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Multilateral trade order under threat from US moves

The United States' recent actions on the trade front – raising steel and aluminium tariffs on questionable “national security” grounds, threatening unilateral trade measures against China, and blocking new appointments to a key WTO adjudicatory body – risk undermining no less than the WTO-centred order governing global trade. Faced with this “three-pronged assault”, the rest of the WTO member states are called upon to act collectively to defend the proper functioning of the multilateral trading system.

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Three-pronged assault on WTO-MTS by the US

Recent US moves on the trade front have put at risk the viability of the WTO-centred multilateral trading system, whose future, contends *Chakravarthi Raghavan*, now rests on the response of the other WTO member states.

GENEVA: The World Trade Organization (WTO) and its multilateral trading system are now faced with a three-pronged assault from the administration of US President Donald Trump, which appears intent on wielding a wrecking ball against the postwar world order that the US itself had conceptualized, fashioned and shaped all these years.

The US is assaulting the WTO-MTS by trade measures in violation of the rules in three ways:

(a) preventing the filling up of vacancies in the WTO Appellate Body (AB) and making it non-functional, so as to do away with the current WTO dispute settlement mechanism. As the US Trade Representative (USTR) Robert Lighthizer has made clear, the US wants to revert to the old GATT process where the powerful could just refuse to implement rulings and prevent their adoption;

(b) bypassing WTO rules to raise import tariffs to protect its domestic steel and aluminium industries, claiming it is doing so for "national security"; and

(c) reneging on US undertakings on Section 301 of US trade law which were provided to a dispute panel and formally recorded by the panel as such in its report adopted by the WTO Dispute Settlement Body (DSB) (thus making the undertakings a US commitment/obligation to other WTO members), and invoking Section 301 to unilaterally judge trade practices of other members and raise tariffs against their exports in violation of its own bound tariff schedules.

The future of the WTO system depends on the way the rest of the WTO members respond to this triple assault: either they act collectively to resist this onslaught, or they keep quiet and allow the US to attack the rights of other members selectively, playing the old imperial game of divide and rule.

While focusing on China, the words and actions of the Trump administration can leave little doubt that it is intent on unleashing protectionist trade measures against trade partners with whom it has

a bilateral trade deficit – Germany, South Korea, Japan and India, among others.

Stonewalling on the AB

In blocking decisions at the DSB to set in motion processes for filling vacancies on the AB, the US has argued that it was doing so since the AB was acting beyond its powers in enabling retiring AB members to continue and complete work on disputes they had been hearing.

There are currently three vacancies on the seven-member AB.

Interestingly, when the AB initially notified the DSB of its working procedures to enable retiring AB members to continue hearing an appeal until the division bench issues its ruling, it was only India that had voiced some systemic concerns. The US itself does not seem to have objected nor expressed any support or understanding at that time over India's concerns, but rather acquiesced in the working procedures – until now.

The government of any state may change its views and policies domestically, though in most domestic jurisdictions the doctrine of estoppel may come into play. In terms of international treaty obligations, there are stipulated procedures (to change one's view and secure changes in international treaty commitments) that the US has not bothered to follow.

It has rather sought to prevent the functioning of the WTO's integrated dispute settlement process – the one feature of the present multilateral trading system that marked a departure from both the 1947 GATT system as well as other mechanisms of international treaties, a feature that both developed and developing countries at the time of establishing the WTO had pointed to as a major gain.

All viewed the dispute settlement system as ensuring the protection and implementation of the rights and obligations of the weakest as well as the strongest trade partners through relatively

impartial judgements by dispute panels and the AB on clarifications of WTO trade law.

Trade wars

In the wake of the various trade measures unveiled or contemplated by the Trump administration, there has been increasing talk of “trade wars”.

“Trade” and “war” are two words antithetical to each other. Trade, by its nature, is a voluntary act between two or more individuals or enterprises. War, on the other hand, is a coercive instrument by which one country prevails over another and forces it to yield and act according to what the winning side wants.

Yet, over the ages, and more so since feudalism gave way to mercantilism, war or the threat of war has been used to force countries to trade or open up to trade.

The two “Opium Wars” (1839–42 and 1860) to enable Britain to sell opium to China to buy Chinese silk are the most egregious example.

For its part, the US, with its dubious claims to anti-colonialism, used China’s defeat in the first Opium War to get Beijing to conclude the Treaty of Wangxia in 1844 to establish consular (and trade) relations.

Similarly, there was some gunboat diplomacy by the US in 1853 when Commodore Matthew Perry led a small squadron of US naval vessels into the harbour at Tokyo Bay to deliver a letter to the Emperor of Japan asking for facilities and shelter for US ships and sailors in distress on Japanese shores. Perry returned a year later with a bigger squadron to receive Japan’s reluctant agreement to a treaty according the US access to two ports for refuelling and provisioning by US ships, the right to appoint US consuls to live in these port cities, and a “most favoured nation” (MFN) clause whereby all future concessions Japan granted to other foreign powers would also be granted to the US.¹

The Chinese were able to bring all the colonial legacies on the mainland to an end only in 1949 after the Mao-led People’s Republic of China was established. Much later, in 1997, the reversion of Hong Kong to Chinese sovereignty (but administered as a separate customs territory) took place, while the Portuguese colony of Macau reverted to China only in 1999.

These are but some of the extreme, disagreeable examples of events that

have had long-term repercussions on relations between China and the West (repercussions which are even now reflected in Chinese dealings with, and suspicions of, Americans and Europeans and many other foreigners).

Tit-for-tat dispute

There is loose talk, nay sabre-rattling, in US government circles about “trade wars”. Trump has tweeted that “trade wars are good and easy to win”.

After having put in place increased tariffs on imports of steel and aluminium (claiming “national security” needs), the Trump administration unveiled plans for a slew of tariffs on up to \$50 billion of imports from China.

In a tit-for-tat trade spat, China retaliated with tariffs on \$3 billion of imports from the US (already in effect, to counter the US steel and aluminium tariffs) and announced plans for counter-tariffs (to take effect when the \$50 billion US tariffs become effective) on up to \$50 billion worth of imports of other US goods (soybeans, aircraft and other politically sensitive items).

Amidst stumbling stock markets and media headlines of “trade wars”, Trump and his economic advisors all then began announcing that there is no trade war, that negotiations are under way, and that the economic effects would be minimal.

However, the mercurial Trump has also been changing his stance, asking the USTR to levy additional duties on up to \$100 billion of imports from China.

Beijing, for its part, made clear it would impose “comprehensive counter-measures ... to the end and at any cost” if Trump makes good on his threats.

At the moment, both sides are engaged in some shadow boxing; it will be about 60 days before the US-announced \$50 billion tariffs take effect, and then the \$50 billion Chinese counter-tariffs.

However, even before these tariffs and counter-tariffs come into force, the mere announcement is having negative effects on US farmers and on markets for the products China has unveiled as well as on US enterprises producing or trading these products.

As for the Trump threat of additional tariffs on \$100 billion of imports from China, Beijing has made clear it will respond with equivalence. The US is thus considering tariff increases on some \$150 billion of Chinese exports, but faces a

potentially devastating hit if China responds in kind as it has promised. With the US in 2017 selling no more than \$130 billion in goods to China, the latter’s retaliation would involve the services sector, where the US has a trade surplus with China (of perhaps about \$30 billion).

While Trump has said he will act to help US farmers affected by Chinese counter-tariffs, any additional farm support would in turn provoke a trade fight with other trading nations which would resist the threat to their own farmers posed by the subsidized US agri-exports.

Meanwhile China is also applying some pressure tactics: it has appealed to US businessmen to stop Trump’s trade offensive. On 8 April, Chinese state media published an article calling on industrial and commercial leaders in the US to stand up to the White House’s plans for the additional \$100 billion tariffs, warning that China will mount a fierce counter-attack if Trump moves forward.

US businesses too seem inclined to back China’s position, with many complaining that the tariffs would make other countries more attractive to Chinese buyers.

“Growing trade disputes have placed farmers and ranchers in a precarious position,” Zippy Duvall, president of the American Farm Bureau Federation, was reported as saying in US media on 6 April.

