

THIRD WORLD *Economics*

TRENDS & ANALYSIS

Published by the Third World Network KDN: PP 6946/07/2013(032707) ISSN: 0128-4134 Issue No 664 1 – 15 May 2018

Trying times for developing countries in WTO

Amid a US turn to unilateralism and protectionism, and as the flexibilities they currently enjoy under the WTO rules are being questioned by the industrial nations, developing countries find themselves confronted with a challenging state of affairs at the world trade body.

- Developing and least-developed countries face worst crisis yet at WTO – p2

Also in this issue:

China urges WTO members to join fight against US unilateralism

p3

“We have to redefine policies for sustainable development”

p11

Trade rules are deeply flawed but Trump’s tariff fixation isn’t helping

p10

The energy treaty that’s boosting corporate power

p13

Contents

CURRENT REPORTS

- 2 Developing and least-developed countries face worst crisis yet at WTO
- 3 China urges WTO members to join fight against US unilateralism
- 4 G33 for policy instruments to improve food security
- 6 Dispute settlement system facing terminal existential crisis – AB chair
- 9 Australia wins major WTO ruling over tobacco plain packaging

OPINION

- 10 Trade rules are deeply flawed but Trump's tariff fixation is hurting America and the rest of the world
- 11 "We have to redefine policies for sustainable development"

ANALYSIS

- 13 The energy treaty that's boosting corporate power

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

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

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

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Developing and least-developed countries face worst crisis yet at WTO

WTO provisions according developing countries greater policy leeway are at risk from reported US moves to push for reciprocal commitments in the international trade body.

by D. Ravi Kanth

GENEVA: Developing and least-developed countries are facing the worst crisis yet at the World Trade Organization due to a sustained assault by the United States along with the European Union and Japan.

The developed countries want to curtail the special and differential flexibilities of developing countries, while foisting plurilateral negotiations in select areas without multilateral consensus, trade envoys told the *South-North Development Monitor (SUNS)*.

US President Donald Trump has ratcheted up pressure on the WTO to fall in line or face the dire consequences. Using Trump's aggressive trade demands as a pretext, some major developed countries such as the EU and Japan have been attempting to deny the special and differential treatment (S&DT) flexibilities to developing countries. They are also attempting, without multilateral consensus, to push through plurilateral outcomes in select areas, said a trade envoy from a major developing country who asked not to be quoted.

"The entire system [the WTO] is under threat following the Trump administration's trade initiatives based on fair and reciprocal market access as well as other related developments at the WTO such as the attempt to foist plurilateral outcomes without multilateral consensus, [and] intensified moves to undermine the special and differential treatment flexibilities by industrialized countries, particularly the EU," the envoy suggested.

Some WTO members such as the EU and other developed countries are seeking to undermine the S&DT architecture in every WTO committee, including on customs valuation when some countries demanded technical assistance at a recent meeting, the envoy said.

Even in the area of technology trans-

fer, which was discussed at the WTO's TRIPS Council in June, the developed countries remained cold to proposals on the incentives needed to encourage companies to transfer technologies to least-developed countries (LDCs).

"In fact, the Trump campaign against the WTO has become useful and handy for the EU and other industrialized countries to deny S&DT flexibilities and insist [that] individual developing and least-developed countries ... demonstrate the need to avail [themselves of] S&DT," the envoy said.

"The threat from the US is much more open and transparent while the EU and other developed countries are posing threats for eliminating the policy space that is in-built in the WTO system," added the envoy.

According to another developing-country trade envoy who asked not to be quoted, "the WTO Director-General Roberto Azevedo will use the threats from President Trump and his [US Trade Representative] Robert Lighthizer much more to satisfy Washington."

"Fair and reciprocal tariff" bill

On 2 July, Trump said his administration would take action against the WTO because the US has been treated "very badly."

"We are not planning anything now, but if they don't treat us properly we will be doing something," the US President said during an appearance with the Netherlands Prime Minister Mark Rutte, according to *Washington Trade Daily*.

"The WTO has treated the United States very badly and I hope they change their ways. They have been treating us very badly for many years, many years, and that's why we were at a big disadvantage with the WTO," he said.

