course of action would negatively impact the very members which require assistance, it underlined.

Bolivia noted that 70-80 members would be deemed to be in a position of delinquency under this proposal because they have not notified their agricultural support. Incentives and punishment do not work very well in the international system, it said.

Turkey, Bolivia, Korea, Cameroon, Venezuela, Cuba, Chile and Ghana pointed out that there was not enough time to build consensus on the proposal ahead of MC11 in December.

According to trade officials, several members noted that as transparency issues on fisheries subsidies were being tackled as part of wider negotiations at the WTO Negotiating Group on Rules, it would be best to have discussions on this matter in that forum.

The US thanked members for their responses and said that it gave them useful material for their continued reflection. (*SUNS8575*) □

US doubts WTO’s pre-eminence in multilateral trade liberalization

In ongoing talks on drafting the outcome document for MC11, the US has questioned the prime role of the WTO in furthering multilateral trade liberalization.

by D. Ravi Kanth

GENEVA: The United States has cast doubts on the pre-eminence of the WTO for accelerating multilateral trade liberalization. It did so on 14 November during a discussion at a small group meeting on the outcome document for the ministerial meeting in Buenos Aires, trade envoys familiar with the development told the *South-North Development Monitor* (*SUNS*).

At an informal information session with around 30 countries, the chair of the WTO General Council, Ambassador Xavier Carim of South Africa, explained

how the drafting committee will proceed in preparing the outcome document.

The countries represented at the session included the US, the European Union, China, India, Brazil, Japan, Australia, Canada, Switzerland, New Zealand, Korea, Hong Kong (China), Singapore, Mexico, Argentina, and the coordinators of the African, Caribbean and Pacific (ACP) Group, the African Group and the group of least developed countries (LDCs).

Ahead of the meeting, the General Council chair had circulated a five-page

restricted document based on his consultations with members until then.

Carim said his first general observation was that "all delegations acknowledged the rather difficult circumstances surrounding the preparations for [MC11] and the limited time we have from now until MC11."

"The vast majority nevertheless stressed that a consensual outcome document – a Ministerial Declaration – would be their preferred option," he said.

Without naming delegations, he said that "other delegations underlined that the significance of a Ministerial Declaration should not be overemphasized."

"For these delegations, while a Chair's statement was not their preferred option, such an outcome could be accepted," he said. "In their view, the substantive results in individual areas and a clear indication on future work were more important than an agreed Ministerial Declaration."

However, the danger with a Chair's statement is that it lacks ministerial approval and can become a terrain for conflicting interpretations, said a trade envoy who asked not to be quoted.

Carim said he "did hear a concern about any process aimed at producing a consensual Declaration, given the precarious situation facing Members. In this view, a Chair's statement would be a prudent course to keep in mind."

He suggested that members could work on a two-part document for a possible Ministerial Declaration. Part I will deal with "a few introductory/opening paragraphs", while Part II will deal with "any decision that Ministers could agree on either as outcomes for MC11 or for post-MC11 work programme".

He said he will focus on "the first part – that is, the introductory paragraphs". He urged members to agree "on a concise and factual opening few paragraphs".

He said the second part on the outcomes at the Buenos Aires meeting as well as the post-Buenos Aires work programme would "remain the responsibility of the TNC [Trade Negotiations Committee] and its negotiating bodies as well as of the other WTO bodies currently working on possible Ministerial outcomes".

Carim suggested four elements in Part I of the outcome document:

(i) Recall and reaffirm the principles

(continued on page 16)

The Management of Capital Flows in Asia

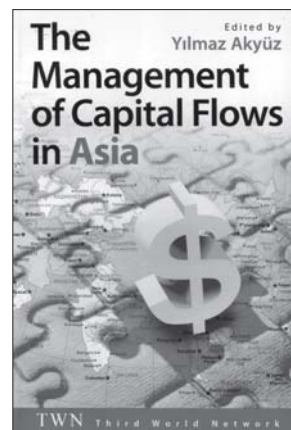
Edited by Yilmaz Akyüz

THE 1997 Asian financial crisis brought home to the region's economies the importance of managing capital flows in order to avert financial shocks. This book looks into whether and how this lesson was taken on board by policy makers in Asia, and, accordingly, how capital account regimes in the region evolved in the post-crisis period.