Patrick Delaney, a spokesman for the American Soybean Association, was cited by *The New York Times* as saying that his group was working to stop the tariffs from taking effect. “It’s a whole lot easier not to wreck the car in the first place than it is to think about what a repair might look like,” he said.

China’s Xinhua news agency reported that top US aircraft manufacturer Boeing has expressed deep concern that the US-China trade dispute could escalate into a major trade war that will negatively impact the aerospace industry.

The tariff battle “could do harm to the global aerospace industry”, Boeing said in a short statement released on 4 April, announcing its own efforts to proactively engage both governments (to head off the trade war).

No winners in trade wars

Any cursory study of the history of political economy and trade shows that there are no winners in trade wars: all are losers.

When two countries engage in trade spats by imposing tit-for-tat tariffs or other trade measures against each other, the trade-surplus country has traditionally tended to lose more than the one with the trade deficit. But this is not the case in today's world of global value chains and production spread across countries.

In any event, while the US has trade deficits in goods with China and many others, it has no deficit when trade in goods and services are taken together.

Also, the trade deficit is a necessary counterpart of the US dollar as an international reserve currency, with countries accumulating dollar balances in their central banks as reserves. If there be no US deficit, the dollar will become a scarce currency, resulting in countries not buying US goods and services.

However, dealing with Trump and his trade war threats is a whole new ballgame since he is qualitatively different from a long line of his postwar predecessors. He is trying to bring down the entire edifice of the postwar world order (political, security, money and finance, and trade) which the US itself, the sole hegemonic power at the end of the war, had conceived, built and fostered.

With his knowledge and experience of the construction industry, and how to become rich by resort to bankruptcies, Trump is willing to use a wrecking ball against the present world order. While he himself has so far offered no alternative, his dislike of the United Nations system, the WTO, multilateral trade and multilateralism are clear and palpable. The pronouncements of his advisors, verging on economic illiteracy, are often as contradictory as Trump's own tweets.

And with his most recent appointment of John Bolton as National Security Advisor in the White House, the dangers of US misadventures in the Middle East (against Iran) and in the Far East have increased. There are some contrary signals too in terms of moves under way for a US-North Korea summit. Given the decades of hostility between the two, any peace will need patient, medium-to-long-term negotiations, and it is extremely doubtful whether the mercurial Trump will engage in these.

Assault on the WTO

As set out earlier, on the trade front the Trump administration has mounted a three-pronged assault on the WTO:

(a) Blocking consensus on launching

a process to fill the three vacancies (and two more soon to occur) on the AB, thus threatening to make the AB and the WTO dispute settlement system non-functional. Trump's USTR has proposed going back to the old GATT system of parties negotiating settlement after dispute panel reports (and blocking adoption of panel reports with which they disagree).

This, in spite of the fact that it was the US itself which had pushed for a binding dispute settlement process in the first place. Frustrated with the EU blocking consensus and preventing adoption of rulings favouring the US in the French wheat flour and Italian pasta disputes, the US had sought, during the final stages of the negotiations to establish the WTO, a provision for "negative consensus" in dispute settlement, whereby dispute rulings would be automatically adopted unless there was a consensus not to do so.

(b) Invoking powers under Section 232 of US trade law and citing "national security", the Trump administration has slapped 25% tariffs on imports of steel and 10% on imports of aluminium. Subsequently, it exempted some of its trading partners from these enhanced tariffs and exempted some others like the EU for a short period pending some negotiated accord. China, Russia, Japan and India are not among those exempted.

China, the EU, India, Russia and Turkey have requested consultations with the US under Article 12.3 of the WTO's Safeguards Agreement. China has also initiated a dispute in the WTO on the tariffs; Hong Kong-China, the EU, Russia, Thailand and India all have requested to join the consultations between the US and China as part of the dispute settlement process.

In the domestic jurisdictions of most nations following the rule of law (whether of the Anglo-Saxon jurisprudence or the European continental system under the Napoleonic code), it is a well-settled principle that it is the "pith and substance" of a measure, not how it is called, that matter in litigations.

In terms of US domestic law, the imposition of tariffs on steel imports has been challenged at the US Court of International Trade in New York. The complaint by Severstal Export GmbH and Severstal Export Miami Corporation cites various pronouncements by Trump to argue that the action is not a genuine "security" measure (under Section 232) but one aimed at securing a positive trade balance with individual trading nations.

The complainants have averred that the President's proclamation citing national security "is a pretext to the actual intent for the imposition of tariffs on steel articles". They point to Trump's regularly stated intent, both prior to and after assuming the presidency, to obtain a "positive trade balance" with other countries, to "bring jobs home" and win trade wars.

The issue is such that the domestic challenge can go all the way to the US Supreme Court before a final decision is reached. US trading partners at the WTO cannot await its outcome or be too influenced by it.

At the WTO, in judging whether the US tariffs on steel and aluminium are "national security" measures, "safeguard" measures or merely efforts at altering bound tariff schedules (without negotiating compensation with concerned trade partners), arguably the same "pith and substance" argument will apply. And in this matter, the various pronouncements of Trump and his advisors would be cited in disputes as evidence.

Article XXVIII of GATT 1994 enables a member state to modify its bound tariff rates by following a set procedure: giving notice and negotiating with the member with whom the original duty reduction was negotiated, as also with principal suppliers, to reach an agreement for compensation; failing any agreement, the member seeking modification can nevertheless modify its schedule, while others can withdraw equivalent concessions.

Instead of adopting this route, as US trade law academic Prof. Steve Charnovitz has pointed out, the Trump administration has invoked the "security" exception to selectively modify the steel and aluminium import duties.²

At the WTO, the AB has not so far heard any appeal and decided the point of law on the scope of the security exception; and by blocking the filling up of AB vacancies, the US is preventing any such decision if a dispute is raised.

However, an analogous issue has figured before the International Court of Justice (ICJ) in a dispute between Djibouti and France on interpretation of Article 2(c) of the 1986 Convention on Mutual Assistance in Criminal Matters. Article 2(c) provides that the requested state may refuse a request for mutual assistance "if it considers that execution of the request is likely to prejudice [the] sovereignty, ... security, ... ordre public or other ... essential interests" of the state.

In that dispute, the ICJ said in its ruling that “while it is correct, as France claims, that the terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties”.³

The Vienna Convention, and its stipulation on the “good faith” obligation of parties, is fully applicable at the WTO, as affirmed by the AB in disputes.

Thus, in the dispute on the US steel and aluminium tariffs, it would be for the US, as the member invoking the security exception, to provide sufficient evidence of its “good faith” in its own consideration of the facts and in its conclusion that its essential security interests were affected. And it would be for the dispute panel to weigh this and accept or reject it.

(c) Making clear that his principal trade target is China, Trump has also announced – after a Section 301 investigation by the US Commerce Department of alleged unfair trade practices by China – a list of various imports from China that will be subject to increased tariffs (to take effect after 30 days, and in the interregnum for the US public to file comments and/or objections), and pending negotiations with China to resolve US complaints. The proposed new slew of tariffs and trade restrictions (including on Chinese investments and acquisitions of US enterprises) is in response to alleged Chinese theft of intellectual property (by forcing US enterprises to transfer technology in return for market access or setting up joint ventures) and other restrictions on US investments.

This use of Section 301 is contrary to express commitments made by the US before a WTO panel hearing a dispute brought in 1998. The panel’s report (adopted by the DSB) made clear that if the commitments were disregarded (by the US in future), it may attract liability of a state under international law.

Need for a collective response

These US assaults on the WTO and multilateral trading system bear the hallmarks of an effort to resort to a 21st-century version of 19th-century mercantilist gunboat diplomacy to open up a foreign market. This calls for a collective response from the entire WTO member-

ship other than the US.

Unfortunately, the major industrialized nations are either silent or acquiescing in the attacks against China. Thus, French President Emmanuel Macron, in an interview on Fox News broadcast on the eve of his April state visit to the US, was reported as hoping that the US would make permanent the current tariff exemption on steel and aluminium imports from the EU. Macron was quoted as saying: “You don’t make trade war with your ally ... You need allies. We are an ally.”