In response to questions from report-

ers on a draft bill – “United States Fair and Reciprocal Tariff Act” – prepared by the White House for ignoring the most-favoured-nation (MFN) and scheduled commitments at the WTO, a spokesperson acknowledged the existence of the draft but denied that it will be pursued at this juncture.

“The president asked his team to develop ideas to remedy this situation and create incentives for countries to lower their tariffs,” the White House spokesperson said. “The current system [at the WTO] gives the US no leverage and other countries no incentive. The American people should expect their leadership to fight for our workers and find ways to improve the system.”

Trump has threatened to impose punitive tariffs on imports of automobiles and automotive products following the additional duties imposed on imports of steel products in June. The EU and Canada have implemented their retaliatory measures against the US’ additional steel duties.

In response to Trump’s threats and the draft “fair and reciprocal tariff” bill, several trade envoys said they were “astounded” and “shocked” at a draft bill that would enable the president to abrogate Washington’s MFN and scheduled commitments at the WTO.

The leaked five-page draft bill, which may not sail through the US Congress given its far-reaching implications, is “worrisome” because of the ideas contained in it, said envoys who asked not to be identified. After all, the underlying objectives of the draft bill are repeatedly echoed by Trump, said a trade envoy from an industrialized country.

“It raises fundamental questions about the division of powers between the executive and legislative body in the US,” the envoy said. Moreover, the leaked draft came at a time “when the US Senate is planning to take away a number of powers from the executive, especially those arising from Section 232”.

If the draft bill is passed on grounds of securing reciprocity, then it is “a serious blow to the MFN principle as well as the integrity of scheduled commitments”, the envoy said. “And it means the US could not stay in the WTO,” the envoy argued.

“Everyone has taken this with a great degree of astonishment and let us see how it comes out,” the envoy added.

Another industrialized-country

trade envoy said that he would not attach much importance to the draft bill because there have been reports that it is exaggerated. “Unless I see it as a draft bill under consideration by the US Congress, I would not comment,” the envoy said.

A third envoy said the “draft bill is so much against the WTO and doing this unilaterally would mean you are leaving the WTO.”

“If they leave the organization, it would be a very bad thing given their large share of 16% in global trade,” the envoy argued. “They are the architects of the WTO and I’m not saying if they leave, the WTO will collapse, but it would be a very bad thing.”

“I don’t want to prejudge what would come out of the draft bill but I cannot see that it will fly through Congress,” the envoy added.

During the “last 12 months so many

things happened, and I would not be surprised if it happens,” the envoy concluded.

A developing-country trade envoy said that such a bill would imply that the US administration is “simply discarding and bypassing the rules they designed and implemented all these years.”

“The US extracted maximum gains from these rules,” the envoy said. “If anything, the developing countries had consistently said they are being disproportionately disadvantaged because of the WTO rules and denied policy space to develop their industries for generating employment in their economies.”

In short, the developing and least-developed countries face the prospect of their hard-won S&DT flexibilities being taken away once and for all so as to ensure that the US stays in the WTO, said trade envoys who asked not to be quoted. (SUNS8714) □

China urges WTO members to join fight against US unilateralism

US “unilateralism and protectionism” came under fire from China at a recent WTO meeting, reports *D. Ravi Kanth*.

GENEVA: China urged members of the World Trade Organization on 3 July to join its efforts in “firmly fighting against unilateralism and protectionism”.

Inveighing against the US’ escalating unilateral measures under the Section 232 provisions of US trade law and the punitive duties on Chinese products under Section 301 provisions, China said it is “willing to continue to take concrete actions to safeguard the authority of the WTO.”

“We would also call on the whole Membership [of the WTO] to join us in firmly fighting against unilateralism and protectionism,” a Chinese official told his counterparts at a meeting of the WTO’s Council for Trade in Goods (CTG).

“The acts of the United States are a severe violation of the fundamental principles of the WTO, which would seriously damage the multilateral trading system and destruct the global trade order,” the Chinese official said, according to several participants present at the meeting.

“History tells us that if the

unilateralism is unrestrained, it would bring destruction to the world economy and all members, especially the developing country members,” China said.