The early years of the new millennium saw a strong surge of capital flows into Asian emerging markets amid conditions of ample global liquidity. In response to the influx of funds, these countries generally chose to keep their capital accounts open to inflows, dealing with the attendant impacts by

liberalizing resident outflows and accumulating foreign exchange reserves. While this approach enabled them to avoid unsustainable currency appreciations and external deficits, it did not prevent the emergence of asset, credit and investment bubbles and domestic market vulnerability to external financial shocks – as the events following the 2007 subprime crisis would prove.

This book – a compilation of papers written in 2008 for the first phase of a Third World Network research project on financial policies in Asia – examines the above developments in relation to the region in general and to four major Asian developing economies: China, India, Malaysia and Thailand.



ISBN: 978-967-5412-50-9 240pp
16.5 cm x 24 cm Year: 2011

	Price	Postage
Malaysia	RM30.00	RM2.00
Third World countries	US\$14.00	US\$7.00 (air)
Other foreign countries	US\$20.00	US\$10.00 (air)

Orders from Malaysia – please pay by credit card/crossed cheque or postal order.

Orders from Australia, Brunei, Indonesia, Philippines, Singapore, Thailand, UK, USA – please pay by credit card/cheque/bank draft/international money order in own currency, US\$ or Euro. If paying in own currency or Euro, please calculate equivalent of US\$ rate. If paying in US\$, please ensure that the agent bank is located in the USA.

Rest of the world – please pay by credit card/cheque/bank draft/international money order in US\$ or Euro. If paying in Euro, please calculate equivalent of US\$ rate. If paying in US\$, please ensure that the agent bank is located in the USA.

All payments should be made in favour of: **THIRD WORLD NETWORK BHD.**, 131 Jalan Macalister, 10400 Penang, Malaysia. Tel: 60-4-2266728/2266159; Fax: 60-4-2264505; Email: twn@twnetwork.org; Website: www.twn.my

I would like to order copy/copies of *The Management of Capital Flows in Asia*.

I enclose the amount of by cheque/bank draft/IMO.

Please charge the amount of US\$/Euro/RM to my credit card:

☐ Visa

☐ Mastercard

A/c No.: Expiry date:

Signature:

Name:

Address:

Sharing national experiences in use of compulsory licences

An October meeting of the WTO's intellectual property body heard calls for balancing IP protection with the public interest, including through recourse to compulsory licensing of patents.

by Kanaga Raja

GENEVA: Highlighting the use of compulsory licences by countries such as the United States, Germany and most recently Malaysia in order to gain access to, amongst others, affordable essential medicines, several major developing countries have stressed the importance of a balanced intellectual property (IP) system with built-in flexibilities.

India, Brazil and South Africa, along with other major developing countries, stressed this view at a 19-20 October meeting of the WTO's Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS).

When the TRIPS Council met in June, Brazil, China, Fiji, India and South Africa had circulated a document on intellectual property and the public interest in which they invited WTO members to share their experiences on the use of compulsory licences for accessing health and other technologies.

The co-sponsors of the document highlighted a growing concern about an imbalance between intellectual property rights and the public interest. With regard to health technologies, for example, patents and related monopoly rights in test data, without sufficient use of balancing exceptions and limitations to protect the public interest, permit companies to maintain high prices and exacerbate crises of access around the world, where many patients cannot afford medicines and governments with finite health budgets are forced to ration care.

Increased copyright protections create similar problems of access to knowledge goods, limiting the ability of many people around the world to access print, audio or visual works of education or entertainment. These are only a few examples of the problem, the co-sponsors pointed out.

They underlined the need to pursue a development-oriented approach towards formulating IP laws and policies rather than pursuing an iconoclastic approach of IP for development. More than 20 years after the adoption of the TRIPS Agreement, they said, there is a need for discussion in the TRIPS Council on the

relationship between IP and the public interest and to broaden the understanding of how the IP system can be more responsive to public interest considerations. (See TWE No. 641 for a report on the June TRIPS Council meeting.)