In any event, irrespective of the stance of key developed countries, it is in the larger interest of all developing nations to unite and support China.

For its part, China too needs to reassess and revise its own stands and agenda at the WTO, abandoning its “Middle Kingdom” mindset in pushing for WTO discussions on issues opposed by most developing nations such as e-commerce and investment facilitation.

Irrespective of the views on the US steel and aluminium tariffs or the Section 301 actions against China, the US, in blocking the process for filling vacancies on the AB (thus attempting effectively to render nugatory the ability of the AB to function and hear appeals on law), is threatening the credibility and viability of the WTO’s dispute settlement system, its one feature protecting the rights of its weaker members against the strong.

If the US continues to impede this process, then perhaps it is time for the rest of the WTO membership to take the necessary steps and ask the US to withdraw from the WTO.⁴ If the members are unable to unite even on this basic systemic issue, they may as well wind up the WTO and its multilateral trading system.

Meanwhile, top US and Chinese economic officials have been engaged in talks to head off a trade war. Whatever the final outcome of these efforts, it is clear that beyond increasing the profits of Big Pharma and benefiting the richest Americans via better Wall Street access to Chinese markets, none of the contemplated or imposed US tariffs will bring additional jobs to the US; in some cases such as the steel and aluminium tariffs, they will raise costs for a whole range of other US industries where these goods are used as production inputs.

So far, the responses of various

protagonists and trade partners of the US have been restrained, with most of the developed countries mute. Perhaps they are hoping that pressure from affected US industries, importers and consumers may yet force Trump to modify his initial announcements. Or they might be hoping that other US domestic developments (the Mueller inquiry, various lawsuits against Trump, the coming midterm elections) might intervene and put an end to Trump’s mercurial policy changes and announcements.

However, such a wait-and-see stance may end up even in the interim inflicting serious injury to the WTO and multilateral trading system, making future reversals more difficult.

And those who might be thinking of appeasing Trump through minor concessions should recall Winston Churchill’s definition of an “appeaser” as “one who feeds a crocodile hoping it will eat him last”.⁵ (SUNS8670) □

The author acknowledges that he has benefited from comments by B.K. Zutshi, who as Indian Ambassador to GATT 1947 (1989-1994) was involved in the negotiations on the Marrakesh treaty establishing the WTO; and by Rammanohar Reddy, former Editor of Economic and Political Weekly and currently Reader’s Editor at Scroll.in. Any remaining deficiencies are those of the author. An earlier version of this article was published in Third World Resurgence (No. 328).

Notes

1. See https://nb.sinocism.com/p/understanding-chinas-rise-under-xi-jinping-by-the-honourable-kevin-rudd?utm_medium=web&utm_campaign=share-web and <https://history.state.gov/milestones/1830-1860/opening-to-japan>
2. <http://worldtradelaw.typepad.com/ielpblog/2018/04/the-us-china-national-securitysafeguardstariff-fight.html#comments>
3. Cited by Prof. Regis Bismuth, Professor at Sciences Po Law School, France, in a comment posted on the International Economic Law and Policy blog run by Prof. Simon Lester, <http://worldtradelaw.typepad.com/ielpblog/2018/03/litigating-gatt-article-xxi-the-us-view-of-the-scope-of-the-exception.html#comments>
4. See Chakravarthi Raghavan, “Contemplating the unthinkable, a WTO without the US”, *TWE* No. 653.
5. Fred Metcalf (ed.), *Dictionary of Humorous Political Quotations*, Biteback, 2012.

US to allies: VERs on steel and aluminium or extra tariffs

The US is reportedly asking a number of its trading partners to limit their exports of steel and aluminium in return for exempting them from higher tariffs on these products.

by D. Ravi Kanth

GENEVA: The United States has threatened some of its closest trading partners to either fall in line with appropriate voluntary export restraints (VERs) or quotas on steel, aluminium and other products by 1 June or face the consequences of permanent higher duties.

If the talks with its allies fail to deliver results by 1 June, the US intends to make permanent the additional duties of 25% on steel and 10% on aluminium under national security provisions of Section 232 of its trade law even though they breach its scheduled WTO binding commitments.

(The VERs demanded by the US from its trade partners are illegal under the WTO treaty. And instead of using provisions of Article XXVIII of GATT 1994 to modify and raise its bound duties on steel and aluminium, the US is claiming a "security exception" to do so. – SUNS)

The US administration is wielding a sword of Damocles on the European Union, Canada and Mexico to demand they agree to VERs. President Donald Trump has granted them another reprieve for 30 days until 1 June from the controversial steel and aluminium tariffs.

Without mentioning the VERs explicitly, the White House has said unambiguously that the additional 30-day exemption is "final", implying that if the EU, Canada and Mexico fail to fall in line as per Washington's demands, the additional duties of 25% on steel and 10% on aluminium would be made permanent.

The additional duties had been announced on 8 March.

Apart from wanting Canada and Mexico to fall in line with quota-driven exports for both steel and aluminium, the US also wants its two neighbours to agree to a revised North American Free Trade Agreement (NAFTA) on its "America First" terms.

The US wants the EU to agree to "quotas that will restrain imports, prevent transshipment and protect the national security", according to a statement issued by the White House on 30 April.

The statement also said that Argentina, Brazil and Australia have reached "agreements in principle" with the US with respect to steel and aluminium. But it is not clear what these three major farm-exporting countries are required to do as the US did not release the details of the agreements.

South Korea had already secured a permanent exclusion from the steel and aluminium tariffs by agreeing to sharply reduced quotas for exporting these two items to the American market as well as to more imports from the US.

US-China talks

The latest US announcement has come as the US and China engage in consultations on how to avert a possible trade war following Washington's unilateral threat to impose new duties on \$50 billion of Chinese imports in retaliation for alleged theft of intellectual property.

On 1 May, the US Trade Representative (USTR) Ambassador Robert Lighthizer broadly indicated what it was expecting of China in the negotiations. He made it unambiguously clear during an address to the US Chamber of Commerce that "it is not my objective to change the Chinese system" but "I have to be in a position where the United States can deal with it, where the United States isn't the victim of it".

"China's 'Made in China 2025' initiative amounts to an industrial policy that seeks to create national champions that will dominate global high technology industries," the USTR was cited as saying by the *Washington Trade Daily* of 2 May.

Lighthizer's central message, according to the *Financial Times* of 2 May, was that China's "economic model of state capitalism is a direct challenge to the US economy."

The report also suggested that the main battle between the US and China is going to be over "technology", with foreign companies said to be compelled to enter into joint ventures with local com-

panies and transfer technology know-how in return for securing access to the Chinese market.

In a tit-for-tat response to the American steel and aluminium duties as well as the proposed measures against alleged Chinese theft of intellectual property, China has announced tariffs on a range of US products. China's trade diplomats have pointedly criticized the US by name at the WTO, describing Washington's crowbar "unilateral trade measures" as posing the biggest challenge to the multilateral trading system.

Muted response

Paradoxically, as the Trump administration finds it difficult to counter China which is standing up to Washington's allegedly illegal "America First" trade policies, including rebalancing of mounting trade deficits, it is not facing a matching threat in the EU, Japan, Canada or the developing-country "champion" Brazil, according to trade envoys who asked not to be quoted.

The EU, which is the world's largest trading entity and which hitherto remained as a countervailing power at the WTO, is yet to offer a cohesive and coherent policy response to the US. The EU and Japan did not even protest against the Section 232 actions on steel and aluminium at the WTO's Safeguards Committee meeting on 23 April (see following article).

Responding to the reprieve granted by Trump until 1 June, the EU merely said the decision to exempt for 30 days "prolongs market uncertainty, which is already affecting business decisions", according to a news report in the *Financial Times* on 1 May. Leaders of Germany and France, the EU's leading members, had pleaded with Trump not to make the additional duties on steel and aluminium permanent.

"As a longstanding partner and friend of the US, we will not negotiate under threat," the European Commission said in a statement, according to the *FT*.