Mocking the US about its sudden unilateral actions, China said “at this moment, we cannot be certain who and what product would be the next target of the US unilateralism.”

“But we can be sure that if the WTO members are not able to fight and control the current unilateralism and protectionism, the whole WTO membership including the United States would be the victims,” China maintained.

Urging the US to “respect both facts and rules”, China said it would take “all necessary measures to fight against the unilateral acts and defend its legitimate rights and interests under the multilateral trading system.”

Many developing countries and several developed countries joined China in opposing the US measures on steel and aluminium as well as the proposed measures on automobiles, arguing that these have severely undermined the multilateral

eral trading system.

In a scathing statement, China dismissed the US claims that the punitive duties imposed on steel and aluminium and the proposed duties on automobiles and automotive parts are for safeguarding US national security.

"The US Section 232 measures on products that are 'civilian' in nature are actually adopted to protect the commercial interests of its domestic interests."

"Therefore, these are purely trade protectionist measures under the disguise of 'national security' and will seriously undermine the multilateral trading system," a Chinese official told the meeting.

China and seven other parties – the European Union, India, Canada, Mexico, Norway, Russia and Switzerland – have now invoked WTO dispute settlement proceedings against the US on the steel and aluminium tariffs.

The Chinese official also cited a statement made by Peter Navarro, the Director of the US White House National Trade Council, who had said that "[a]ny country ... which [is] exempted from the tariffs will have a quota and other restrictions." China asked the US to clarify whether the statement is true and whether the US has now reached any agreements on quotas or any form of "voluntary export restriction" with the countries which are exempted from the Section 232 measures.

Further, China expressed "grave concerns" over the latest Section 232 investigations on imports of automobiles and automotive parts. It said "automobiles and parts and components thereof imported by the US are mostly products for civilian purposes and [by] no means involve 'national security'."

China said "the frequent initiations by the United States of investigations under Section 232 are obviously protectionist under the guise of 'national security' and will significantly distort the global market and value chain."

Commenting on the US Trade Representative Robert Lighthizer's decision to impose an additional duty of 25% on \$50 billion worth of Chinese imports under the Section 301 provisions of the US Trade Act, China said the US measures "are purely unilateral actions which are inherently incompatible with the multilateral trading system."

The US was to collect additional duties on \$34 billion of Chinese goods from

6 July and review the remaining \$16 billion through public notice and comment process. It has also threatened to impose additional duties on another \$200 billion worth of products from China.

The US, however, objected to China's statement on the Section 301 measures, arguing that it was not part of the CTG agenda, said a participant after the meeting.

On the Section 232 measures on steel and aluminium, the US said the issue is already under dispute settlement proceedings.

But more than 40 countries chided the US for imposing the additional duties on steel and aluminium and the threat to impose duties on automobiles and automotive parts.

Japan and Russia had included the Section 232 measures in the CTG agenda.

The EU said the proposed measures to restrict the import of cars, car parts and light trucks on grounds of national security are unjustifiable as there is no economic threat to the US automobile industry.

Trade conflict

Meanwhile, in a statement issued at the German Bundestag on 4 July, German

Chancellor Angela Merkel warned the Trump administration that hitting auto imports with new tariffs would have dire consequences. "We now have tariffs on aluminium and steel and we have a discussion that is far more serious," she said, according to CNN.

"This is taking on the contours of a trade conflict – I don't want to use words that go any further. It's worth every effort to try and defuse this so that this conflict does not become a war," she said.

According to the *Washington Trade Daily* of 5 July, Trump has threatened to impose a 20% tariff on all European cars coming to the US if the EU doesn't remove its own trade barriers.

"Targeting cars would dramatically raise the stakes in the spat between Europe and its biggest trading partner. EU-US trade in goods and services is worth more than \$1.2 trillion each year," WTD reported.