During the latest discussions on intellectual property and the public interest at the TRIPS Council in October, South Africa highlighted several recent noteworthy developments (since the June meeting) that had occurred in the area of compulsory licensing, namely in the US, Germany and Malaysia.

India also pointed to the fact that since the last meeting of the TRIPS Council, compulsory licences had been issued by Germany and Malaysia. It further noted that Brazil, Thailand, South Africa and others had previously used flexibilities under the TRIPS Agreement, including compulsory licences to bring down the prices of antiretroviral medicines by increasing the supply of generic versions.

India also gave some brief details of the compulsory licensing provisions in the US, while Brazil highlighted the recent case in Germany concerning the grant of a compulsory licence for an antiretroviral ingredient.

Public policy objectives

According to trade officials, South Africa, Brazil, India, China, the European Union, the United States, Japan and the Holy See took the floor on the agenda item of IP and the public interest at the TRIPS Council meeting on 20 October.

In a statement delivered on behalf of Brazil, China, India and South Africa, South Africa said the TRIPS Agreement clearly recognizes that the principles of IP protection are based on underlying public policy objectives.

Article 8 of the TRIPS Agreement, entitled "Principles", states that WTO members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital impor-

tance to their socio-economic and technological development, provided that such measures are consistent with the provisions of the Agreement.

Article 8.2 further states that appropriate measures may be needed to prevent the abuse of IP rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

The 2013 Trilateral Study of the World Health Organization (WHO), the World Intellectual Property Organization (WIPO) and the WTO points out that price is a critical determinant of access to medicines, especially in countries where the public sector is weak and poor people purchase their treatment on the private market. It posits that in some developing countries, up to 80-90% of medicines are purchased out of pocket, as opposed to being paid for by national health insurance schemes or private insurance schemes.

South Africa noted that in the last session of the TRIPS Council in June, some delegations indicated that the use of compulsory licences can assist countries to uphold the delicate balance achieved in the TRIPS Agreement, and noted that even though the use of compulsory licences is commonly referenced in respect of health issues, compulsory licences can be used in a variety of other situations as well.

According to South Africa, the right to health is a fundamental part of human rights and of our understanding of a life of dignity. As such, the achievement of the highest attainable standard of health is the right of every human being, without distinction of race, religion, political belief, or economic or social condition. This is codified in the 1948 Universal Declaration of Human Rights.

In the same vein, Goal 3, Target 3.b of the Sustainable Development Goals (SDGs), which relates to support for research and development of vaccines and medicines for the communicable and non-communicable diseases that primarily affect developing countries, promotes access to affordable essential medicines and vaccines, in accordance with the WTO's 2001 Doha Declaration on the TRIPS Agreement and Public Health. The Declaration affirms the right of developing countries to use to the full the provisions in the TRIPS Agreement regarding flexibilities to protect public health and, in particular, provide access to medicines for all.

South Africa said that a common

theme that emerged from the discussions was how governments use compulsory licences to substantially reduce the price of essential medicines while striking a balance between the interests of right holders and users.

It is however noteworthy, said South Africa, that in specific areas such as access to antiretroviral therapy, where substantial progress has been made and where substantial price reductions for commonly used first-line antiretrovirals have been achieved, prices for second-line regimes remain much higher. The World Health Statistics point out that new health technologies, such as medicines, vaccines and diagnostics, are becoming increasingly expensive.

According to South Africa, a balanced IP system, through a combination of flexibilities, complementary policies and incentives, guarantees sustainable public health outcomes that harness innovation and promote access to medicines and health technologies.

It pointed out that since the last TRIPS Council meeting, several noteworthy developments have occurred in the area of compulsory licensing.

It said that on 6 June, Judge William Martin Conley, a US District Judge of the Western District of Wisconsin, issued a compulsory licence allowing Apple Computers to use a patent it had infringed, owned by the Wisconsin Alumni Research Foundation, in return for an ongoing royalty.

This case follows a long line of cases that seem to suggest that court decisions in the US have allegedly responded to instances of infringement of medical patents by denying injunctive relief, instead granting monetary damages, often in the form of royalty payments – what would in effect provide for compulsory licensing. Public interest is often at the heart of such decisions.