Germany, which had denied a humanitarian package to the EU's weakest member Greece for recovering from the bleeding economic crisis it is facing now, seems however to be ready to negotiate with the US for a permanent exemption from the steel and aluminium tariffs.

"Neither the European Union nor the United States can have an interest in

escalating trade relations," said Martina Fietz, a spokeswoman for German Chancellor Angela Merkel, according to the *FT* report. "Rather, both the US and the EU would profit from a further deepening of trade relations. In this regard, a positive trade agenda should be developed in the interests of both sides."

It is clear that the Trump administration seems to be gaining an upper hand on the German leader, who not long ago had said Europe must stand on its own legs and shape its own future.

EU reaction

Ahead of the temporary US reprieve granted on 30 April, the EU had said that it has a package of trade retaliatory measures ready against the US in case Washington decides to make permanent the additional steel and aluminium tariffs, according to a person familiar with the development.

The EU has prepared a list of American goods of more than \$3 billion that would be subjected to additional duties as per Article 8 of the WTO Agreement on Safeguards, the person said, asking not to be quoted. "The EU has loaded its guns ready with retaliatory measures against American goods but will not fire them unless it is compelled to do so," the person said, adding that the EU will strictly adhere to the process laid out in the Safeguards Agreement for taking retaliatory measures.

EU exports to the US of steel products of the types covered by the US measures have a total value of \$5.99 billion, and aluminium products a total value of \$1.25 billion, making the EU the first and fifth exporter to the US of steel and aluminium, respectively. Brussels has said that "should the exclusion not continue to be in place, then the EU's exports would be impaired significantly by the United States' measures."

Consequently, the EU sought to join as a third party in the trade dispute launched in the WTO by China against the US Section 232 measures.

The US has already rejected a request from the EU to enter into safeguard consultations on the additional steel and aluminium duties, saying Trump has determined that the tariffs are "necessary to adjust imports of steel and aluminium articles that threaten to impair the national security of the United States." "These actions are not safeguard mea-

sures, and therefore, there is no basis to conduct consultations under the Agreement on Safeguards with respect to these measures," the US informed the EU.

Despite these pronouncements, the EU is slowly yielding ground to Trump by joining consultations outside the WTO, according to a trade envoy who asked not to be quoted.

In conclusion, the US steel and alu-

minium tariffs could open a new chapter in global trade where the transatlantic powers will join hands to fight China on several fronts, the envoy suggested.

It remains to be seen whether China can build a broad developing-country coalition at the WTO and outside to challenge the US so as to ensure a developmental face to global trade. (SUNS8674) □

US faulted at WTO Safeguards Committee over S. 232 actions

The US steel and aluminium tariffs had come under fire during a recent meeting at the WTO.

by Kanaga Raja

GENEVA: Several members of the WTO on 23 April voiced sharp concern and disappointment over the decision by the US to impose additional tariffs on imports of certain steel and aluminium products under Section 232 of the US Trade Expansion Act of 1962.

The Russian Federation, Venezuela, Turkey, Norway, Switzerland, India and Singapore all joined China in criticizing the tariffs, which were levied by the US claiming "national security" grounds and purporting to act under Section 232.

This criticism of the US actions came at a formal meeting of the WTO Committee on Safeguards, under an agenda item requested by China.

In recent weeks, a growing number of WTO members have been seeking consultations with the US under Article 12.3 of the WTO's Agreement on Safeguards over the Section 232 actions. So far, China, the European Union, India, the Russian Federation and Turkey have requested such consultations.

Also at the 23 April meeting of the Safeguards Committee, South Korea, the Philippines, the EU, China, Singapore, Switzerland, Norway and Malaysia criticized the recent US decision to impose safeguard tariffs on imported solar cells. South Korea, China and Mexico also criticized a similar action taken by the US targeting imported large residential washers.

Multilateral system undermined

At the meeting, according to trade officials, the Russian Federation, Venezuela, Turkey, Norway, Switzerland, India and Singapore joined China in voicing their concerns over the US actions under

Section 232.

In a strong statement, China recalled that on 8 March US President Donald Trump issued a proclamation finding that steel and aluminium were being imported into the US market in such quantities as to pose a national security threat to the US, and imposed tariffs of 25% and 10% on imports of steel and aluminium, respectively. China said that although the measures were imposed under the guise of national security, these were safeguard measures and the US should have responded to China's request for consultations under the Safeguards Agreement.

According to trade officials, China underlined that the Section 232 actions severely damaged the stability of the multilateral trading system and distorted international supply chains, with considerable negative follow-up effects. For example, it pointed out, some members had been forced to take measures because of concerns regarding trade diversion arising from the steel and aluminium tariffs.

China warned that if such measures deliberately undermining the multilateral trading system could not be curtailed, the multilateral system would face the risk of collapse.

China also emphasized that the US decision to exempt certain exporters from the tariffs, including some of the largest suppliers to the US market, clearly violated the WTO's "most favoured nation" (MFN) principle.

Another example, China said in an apparent reference to the US-South Korea free trade agreement, was the US use of the exemptions to push another member to agree to voluntary export restraints

on steel in their bilateral trade agreement, which was clearly forbidden under multilateral trading rules.

China said that it opposed the US approach and that members could not allow this unilateralist momentum to continue. A member was not allowed to use tariff measures as a threat to pressure other members unilaterally, China said, adding that the answer was to respect the multilateral trading system.

According to trade officials, the US reiterated what it had said in an earlier submission to the Safeguards Committee, namely that the tariffs were not safeguard measures and therefore there was no basis to conduct consultations under the Safeguards Agreement with respect to these measures, and that there was nothing to justify China's imposition of "rebalancing" tariffs under Article 8.2 of the Safeguards Agreement.

The US maintained that China's response on 2 April in imposing "rebalancing" tariffs on 128 US products had no basis under the Safeguards Agreement, since these were not safeguard measures. It also claimed that China had not asserted any other legal basis for its action and therefore there appeared to be no basis for China's actions under the WTO rules.

The US maintained that China had adopted non-market-oriented policies in these sectors, leaving WTO members with no other choice to address the situation. According to the US, it was important to put first things first and discuss such distortions. The US claimed that China did not appear to be addressing this but in fact appeared to be increasing state intervention under its "Made in China 2025" industrialization and innovation programme.

The US said until China alleviates the global problem it has created, members would have no choice but to address the problem in the form they considered most appropriate.

According to trade officials, Russia said it believed, like China, that the US action was in essence a safeguard measure.

According to Russia, the whole process leading up to the imposition of the tariffs lacked transparency and deprived foreign producers of the right to provide evidence in the hearings. What was most outrageous, said Russia, were the exclusions exempting certain suppliers, including the biggest suppliers, from the

tariffs. Russia said it could not understand how the US intended to achieve its goal of protecting the US industry when the biggest exporters were excluded.

The US actions only caused instability in trade, led to increased trade barriers and created a lose-lose situation for all members, warned Russia.

Turkey said that it was not convinced by the national security argument and that such claims should only be used in exceptional circumstances. According to Turkey, the G20's Global Forum on Steel Excess Capacity provided a venue to discuss the problem of excess capacity, and such problems should be resolved through coordinated efforts rather than resort to unilateralism.

Norway said that it was deeply concerned by the US actions. While they were harming Norwegian steel producers, Norway said what it was most concerned about was that the actions were undermining the multilateral trading system.

Switzerland shared the concerns of the other members regarding the unilateral US actions. It said that it did not understand the rationale of exempting certain members while similar members were subject to the tariffs.

According to trade officials, India said that such unilateral actions had no place in the international trading system and that it was watching the situation closely.

Singapore said that the US actions adversely affected global supply chains and downstream US industries.

China pointed out that it was working with other members to resolve their relevant concerns and that the G20's Global Forum on Steel Excess Capacity and other fora existed to discuss the issue. Good discussions had already taken place and China had already made significant progress in reducing domestic steel production and was continuing to further reduce capacity, it said.

US actions on solar cells and washers

Meanwhile, the US made a long statement at the Safeguards Committee meeting under the agenda item on US safeguards on solar cells and large residential washers.

The US had imposed safeguard duties in January on imported solar cells and large residential washers.