In short, it is a defining moment for the WTO members as to whether they can join hands against the US to curb its unilateral actions or allow Washington to assume the dangerous face of what the world witnessed in the run-up to the Second World War following the unilateral actions of a former German chancellor. (SUNS8716) □

G33 for policy instruments to improve food security

The G33 developing-country grouping wants to revive negotiations aimed at advancing food security and redressing "imbalances and inequities" in the WTO rules governing agricultural trade.

by D. Ravi Kanth

GENEVA: Members of the G33 farm coalition have upped the ante for addressing "policy instruments to improve food security, livelihood security and rural development" at the WTO because of "severe food insecurity" in most developing countries during the past several years.

In a proposal entitled "Reaffirming Multilateralism and Development for MC12", the G33 coalition of developing and poorest countries said their small-scale producers are facing the worst livelihood crisis because of the continued

short-term price volatility in agriculture.

The two-page proposal, which was submitted to the Doha negotiating committee on agriculture on 5 July, lists the unaccomplished reforms that are much needed now for coming to grips with the continued "inequities and imbalances in the Uruguay Round Agreement on Agriculture (AoA)."

The small-scale farmers in developing and poorest countries who depend on agriculture for their livelihood urgently need an "open, transparent but also, more importantly, a development-

oriented trading system that provides a level playing field", the G33 said.

Expressing sharp disappointment at "the lack of consensus" during the WTO's eleventh Ministerial Conference (MC11) in Buenos Aires last year, the G33 said developing countries are hindered by the failure to address issues related to food security, livelihood security and rural development.

At MC11, the United States had single-handedly blocked the chair's draft negotiating text at the meeting on the ground that it could not agree to any outcome on the permanent solution for public stockholding programmes for food security.

"The US came to the Buenos Aires meeting with a decision to block the permanent solution for public stockholding programmes for food security because of its new farm bill," said a trade minister who had participated in the "green room" meeting at MC11 convened by facilitator Amina Mohamed, the then Foreign Affairs Secretary of Kenya.

The WTO Director-General Roberto Azevedo too sided with the US in ensuring there was no progress on the permanent solution for public stockholding programmes and on a special safeguard mechanism for developing countries, said an African trade minister who asked not to be quoted. "The US and the director-general played their part in blocking progress on the two vital issues at Buenos Aires," the minister said.

At one point in Buenos Aires, the facilitator threatened the director-general in a closed-door meeting that she would take the next flight if the latter continued to play an inimical role, the minister said.

Critical policy instruments

Over the last 17 years of the Doha agriculture negotiations in the WTO, the G33 has steadfastly called for "meaningful Special Products (SP), an accessible and effective Special Safeguard Mechanism (SSM) and a permanent solution on Public Stockholding for Food Security Purposes (PSH)."

The G33 said these three policy instruments – SPs for ensuring that certain products are completely exempted from any commitments, the PSH to ensure that market price support programmes do not come into play for providing major food

grains at affordable prices, and the SSM to enable developing countries to face unforeseen surges in imports of vital agricultural commodities, especially cereals – are an imperative for "developing Members to deal with challenges, particularly in sustaining investments in agriculture for food security, livelihood security and rural development, as well as addressing the destabilizing and crippling effects of import surges and downward price swings in the increasingly volatile global agricultural markets."

Given hundreds of millions of small-scale agricultural producers, "which represent the majority of the food insecure population in developing Members," there is an urgent need to kickstart the negotiations so as to ensure an outcome at the WTO's twelfth Ministerial Conference (MC12) next year, the G33 pointed out.

The G33 maintained that, based on data from the UN Food and Agriculture Organization (FAO), 22.3% of the population in developing countries are engaged in agriculture as compared with 4.8% in developed countries.

Moreover, "the average size of agriculture holdings in some developing Members [is] minuscule, 2.2 hectares in Asia and 2.92 hectares in Africa, while for some developed Members the number is far beyond that, 349 hectares in Canada, 186.95 hectares in the United States, and 27.27 hectares in the European Union," said the G33.

Further, data prepared by several international agencies suggest that "small-scale farmers, with equal to or less than two hectares of landholdings, provide up to 80% of the food supply in some developing regions and represent 85% of the world population active in agriculture; three out of four of the world's extreme poor live in rural areas."

Therefore, it is essential to increase the production and income of small-scale producers so as to improve access to food among the most vulnerable and improve supply for local and domestic markets.