On 11 July, the German Federal Supreme Court announced that it had affirmed the 2016 decision of the Federal Patent Court to issue a compulsory licence allowing pharmaceutical company Merck to continue selling its HIV drug Isentress. The Federal Court shared the assessment of the Federal Patent Court that a public interest in the granting of a compulsory licence was credible.

On 20 September, the Malaysian Department of Health announced that the Cabinet had authorized a government-use compulsory licence in respect

of generic versions of the hepatitis C medicine sofosbuvir. The decision was made after the Ministry of Health's efforts to include the drug in the Medicine Patent Pool and price negotiations with the patent holder were unsuccessful.

Balance

In its statement, Brazil said it understands that the balance reached by the TRIPS Agreement allows for ways to address public health challenges while maintaining IP systems that incentivize the investment and research necessary to develop innovative new medicines. This is clearly provided in two of the pillars of the Agreement, namely, Articles 7 and 8, which contain the objectives and principles of IP protection under the treaty.

In Brazil's view, a balanced IP system, with built-in flexibilities as well as complementary policies and incentives, is the best way to promote innovation in all fields of technology, including the health sciences. In short, it said, a balanced IP system is a much stronger IP system.

It said that the recent entry into force of the Protocol of Amendment to the TRIPS Agreement demonstrates the need to have mechanisms that ensure adequate remuneration to IP right holders while allowing governments to adopt measures necessary to protect the public interest.

The preamble of the TRIPS Agreement advocates this view, as it recognizes "the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives".

Brazil recalled that it had previously described the process that led to the single compulsory licence issued by Brazil, as well as the results achieved by it. More recently, developments in countries from different regions have generated increased interest in the matter.

As an example, the Bundesgerichtshof, Germany's highest civil court, last July decided to uphold the decision of a lower court to grant a provisional compulsory patent licence on raltegravir, an antiretroviral drug ingredient.

The producer of that medicine was facing legal threats from the owner of the raltegravir patent, in spite of distributing the drug in Europe for some years. In the course of judicial proceedings, it

requested a compulsory licence based on Section 24(1) of the German Patent Act. Section 24(1) lists two conditions for the grant of a compulsory licence: (i) that the licence seeker has, within a reasonable period of time, unsuccessfully attempted to obtain permission from the owner of the patent; and (ii) that the public interest calls for the grant of a compulsory licence.

Based on this, it was decided to grant a provisional compulsory licence allowing the company to continue to distribute the medicine containing raltegravir in the country. The court understood that there was a concrete need among certain HIV patient groups for a treatment containing raltegravir. The use of alternative compounds would entail severe risks of adverse effects and a loss of therapy quality, in particular for infants and pregnant women.

This decision, in Brazil's view, is a good example of how the IP system provides the basis for advancing the public interest without prejudicing the innovative efforts by companies. It also shows that this should not be a polarizing issue, as it is of interest to all WTO member states.

Brazil said during the June session of the TRIPS Council, comments were heard to the effect that access to medicines also depends on factors outside the IP system. While this is undoubtedly a complex phenomenon that requires a broad range of actions, it said, the mandate of the Council does not include tax systems or the physical infrastructure of countries, but intellectual property. "Let us focus on this issue and its concrete effects in a positive and constructive way, enabling a rich exchange of views and experiences that enhances the mutual understanding of the matter."

Compulsory licensing experiences

In its statement at the Council, India expressed support for the statements made by South Africa and Brazil. It noted that during the last meeting of the Council, many members, including India, had shared their experiences on the use of compulsory licensing.

India said it had shared details of the one compulsory licence issued by India so far. In March 2012, Indian generic manufacturer Natco Pharma was granted a compulsory licence to manufacture Bayer's drug sorafenib tosylate

(Nexavar) used for the treatment of kidney and liver cancer.

India noted that since the last meeting of the TRIPS Council, compulsory licences had been issued by Germany and Malaysia.

According to India, the TRIPS Agreement attempts to strike an appropriate balance between the interests of right holders and users. The Agreement also recognizes that the principles of IP protection are based on underlying public policy objectives.

In furtherance of the objectives and principles of the Agreement enshrined in Articles 7 and 8, a number of safeguards or flexibilities have become an integral part of the TRIPS framework, said India. These flexibilities have been clarified and enhanced by the Doha Declaration on the TRIPS Agreement and Public Health, which states that WTO members have the flexibility to interpret and implement the TRIPS provisions in a manner supportive of their right to protect public health.