According to trade officials, the US maintained at the meeting that the inves-

tigation into both products had been carried out in a very open and transparent manner, with WTO members notified of the progress in the US investigation during every step of the process.

WTO members were given ample opportunity to present written arguments, it said. Recommendations were forwarded to the president, who took the measures he considered necessary to remedy the situation.

Members were also given the opportunity to consult with the US on its actions under the Safeguards Agreement, with those requesting consultations holding talks with the US from February to April. The US said that it then submitted to the WTO joint notifications with nearly all members it held consultations with, and most of the notifications contained a specific date by which members could take action to maintain substantially equivalent levels of concessions.

With regard to the safeguard on solar cells, the US said that it was still considering requests for exclusions and that it expected an announcement on this in the coming months.

According to trade officials, South Korea said that it considered the US measures to be excessive and inconsistent with the WTO agreements with respect to the alleged significant increase in imports, serious injury to competing US producers, and direct causation between the increased imports and the injury suffered.

South Korea said it had failed to agree with the US on compensation for both the safeguard measures and had notified the WTO of its plans to suspend concessions against the US. It expressed hope that the measures would be withdrawn as soon as possible.

The Philippines said that it had held consultations with the US on the safeguard on solar cells and that both sides agreed to continue their discussion while maintaining their rights under the Safeguards Agreement. According to the Philippines, they also agreed that the Philippines had the right to suspend concessions after 6 February 2021 or following any decision by the WTO's Dispute Settlement Body declaring the safeguard to be in violation of WTO rules.

The EU said it was very concerned about the use of safeguards by the US, which was not a traditional user of such remedies, having last imposed a safeguard in 2002. The EU maintained that

the safeguard on solar cells was not appropriate because the problem was primarily the increased imports from a number of Asian producers but was causing collateral damage to others. EU imports were not the problem, it claimed.

According to trade officials, China voiced concerns over both the investigations on solar cells and large residential washers. With respect to the investigation on solar cells, almost all important data was kept confidential and particular key indicators were redacted, said China. The US, it added, failed to consider how its domestic industry was affected by the global market downturn in the solar cell market, instead attributing injury to imports. Furthermore, the US did not impose the tariffs in response to unforeseen circumstances as required under the Safeguards Agreement.

Singapore said it was concerned about the US action and that the tariffs would only dampen growth and increase

costs to US producers.

Switzerland expressed deep disappointment with the US decision. It said that blocking all imports, even those not contributing to the problem, was not a proper solution.

Norway said that it regretted the US decision and had doubts that it met the criteria for imposition of a safeguard under WTO rules.

Malaysia said the US solar safeguard was causing serious injury to its domestic producers and that it had agreed to continue discussions with the US on the matter.

Mexico said it was very concerned about the US change of position on the use of safeguards and that safeguards should be used only in exceptional circumstances. Mexico also pointed to a US International Trade Commission finding that exports of washing machines from Mexico did not harm the US industry. (SUNS8669) □

China calls for common front on US S. 301 measures

China has urged joint action by WTO members against US “unilateralism and protectionism” embodied in the controversial so-called Section 301 trade measures.

by D. Ravi Kanth

GENEVA: China has called for a common front against the United States at the WTO for fighting the “unilateralism and protectionism” unleashed by Washington through its “crowbar trade measures” under Section 301 of the US Trade Act of 1974, according to people familiar with the development.

In a hard-hitting statement delivered at the WTO’s Dispute Settlement Body (DSB) meeting on 27 April, China said “we believe the time has come for all members to join with each other to take actions against the unilateralism and protectionism manifested in the US conduct, so that what has happened time after time in the past will not repeat itself in the future.”

“What certainly has happened today is that the unilateral nature of the US Section 301 is revived and is now challenging the foundations of the rules-based multilateral trading system,” China pointedly said.

Against the backdrop of the Section 301 investigations into China’s intellectual property policy regime on purported

grounds of Beijing’s “unfair economic practices” and the subsequent threat of US trade retaliatory measures to the tune of \$50 billion, China said there is a material change in the dynamics of unilateral positions adopted by the US.

China said that the US has initiated 125 investigations under Section 301 and retaliated in 17 instances.

Between 1974 and 2018, China pointed out, the US has initiated 27 investigations against the EC (later the EU), 16 investigations against Japan, 14 investigations against Canada, 11 investigations against South Korea, eight investigations against Brazil, six investigations against Argentina, six investigations against Chinese Taipei, five investigations against India, three investigations against Thailand, two investigations against Belgium, France, Indonesia, Italy, Portugal, Spain, Sweden, Switzerland, the UK and Ukraine respectively, and one investigation against Australia, Austria, Colombia, Costa Rica, Denmark, Germany, Guatemala, Honduras, Ireland,

Mexico, Norway, Pakistan, Paraguay, Netherland, Turkey and the Soviet Union respectively.

China said that the Section 301 investigations remained a nightmare for countries before the establishment of the WTO, particularly for those countries that did not possess the negotiating leverage. Shockingly, with a low threshold for the investigations, “roughly one third of all Section 301 investigations were self-initiated by the US government, namely without any petition by any domestic industry”, Beijing maintained.

“Twenty-three years after the establishment of the WTO [in 1995], Section 301 of the Trade Act of 1974 continues to serve as the tool of the US to take unilateral actions against other members,” China said.

According to China, a WTO dispute settlement panel in 2000 had clearly ruled that even though Section 301 is not inconsistent with Article 23 of the Dispute Settlement Understanding (DSU) that deals with strengthening multilateralism, any actions taken under Section 301 must be based on the “rulings and recommendations” issued by the DSB.

“Contrary to these commitments, none of the decisions or actions taken by the US in this recent Section 301 investigation was based on any adopted rulings or recommendations of the DSB,” China emphasized.

Strangely, the US defended its Section 301 investigations and subsequent actions by asserting that the US made no findings in the Section 301 investigation that China had breached its WTO obligations, China said. The US argued therefore that it was entitled to take retaliatory trade measures against China regardless of whether those retaliatory measures conform to the WTO rules.

Clearly, this is “a fundamental misinterpretation of Members’ WTO obligations”, China asserted. Citing Article 1 and Article 2 of the General Agreement on Tariffs and Trade (GATT) 1994 which require members to provide MFN (most favoured nation) treatment to all other contracting parties and each contracting party to accord the same treatment as per the schedules of concessions, China said “the precondition suggested by the US is not justified.”

Dangers

China had in March launched at the WTO a trade dispute against the US Sec-

tion 301. When the dispute came up for discussion at the 27 April DSB meeting, several other countries – Pakistan, Russia, Hong Kong-China, Chinese Taipei, the European Union, Brazil, India and Norway – cautioned the US about the dangers that the US unilateral actions pose to the global trading system.

Chinese Taipei and the EU said while they share the US concern about China's alleged violations of intellectual property rights, the best way to address the matter is through the multilateral trading system.

Without naming the US, India said "adoption of unilateral measures by Members will erode our long-cherished principles of predictability and non-discrimination and can lead to a real risk of a full-blown trade war."

"As a firm supporter of the rules-based multilateral trading system", India said, "gaps, imperfections and unfair elements in trade rules need to be discussed and reformed in the WTO."

"Unilateral measures, on the other hand, could stop the fragile global economic recovery in its tracks, with consequences for jobs, GDP growth and development that would harm us all," India argued.

In a sharp response to China's trenchant criticism on Section 301, the US said it had already catalogued the Chinese abuse of intellectual property rights in its trade dispute complaint filed in March. Instead of addressing its "damaging and discriminatory" policies, China accuses the US of "unilateralism", the US argued.

The controversial Chinese practices, according to the US, include "foreign ownership restrictions" involving joint venture requirements and foreign equity limitations, "China's regime of technology regulations" that force American companies to transfer technology, China's facilitation of investment systematically to take over foreign companies and assets, and China's theft of sensitive commercial information and trade secrets from computer networks.

China, however, dismissed the US statement, saying that it was a "wilful distortion of facts" and that the allegations on policies on technology transfer and licensing on non-marketing terms were "entirely without basis."