India said that Article 31 of the TRIPS Agreement provides members complete freedom to decide the grounds for issue of compulsory licences. The Doha Declaration has also duly confirmed this.

India noted that during the 1980s and 1990s the antiretroviral medicines used to treat HIV / AIDS were priced beyond the reach of most people who needed them in developing countries. Countries like Brazil, Thailand, South Africa and others used flexibilities under the TRIPS Agreement, including compulsory licences, to bring down the price by increasing the supply of generic antiretrovirals for a fraction of the price of the patented equivalents.

Indian generic companies, especially Cipla, played an important role by announcing in early 2001 that the triple therapy could be manufactured for less than a dollar a day, compared with the price of standard triple therapy of \$10,000 per patient per year. Indian generic companies made antiretroviral medicines accessible to all those who needed the drugs but had previously not been able to afford them, said India.

India then went on to provide some brief details of the compulsory licensing provisions in a developed country, the US. It said that according to a 2014 US Congressional Research Service report titled "Compulsory licensing of patented

inventions", US law permits for the issuance of compulsory licences in a number of circumstances, and also allows for circumstances that are arguably akin to a compulsory licence.

The Atomic Energy Act, Clean Air Act, Federal Insecticide, Fungicide and Rodenticide Act and Plant Variety Protection Act in the US all provide for compulsory licensing.

The Atomic Energy Act allows for compulsory licensing if the invention or discovery covered by the patent is of primary importance in the production and utilization of special nuclear material or atomic energy. The Clean Air Act contains a similar provision relating to devices for reducing air pollution. The Plant Variety Protection Act provides for compulsory licensing of seed-bearing plants that are protected by a plant variety certificate, a patent-like instrument granted by the Department of Agriculture.

The Bayh-Dole Act offers the federal government "march-in rights", and 28 USC Section 1498 provides the US government with broad ability to use inventions patented by others.

Compulsory licences have also been awarded as a remedy for antitrust violations and a court may decline to award an injunction in favour of a prevailing patent owner during infringement litigation, an outcome that some observers believe is akin to the grant of a compulsory licence.

India cited the September 2016 report of the UN Secretary-General's High-Level Panel on Access to Medicines which states that many governments have not used the flexibilities available

under the TRIPS Agreement, including compulsory licences, for various reasons, ranging from capacity constraints to undue political and economic pressure from states and corporations, both express and implied.

India said political and economic pressure placed on governments to forgo the use of TRIPS flexibilities violates the integrity and legitimacy of the system of legal duties and rights created by the TRIPS Agreement and reaffirmed by the Doha Declaration.

India quoted the recommendations on compulsory licences in the High-Level Panel's report: "Governments should adopt and implement legislation that facilitates the issuance of compulsory licences. Such legislation must be designed to effectuate quick, fair, predictable and implementable compulsory licences for legitimate public health needs, and particularly with regards to essential medicines. The use of compulsory licensing must be based on the provisions found in the Doha Declaration and the grounds for the issuance of compulsory licences left to the discretion of governments."

India requested the delegations of the EU and Malaysia to provide details on the compulsory licences issued by Germany and Malaysia respectively. It said it looked forward to listening from other delegations on their experiences on using this important TRIPS flexibility. (SUNS8567) □

The full statements of India, Brazil and South Africa have been posted on the website of Knowledge Ecology International (KEI) at www.keionline.org.

Connect to Third World Network's World Wide Website for the latest on

**International Relations • Environment •
Agriculture • Science • Economics • Trade •
Health • Education • Communications •
Development • Indigenous Peoples •
Medicine • Forestry**

www.twn.my

Finance following growth

The relationship between financial development and economic growth is far from clear-cut, explain *Anis Chowdhury* and *Jomo Kwame Sundaram*, and there may even be a danger of “too much finance”.

Economists of all persuasions recognize the critical role of finance in economic growth. The financial sector’s stability and depth are widely considered important in this connection.

Thus, many believe that the lack of a well-developed financial sector constrains growth in developing countries. Neoliberals generally attribute this to excessive regulation, especially the role of state-owned financial institutions, interest rate limits and restrictions on short-term cross-border capital flows.

It is often assumed that banks and financial markets allocate capital to the most productive endeavours, and that the financial infrastructure for credit reduces “information inefficiencies” such as “moral hazard” and “adverse selection”.

Another presumption is that greater financial development will ensure sufficient finance for otherwise excluded sectors, thus raising growth potential.

Financial deregulation

Following the sovereign debt crises of the early 1980s precipitated by sudden hikes in US Federal Reserve interest rates, neoliberal economists have advocated financial sector deregulation.

It was a standard part of the Washington Consensus, which also included privatization and economic liberalization more broadly. This agenda was typically imposed as part of structural adjustment programmes required by the Bretton Woods institutions (BWIs), led by the World Bank. However, many developing-country and transition-economy governments adopted such policies even if not required to do so, following the neoliberal counter-revolution against Keynesian and development economics.

Financial deregulation, privatization and liberalization also gained momentum in the developed world, especially in the UK and the US following the election of Margaret Thatcher and Ronald Reagan in 1979 and 1980 respectively. In the US, such reforms culminated in the repeal of the Glass-Steagall Act – which had imposed a separation between com-

mercial and investment banking activities – in 1999, when President Bill Clinton declared that the law “is no longer appropriate”.

Initial results of financial liberalization generally seemed encouraging. Deregulating countries experienced rapid financial expansion and innovation. Finally, it seemed that the long elusive elixir of growth had been found. Finance had a free hand, expanding much faster than the real economy.

But soon, with inadequate prudential regulation and supervision, booms became bubbles as excesses threatened financial and economic stability, besides undermining the real economy. Economies became increasingly prone to currency, financial and banking crises such as the 1994 Mexican peso crisis, 1997-98 Asian financial crisis, 1998 Russian financial crisis and the 2007-09 global financial crisis.

Tipping point?

Recent research suggests that beyond a certain point, the benefits of financial development diminish, with further development possibly even hurting growth. In other words, the finance-growth relationship is not linear; it may be positive to a point, before turning negative.

Additional finance beyond this tipping point thus becomes increasingly counterproductive. By exacerbating macro-financial fragility, credit growth thus leads to bigger booms, bubbles and busts, ultimately leaving countries worse off.

Interestingly, research done at the BWIs also finds that rapid credit growth is commonly associated with banking crises. The International Monetary Fund (IMF) found that three-quarters of credit booms in emerging markets end in banking crises.

The Organization for Economic Cooperation and Development (OECD) found that deregulating finance over the past three decades has stunted, not boosted, economic growth. It concluded that further credit expansion exceeding

three-fifths of gross domestic product (GDP) not only dents long-term growth but also worsens economic inequality.

A commonly used measure of financial development – average private credit to GDP – increased steadily from about 1960. It has grown more rapidly since around 1990 – exceeding 100% in developed economies and 70% in emerging market developing economies (EMDEs).

The OECD report also found that over the past half-century, credit from banks and other institutions to households and businesses has grown three times faster than economic activity. But GDP growth per capita changed little before and after 1990, with a strong negative relationship between finance and growth emerging after 1990, especially in the eurozone.

EMDEs with lower credit-to-GDP ratios benefited from more credit growth, experiencing a positive finance-growth relationship until about 1990. But with higher credit-to-GDP ratios, the finance-growth relationship turned negative in developed economies well before 1990. Hence, thresholds for credit-to-GDP ratios are likely to be higher for EMDEs than for developed economies.

The new research also points to the possibility of reverse causality – of financial development necessitated by growth. This seems to support Joan Robinson’s suggestion that “where enterprise leads, finance follows”. More money and credit become available as demand for both increases with economic growth.

After all, money and credit are supposed to lubricate the real economy. EMDEs start from relatively low incomes and therefore have greater growth potential. As they realize that potential, demand for finance leads to greater financial development.

In the case of developed economies, especially the eurozone, finance continued to grow even as growth slowed. Apparently, savings adjusted slowly to sluggish income growth, resulting in a rising wealth-to-GDP ratio. This, in turn, creates demand for finance as households seek to “park” their savings, borrow for consumption and buy new consumer durables. Thus, the financial system grows even as economic growth continues to decline. This may result in rising household indebtedness or increasing debt-to-income ratios, ending in debt

defaults.