China slammed the US for rejecting Beijing's complaint invoking dispute settlement proceedings against Washing-

ton at the WTO over the proposed tariff measures following the Section 301 investigations.

On 13 April, the US had said China's request for dispute settlement consultations did not meet the requirements of Article 4 (on consultations) of the DSU since the US has not adopted any tariff measures with respect to China. The US has said that since China's complaint revolves around the "proposed tariff measures" which have not been adopted against China, the issues raised in China's complaint "are not measures affecting the operation of any covered agreement taken within the territory of" a member, within the meaning of DSU Article 4.2. Consequently, China's letter did not "identify the measures at issue" pursuant to DSU Article 4.4, as there are no tariff measures in existence, the US said.

In a sharp response to the US rejection, China has said, in a communication on 25 April, that the measures raised by China are explicitly based on legal provisions.

China ridiculed the US that, after having rejected China's request for consultations, it is ready to enter into consultations with China "with respect to the United States's concern on China's relevant policies addressed in the Section 301 investigation as well as China's Public Notice on imposing additional tariffs on certain products originating from the United States."

"I regret to inform you that such re-

quest obviously exceeds the scope of China's consultations request dated 4 April 2018," China said.

In addition, China said, it is confused by the logic taken by the US. On the one hand, the US emphasizes that the policies addressed in the Section 301 investigation do not appear to implicate WTO obligations except for the measures under *China – Certain Measures Concerning the Protection of Intellectual Property Rights* (DS542). On the other hand, the US' 13 April letter requests to discuss China's policies addressed in the Section 301 investigation, which appears to mean that the US also recognizes that the policies addressed in the Section 301 investigation do implicate the WTO rules.

China said that it will go ahead with the "consultations between our two sides [which] will be conducted in accordance with Article 4 of the DSU and will only cover the measures at issue identified explicitly in the DS543 consultations request, including the list of imported products originating from China for additional tariffs dated 3 April, the Section 301 investigation report dated 22 March, etc."

In short, China seems to have decided to take the fight against the US unilateral actions to the finish at the WTO. It remains to be seen whether other developing and least-developed countries will coalesce around the issues raised by China. (SUNS8673) □

Attempts under way to bury the AB appeal process

The Appellate Body may become a casualty of US efforts to reshape the WTO's dispute settlement system in line with its interests.

by D. Ravi Kanth

GENEVA: Attempts are under way to quietly bury the WTO's Appellate Body (AB) that provides "predictability" and "certainty" with its binding rulings, and shift to the panel process in which the WTO secretariat, in servicing the panels, plays an influential role in shaping the findings, according to trade envoys familiar with the development.

As the United States continues to block the process for filling three vacancies at the AB despite repeated calls by a large majority of countries for an expe-

ditious selection process, the AB will face another critical test soon when the second term for one of its members, Shree Baboo Chekitan Servansing of Mauritius, comes up for a toss, said an envoy who asked not to be identified.

If Servansing decides not to stake a claim for a second term in light of concerns that the US will create hurdles as it has for the selection process to fill the current three vacancies, then the AB will be "further crippled", the envoy suggested.

WTO Director-General Roberto Azevedo might also not be in favour of Servansing staking a claim for a second term, the envoy suggested.

Nevertheless, it remains to be seen whether the Mauritian government, which is close to the US, will be able to convince Washington to adopt a favourable stand to ensure a second term for its former trade envoy, the envoy said.

Fate of AB at stake

According to another trade envoy who also asked not to be identified, the WTO Director-General would prefer to revert to a panel process and do away with the AB once and for all in order to satisfy the US.

In a panel-driven dispute settlement process, the WTO secretariat, which is tasked with servicing the panels, will be able to play an influential role both in constituting a panel as well as in its subsequent findings, the envoy suggested.

Instead of persuading the US to give up its obstructionist stance and bring an end to the crisis at the AB, the Director-General wants to hold consultations with the US on its specific concerns.

At an informal meeting of trade ministers in New Delhi on 19 March, a large number of ministers had unambiguously demanded the continuation of an impartial and independent AB.

Trade ministers had severely criticized attempts by the Director-General and some major industrialized countries to consider "alternatives" instead of resolving the current AB crisis, the envoy said.

"The proposed alternatives ... did not get much traction during the meeting as many ministers wanted to adhere to the rulings of the judicial body [rather] than negotiated outcomes as under GATT 1947," South Africa's trade minister Rob Davies had told the *South-North Development Monitor (SUNS)* on 20 March.

"There is a sharp concern over the non-appointment of AB members," he said, suggesting that there has to be an urgent resolution.

At the New Delhi meeting, the US ambassador to the WTO Dennis Shea said that the AB failed to comply with important markers for its effective functioning. He said the AB failed to meet the 90-day limit for issuing rulings as required under the rules and continues to

issue rulings in which two members had already retired. In addition, he argued that some AB reports went far beyond their mandate for resolving trade disputes.

Back to GATT 1947 system?

Ahead of the New Delhi meeting, Azevedo had, along with the WTO General Council chair Ambassador Junichi Ihara of Japan, held a "green room" meeting to discuss an alternative dispute settlement system at the WTO akin to the one that prevailed under the GATT (General Agreement on Tariffs and Trade) 1947 framework as suggested by the US Trade Representative Robert Lighthizer several months ago, trade envoys told *SUNS*.

In contrast to the current WTO system of binding dispute settlement rulings issued by panels and the AB, the GATT 1947 system required panel rulings to be adopted by consensus of the contracting parties.

[This enabled some of the powerful trading nations to block adoption of rulings that went against their stand. In fact, at that time it was the US that was the aggrieved party under the system, as the European Economic Community (now EU) blocked adoption of panel rulings in two disputes raised by the US regarding agricultural subsidies – the Italian pasta dispute and the French wheat flour dispute. In both instances, the EEC had enabled preferential treatment to producers if they used the costlier wheat from European countries rather than cheaper imported US wheat. The US, in both disputes, had successfully challenged the subsidy involved in the inputs to Italian pasta makers and French flour mills.

[Thus thwarted, the US, during the final stages of the Uruguay Round negotiations which would lead to the establishment of the WTO, insisted on the application of the "negative consensus" rule, under which panel rulings would be adopted unless there was a consensus among all WTO members against it. Since the party that prevailed in a ruling would not be inclined to join in such a consensus, panel rulings would effectively be automatically adopted and therefore binding.

[In agreeing to this arrangement for the WTO dispute settlement system, the EU managed to get an Appellate Body process instituted to hear and dispose of, on issues of law, appeals against a panel finding – the only other instance apart from a "negative consensus" in which a panel ruling is not adopted. – *SUNS*]

At the "green room" meeting in March, the WTO Director-General had suggested that instead of pushing the US hard to continue negotiations to break the current deadlock in selecting three new members to the AB, WTO members must consider the blockage as given and act accordingly, said a trade envoy who asked not to be quoted.

The latest instance of US blockage took place at the 27 April meeting of the DSB, when, for the 11th time, the US withheld support for a proposal (co-sponsored by over 60 member states) to launch a process to fill the three vacancies in the AB.

The chances of resolving the impasse at the AB seem bleak given the US position.

Ultimately, the WTO might be inching closer to the dispute panel process, according to envoys who asked not to be identified. (*SUNS*8667) □

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PPPs show “widespread shortcomings and limited benefits”

An audit of public-private partnership (PPP) projects in the EU has found “widespread shortcomings and limited benefits” with this much-promoted method of funding public services.

by Chakravarthi Raghavan

GENEVA: While public-private partnerships (PPPs) have the potential to achieve faster policy implementation and ensure good maintenance standards, an audit of such projects in the European Union shows “widespread shortcomings and limited benefits”.

The results of the audit are published in a Special Report (09/2018) by the European Court of Auditors (ECA). The report, which was released on 20 March, is available at <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=3D45153>.

PPPs are defined by the Organization for Economic Co-operation and Development (OECD), in the “Principles of Public Governance of Public-Private Partnerships” (2012), as “long-term contractual arrangements between the government and a private partner whereby the latter delivers and funds public services using a capital asset, sharing the associated risks.”