Policy lessons

Besides being cognizant of “too much finance” beyond a tipping point, policymakers need to be aware that causality may run in both directions. Therefore, financial development must accompany productivity enhancement.

Financial liberalization or other financial development policies alone cannot spur productivity growth. Without entrepreneurship, finance is likely to prove to be an illusory source of growth.

This is important as short-term capital inflows cannot enhance productive long-term investments. Short-term capital flows are easily reversible and can suddenly leave, plunging countries into financial crisis.

If the financial sector continues to grow after growth potential falls, it greatly increases the relative size and role of finance, thus accelerating the likelihood of financial instability. Countries need strong macro-prudential regulations to contain such vulnerabilities. — (IPS)

Anis Chowdhury is Adjunct Professor at Western Sydney University and the University of New South Wales in Australia. He held senior United Nations positions during 2008-16 in Bangkok and New York. Jomo Kwame Sundaram, a former economics professor, was UN Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007.

Third World Economics
is also available in Spanish.

Tercer Mundo Economico
is the Spanish edition of
Third World Economics, edited
and published in cooperation
with Red del Tercer Mundo,
Uruguay.

For subscription details,
please contact:

Third World Network /
Red del Tercer Mundo,
Av 18 De Julio 2095 / 301
Montevideo 11200, Uruguay
Fax (5982) 419222
Email: redtm@chasque.apc.org

Economic&PoliticalWEEKLY

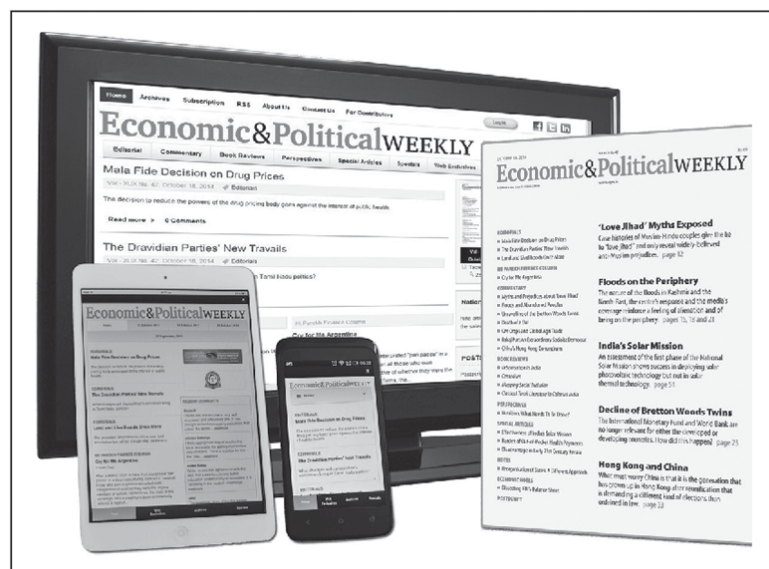
Popularly known as *EPW*, the journal began its existence in 1949 as *The Economic Weekly* and since 1966 as *Economic & Political Weekly*.

Published from Mumbai, India, by Sameeksha Trust (an independent and registered charity), *EPW* is an institution that enjoys a reputation globally for its independent scholarship and for fostering critical inquiry in the social sciences.

EPW is a unique left-leaning journal that devotes space for critical commentary on current events and policy debates alongside rigorous academic research.

Why subscribe to *EPW*?

- Easy-to-access Archives from 1949 to date (*The Economic Weekly* and *EPW*)
- An indispensable resource for researchers working on India and South Asia
- A new initiative called **engage** with features for the digital era
- Digital subscription plans that fit your needs



320-22, A to Z Industrial Estate, Ganpatrao Kadam Marg,
Lower Parel, Mumbai, 400 013, India.

Phone: +91-22-40638282

Website: www.epw.in Contact: circulation@epw.in

Follow us on:   

(continued from page 10)

and objectives of the Marrakesh Agreement Establishing the WTO.