This broad definition, the ECA says, shows that PPPs can be designed to achieve a wide array of objectives in various sectors, such as transport, social housing and healthcare, and can be structured under different approaches.

The three main PPP categories are: (a) concessions, where, typically, final users of the service pay the private partner directly, with no (or reduced) remuneration from the public sector; (b) joint ventures, or institutional PPPs, where both the public and private sector become shareholders in a third company; and (c) contractual PPPs, where the relationship between the parties is governed by a contract.

[Over the last decade or two, PPPs were promoted in developing countries via policy advice and/or loan conditionalities by the International Monetary Fund and the World Bank, regional development banks and other funding agencies of the UN system. In many instances, transnational corporations (TNCs) based in developed countries, or domestic enterprises with TNC links, become the concessionaires, joint venture partners or parties to a contractual PPP.

[The problems identified in the ECA report, which is focused on PPPs in the EU, are present by several orders of magnitude in developing countries, whose governments and bureaucracies have less expertise and experience in negotiating such PPPs. – SUNS]

In the audit report, which surveys the workings and outcomes of several PPPs in EU member states, the ECA concludes that there is a high risk that PPPs will not contribute to the expected extent to the aim of implementing a greater part of EU funds through blended projects including PPPs.

The auditors say: “We found that despite PPPs having the potential to achieve faster policy implementation and ensure good maintenance standards, the audited projects were not always effectively managed and did not provide adequate value for money. Potential benefits of PPPs were often not achieved, as they suffered delays, cost increases and were under-used, and resulted in 1.5 billion euro [of] ineffective spending, out of which 0.4 billion euro [were] EU funds.”

“This,” the report of the auditors adds, “was also due to the lack of adequate analyses, strategic approaches towards the use of PPPs and institutional and legal frameworks. With only few Member States having consolidated experience and expertise in implementing successful PPP projects, there is a high risk that PPPs will not contribute to the expected extent to the aim to implement greater part of EU funds through blended projects including PPPs.”

PPPs in the EU

PPP projects harnessing both the public and the private sector, the report says, provide goods and services which are conventionally supplied by the public sector, while easing the stringent budgetary constraints placed on public expenditure.

Since the 1990s, a total of 1,749 PPPs worth €336 billion have reached finan-

cial close in the EU. Most PPPs have been implemented in the field of transport, which in 2016 accounted for a third of the entire year’s investment, ahead of healthcare and education.

However, to date EU funds have been little used for PPPs.

Although the European Commission’s policy has been encouraging the use of PPPs for some years as a potentially effective means of delivering projects, “we identified that during the 2000-2014 period just 84 PPPs, with a total project cost of 29.2 billion euro, received 5.6 billion euro in funding from the EU”, say the auditors.

Structural and Cohesion Fund grants were the main EU source of funding, followed by financial instruments – often in cooperation with the European Investment Bank (EIB).

The auditors examined 12 EU co-financed PPPs in France, Greece, Ireland and Spain in the fields of road transport and information and communication technology (ICT). The visited member states accounted for around 70% of the total project cost (€29.2 billion) of EU-supported PPPs.

“We assessed whether the audited projects were able to exploit the benefits PPPs are expected to deliver, whether they were based on sound analyses and suitable approaches and whether the overall institutional and legal frameworks within the visited Member States were adequate for the successful implementation of PPPs.”

“Overall,” the auditors say, “we found that:

- PPPs allowed public authorities to procure large-scale infrastructures through a single procedure, but they increased the risk of insufficient competition and thus putting contracting authorities in a weaker negotiating position.

- Procuring PPPs typically requires negotiating on aspects that are usually not part of traditional procurement and therefore takes up more time than traditional projects. One third of the 12 audited projects were, with their procurement duration of 5-6.5 years, affected by considerable delays.

- Similarly to traditional projects, also the majority of the audited PPPs were subject to considerable inefficiencies in the form of delays during construction and major cost increases. Overall, seven out of the nine completed projects (with aggregate project costs of 7.8 billion euro) faced delays ranging from two to 52 months. Moreover, an

additional amount of almost 1.5 billion euro in public funds was necessary to complete the five motorways we audited in Greece and Spain, around 30% of which was provided by the EU (corresponding to 422 million euro). We consider this amount to have been spent ineffectively in terms of achieving the potential benefits.

- More importantly, in Greece (which is by far the largest recipient of EU contributions with 59% of the total EU amount or 3.3 billion euro), the cost per km of three assessed motorways had increased by up to 69%, while at the same time the project scopes were reduced by up to 55%. This was mainly due to the financial crisis and to poorly prepared projects by the public partner, resulting in premature and insufficiently effective contracts with private concessionaires.

- The large scope, the high cost and the long duration of typical infrastructure PPPs require particular diligence. However, we found that prior analyses were based on over-optimistic scenarios regarding future demand and use of the planned infrastructure, resulting in project rates of use of up to 69% (ICT) and 35% (motorways) below forecasts. This does not take into account the pending risk of the heavily underused motorways in Greece after their completion.

- On a positive note, nine completed audited projects have shown good levels of service and maintenance and have the potential to keep these levels for the remaining project duration.

- For most of the audited projects, the PPP option was chosen without any prior comparative analysis of alternative options, such as Public Sector Comparator, thus failing to demonstrate that it was the one maximizing value-for-money and protecting the public interest by ensuring a level playing field between PPPs and a traditional procurement.

- The risk allocation between public and private partners was often inappropriate, incoherent and ineffective, while high remuneration rates (up to 14%) on the private partner's risk capital did not always reflect the risks borne. In addition, most of the six audited ICT projects were not easily compatible with long contract durations since they were subject to rapid technology changes."

Implementing successful PPP projects, according to the audit report,

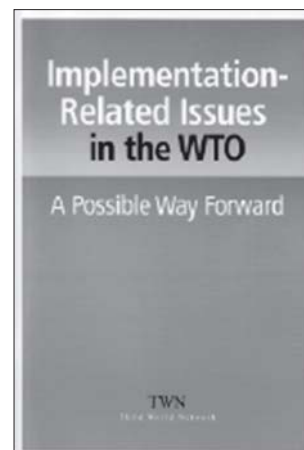
(continued on page 16)

Implementation-Related Issues in the WTO: A Possible Way Forward

The set of multilateral agreements under the jurisdiction of the World Trade Organization (WTO) governs the conduct of international trade. Implementation of the commitments imposed by these agreements has, however, given rise to a host of problems for the WTO's developing-country members, ranging from non-realization of anticipated benefits to imbalances in the rules.

These implementation-related issues have been on the WTO agenda for over a decade, yet meaningful resolution is still proving elusive. This paper documents the progress – or, more appropriately, lack thereof – in the treatment of the implementation issues over the years. It looks at the various decisions adopted, to little effect thus far, by the WTO in this area, including the 2001 Doha Declaration which incorporates the implementation issues into the remit of the ongoing Doha round trade talks.

The paper exhorts the developing countries to draw upon the Doha mandate to bring the implementation issues back to the centrestage of negotiations. As a practical measure given the resource constraints developing-country negotiators face in the WTO, it is proposed that the implementation issues be taken up according to a suggested order of priority. Prioritization notwithstanding, the paper stresses that developing countries have every right to seek solutions to each of these longstanding, long-neglected issues.



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Blended finance not silver bullet for funding development

Touted as “the best possible use of each grant dollar”, blended finance – which pools public and private funds to bankroll development programmes – may in fact fall short of effectively realizing sustainable development objectives.

by Anis Chowdhury and Jomo Kwame Sundaram

After largely failing to provide 0.7% of their gross national income (GNI) in aid to developing countries for almost half a century since making the commitment, donor countries have recently promoted blended finance (BF) as a solution to the financing-for-development challenge.

Blending refers to combining public development funds (in the form of grants, technical assistance or interest indemnification) with loans from private lenders.

Following the adoption of Agenda 2030 for the Sustainable Development Goals (SDGs), the Organization for Economic Co-operation and Development (OECD) and the World Economic Forum (WEF) claimed that “blended finance represents an opportunity to drive significant new capital flows into high-impact sectors, while effectively leveraging private sector expertise in identifying and executing development investment strategies”.