(ii) Take note of progress since the last Ministerial Conference, MC10. This would include points such as “the entry into force of Trade Facilitation Agreement and the TRIPS (trade-related intellectual properties) amendment”, the recent General Council decision on the amendment of the Trade Policy Review Mechanism, the ongoing effort to implement the Nairobi Decision on Export Competition, and other implementation matters concerning LDC issues.

(iii) The third element would involve a statistical and factual update of recent trends in global trade.

(iv) The last element would be a reference to the importance of development and, in particular, the need to further integrate developing countries and LDCs into the trading system.

Surprisingly, the chair's note did not refer to the ongoing Doha Development Agenda trade negotiations that are carried out in accordance with the Marrakesh Agreement. The chair could

have mentioned the importance of affirming the Doha negotiations along with the Marrakesh Agreement, said a trade envoy who asked not to be quoted.

Friends of the chair

The chair appointed the trade envoys of Norway, Egypt, Moldova and Honduras as “friends of the chair” to convene meetings on each of the four elements.

Norway's trade envoy, Ambassador Harald Neple, held the first meeting on 14 November to hear members' views on the first element, “Recall and reaffirm the principles and objectives of the Marrakesh Agreement”.

During the meeting, the participants largely argued the importance of the Marrakesh Agreement and its general principles for furthering multilateral trade liberalization. They also emphasized the importance of the WTO as a pre-eminent body for carrying out multilateral trade liberalization.

The US, however, cast doubts about the pre-eminence of the WTO for furthering trade liberalization, said a trade envoy who asked not to be quoted.

The US position was consistent with various pronouncements that the Trump administration made as recently as a meeting of Asia-Pacific Economic Cooperation (APEC) business leaders in Da Nang, Vietnam, on 10 November. President Donald Trump said the US had “not been treated fairly” in Geneva, according to a news report in *Inside US Trade* on 13 November.

Even at the summit of the G20 major economies in Hamburg, Germany, in July, the US negotiators had succeeded in introducing their language on “reciprocal and mutually advantageous trade and investment frameworks” as opposed to the “developmental” priorities of the Doha Development Agenda.

The Hamburg communique did not even mention the Doha Development Agenda or the unresolved Doha issues. The communique implicitly endorsed the Trump administration's “America First” and “Buy America and Hire America” policies when it acknowledged the “importance of reciprocal and mutually advantageous” trade frameworks.

The US also remains opposed to a Ministerial Declaration at Buenos Aires. (SUNS8576) □

Subscribe to the Third World's own Economics Magazine!

THIRD WORLD ECONOMICS

Fortnightly Economics Magazine of the
Third World Network

SUBSCRIPTION FORM

Annual Subscription Rates

	Airmail	Surface
Mail		
Developed countries	US\$95	US\$75
Third World countries	US\$75	US\$55
Special rates for India Subscribers	Rs900	Rs500
Special rate for Malaysian subscriber	RM110	

(Please print)

Name: _____

Address: _____

I would like to subscribe by AIR/SURFACE MAIL and I enclose the amount of

Please charge the amount of to my credit card:

☐ Visa

☐ Mastercard

A/C No: _____ Expiry date: _____

Signature: _____

● **Subscribers in India** can send form and cheques to *The Other India Bookstore, Above Mapusa Clinic, Mapusa 403 507, Goa, India.*

● **Subscribers in Malaysia** – please pay by credit card/crossed cheque or postal order.

● **Subscribers in Australia, Brunei, Indonesia, Philippines, Singapore, Thailand, UK and USA** – please pay by credit card/cheque/bank draft/international money order in own currency, US\$ or Euro. If paying in own currency or Euro, please calculate equivalent of US\$ rate. If paying in US\$ rate, please ensure that the agent bank is located in the USA.

● **Rest of the world** – please pay by credit card/cheque/bank draft/international money order in US\$ or Euro. If paying in Euro, please calculate equivalent of US\$ rate. If paying in US\$, please ensure that the agent bank is located in the USA.

● **Please send payments/enquiries to:** Subscriptions & Marketing, Third World Network Bhd, 131, Jalan Macalister, 10400 Penang, MALAYSIA. Tel: 60-4-2266728/2266159; Fax: 60-4-2264505; Email: twnetwork@twnetwork.org