The OECD and the WEF launched the multi-year ReDesigning Development Finance Initiative (RDFI) in 2013 to promote public-private cooperation for sustainable development. The RDFI defines BF as “the strategic use of development finance and philanthropic funds to mobilize private capital flows to emerging and frontier markets”. The RDFI promoted BF at the Third International Conference on Financing for Development (FfD3) in Addis Ababa in July 2015.

A BF pioneer claimed that BF had been effective in targeted development interventions and would complement traditional overseas development assistance (ODA) such as grants. The European Council endorsed BF as a tool of development cooperation in 2014, with other donors following suit.

Multilateral development banks (MDBs) have enthusiastically embraced BF, issuing the document “From Billions to Trillions: Transforming Development Finance”, which claimed that it ensures

“the best possible use of each grant dollar”. The Canadian minister of international development echoed this in “Turning billions into trillions: The power of blended finance”.

In a 2017 report, the OECD argued that BF can help bridge the \$2.5 trillion annual investment gap for SDGs in developing countries.

The European Union (EU), the single largest promoter of BF, has made the European Fund for Sustainable Development key to its External Investment Plan (EIP) to address investment gaps in 18 countries of South-eastern Europe, Central and West Asia, and Africa, with a budget of €2.6 billion and guarantees of €1.5 billion.

According to the 2018 Inter-Agency Task Force (IATF) report on Financing for Development, 17 of 23 members of the donor-country Development Assistance Committee (DAC) are engaged in BF, often through intermediaries such as development banks and finance institutions. It also noted that 167 new BF facilities, with approximately \$31 billion in commitments, and 189 BF funds were launched during 2000-16.

A 2016 OECD survey found \$81.1 billion from the private sector mobilized through five instruments (guarantees, syndicated loans, credit lines, direct investments in companies, and shares in collective investment vehicles) during 2012-15.

What’s the catch?

The IATF report noted the lack of a universally agreed definition of BF, while a 2017 report by the NGOs Oxfam and Eurodad listed six different definitions.

All accept ODA (e.g., grants), but other, non-ODA official finance (e.g., export credit) is also included.

Confusingly, terms such as “leveraging”, “mobilizing” and “catalyzing” are used interchangeably.

Thus, monitoring BF’s actual magnitude and development impact is difficult. BF often lacks transparency and accountability, with insufficient information made public.

Noting the confusion, Oxfam-Eurodad argued that BF can be problematic: it is not necessarily pro-poor and mainly serves middle-income countries.

Like others, they also found donor-country private corporations favoured, as with tied aid. When relying on external private finance, BF often crowded out host-country financial sectors.

Furthermore, BF projects may not be aligned with national plans and usually do not involve stakeholder participation, undermining country ownership.

An evaluation of the EU’s EIP found no reliable evidence of BF mechanisms actually aligned with and contributing to development objectives.

The IATF found BF has largely bypassed least developed countries (LDCs) so far. In 2016, the MDBs mobilized \$49.9 billion in private co-financing, with only \$1 billion going to LDCs, where infrastructure gaps are greatest.

An OECD survey found that only 7% of private finance was for projects in LDCs. According to the 2017 OECD report, between 2012 and 2015, most private financing mobilized by ODA was for middle-income countries, with little trickling to LDCs. It also noted that private capital was greatest for finance and energy.

The IATF also observed that BF tends to target investment areas where the business case is clearer – such as energy, growth, infrastructure, climate action and, to a lesser extent, water and sanitation. BF is much smaller for areas such as ecosystems, reflecting such investments’ strong “public good” character, with public finance generally more effective.

Oxfam-Eurodad noted that by pooling public resources and using ODA to subsidize private companies usually owned and domiciled in OECD countries, BF diverts aid from social programmes and essential services.

Clearly, private finance is not guided by the same interests and principles as public finance, and cannot be presumed to serve the public interest.

Labelling BF a “honey trap”, *The Economist* noted, “Private investors do not typically fund the construction of

rural roads in Africa, say, or vaccination drives in villages, even though the returns on such investments are often enormous. That is because the returns are either hard to monetize, or the risks are too great for the private sector to tolerate."

It is unclear how public development funds channelled through risky commercial financial services will effectively mobilize private resources for sustainable development.

There is no evidence that current BF practices are achieving development outcomes that would not have happened otherwise. After all, existing BF mechanisms do not safeguard the public interest and achieve development objectives. The IATF report noted limited evidence of any additional development impact due to BF.

Many BF projects do not monitor development impacts, while the few evaluations made are rarely publicly available. The limited evidence available suggests a modest impact on poverty.

Going forward

ODA nevertheless remains crucial for low-income countries. Private finances cannot achieve what public finances can, especially for social development and environmental protection.

Public finance is more predictable and effective in providing public goods. Despite much enthusiasm for using ODA or public funds to leverage private finance, many unanswered questions remain, suggesting BF is no silver bullet.

Caution is needed as the development community ascertains the pros and cons of using public money to "leverage" private finance. First steps would include a universally acceptable BF definition and a monitoring framework to ascertain the additionality of alternative BF mechanisms for both finance and development impacts.

Additionally, BF should respond to recipient countries' development strategies in the spirit of the 2015 Addis Ababa FfD Action Agenda which recognizes its potential while urging caution. (IPS) ☐

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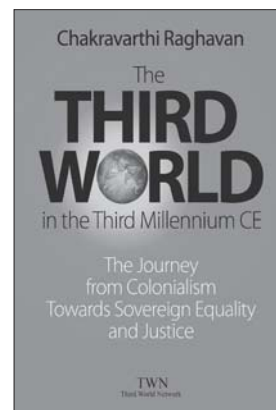
The Third World in the Third Millennium CE

The Journey from Colonialism Towards Sovereign Equality and Justice

By *Chakravarthi Raghavan*

The development path traversed by the countries of the Third World since emerging from the colonial era has been anything but smooth. Their efforts to attain effective economic sovereignty alongside political independence, even till the present day, face myriad obstacles thrown up on the global economic scene. This drive to improve the conditions of the developing world's population has seen the countries of the South seek to forge cooperative links among themselves and engage with the North to restructure international relations on a more equitable basis – not always with success.

In this collection of contemporaneous articles written over a span of more than three decades, *Chakravarthi Raghavan* traces the course of dialogue, cooperation and confrontation on the global development front through the years. The respected journalist and longtime observer of international affairs brings his inimitable blend of reportage, critique and analysis to bear on such issues as South-South cooperation, corporate-led globalization, the international financial system, trade and the environment-development nexus. Together, these writings present a vivid picture of the Third World's struggle, in the face of a less-than-conducive external environment, for a development rooted in equity and justice.



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requires considerable administrative capability that can be ensured only through suitable institutional and legal frameworks and long-lasting experience in the implementation of PPP projects.

"We found that these are currently available only in a limited number of EU Member States. Therefore, the situation does not match the EU's aim to implement greater part of EU-funds through blended projects, including PPPs."

Combining EU funding with PPPs entails additional requirements and uncertainties.

Moreover, the possibility of recording PPP projects as off-balance-sheet items is an important consideration for the choice of the PPP option, but the practice also risks undermining value-for-money and transparency.

The ECA adds: "We therefore recommend the following:

(a) not to promote a more intensive and widespread use of PPPs until the issues identified are addressed and the following recommendations successfully implemented;

(b) to mitigate the financial impact of delays and re-negotiations on the cost of PPPs borne by the public partner;

(c) to base the selection of the PPP option on sound comparative analyses on the best procurement option;

(d) to establish clear PPP policies and strategies; and

(e) to improve the EU framework for better PPP project effectiveness." (SUNS8660) □

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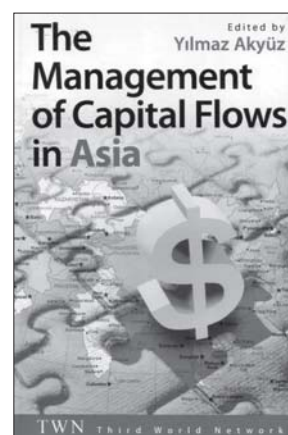
The Management of Capital Flows in Asia

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.



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