"Sustaining small-scale agriculture is, therefore, critical for maintaining food security in developing country Members, as it is the source of income for the overwhelming majority of the poor on the one hand, and the main source of food supply, on the other," the G33 argued.

"As rural households in developing Members are both producers and pur-

chasers of agricultural products, the impacts of price volatility for them are complex," the G33 maintained.

In the face of a continued threat from heavily subsidized farm producers, the small-scale and resource-poor farmers remain vulnerable to both price collapses and dramatic price surges.

Imbalanced rules

Further, the continued "imbalances and inequities inherited from the Uruguay Round in favour of developed countries" pose an existential threat for small farmers in developing countries.

The developed countries continue to enjoy a plethora of Uruguay Round entitlements such as high Aggregate Measurement of Support (AMS, or most trade-distorting Amber Box farm subsidies) beyond *de minimis* with no product-specific caps; very high levels of total per capita domestic support; non-transparent and complex tariff-rate quotas and non-*ad valorem* tariff systems including tariff peaks and escalation; and the highest entitlements to the Special Safeguard Provisions (SSG), the G33 pointed out.

Consequently, the so-called high tariffs for agriculture in developing countries have "not been able to effectively safeguard the interests of small-scale farmers from periodic import surges and almost permanent market distortions in global agriculture trade."

"The prevalence of severe food insecurity has increased in most developing regions between 2014 and 2016, including in Latin America, West Asia and North Africa, Sub-Saharan Africa and East and Southeast Asia," the G33 said.

FAO has projected that during the next decade, many developing members will significantly increase their dependency on agricultural imports, assuming current agricultural policies remain in place, the G33 pointed out.

At a time when WTO negotiations to eliminate fisheries subsidies particularly for illegal, unreported and unregulated fishing are being advanced by invoking the UN Sustainable Development Goals (SDGs), the G33 said the SP, PSH and SSM instruments will also go towards supporting the SDGs.

Against this backdrop, the WTO members must "collectively address those challenges and put the WTO on a steady, meaningful path forward," the

G33 stressed.

The G33 said it wants to reinvigorate the negotiations in the WTO and use the multilateral forum to “develop trade rules that would be beneficial to all its Members.”

It said “work to address imbalances and inequities must be continued based on Article 20 of the Agreement on Agriculture, and reinforced by the Doha Development Agenda which puts ‘development’ and special and differential treatment (S&DT) for all developing Members at its core.”

“Until the same is achieved, we firmly believe that the negotiations must continue, building on the various Ministerial decisions/declarations and the development framework we have agreed since 2001,” the G33 demanded.

It reminded developed countries that there “was a clear mandate to arrive [at] and adopt a permanent solution on

PSH by 2017. Unfortunately, the mandate could not be fulfilled at MC11.”

Therefore, the WTO members must “redouble” their efforts towards a permanent solution for public stockholding programmes for food security, which would facilitate the achievement of a number of SDG goals concerning “the elimination of poverty, malnourishment and hunger, to which we are all committed.”

The G33 called on WTO members to “constructively and meaningfully engage” on these issues with a view to delivering outcomes by MC12. In turn, this will send a strong signal that “the negotiating arm of the WTO continues to remain in business.”

In conclusion, the G33 said that it is “willing to engage constructively and contribute to a credible and balanced outcome which withstands the test of development at MC12 and beyond.” (SUNS8719) □

Dispute settlement system facing terminal existential crisis – AB chair

The head of the WTO’s Appellate Body has said its “legitimacy” and “existence” are under threat amid a lengthy impasse in appointing new members to the body and criticism of its functioning.

by D. Ravi Kanth

GENEVA: The chair of the World Trade Organization’s Appellate Body (AB) Ujal Singh Bhatia on 22 June cautioned WTO members that the dispute settlement system is facing a terminal existential crisis following “the year-long impasse on the process for appointing the AB members,” and “its reduced strength” is now threatening its “legitimacy”.

“Unless WTO members take swift and robust action to remedy this situation, there may soon come a time when appellate proceedings are paralyzed if fewer than three AB members are available,” the chair warned.

By December 2019, the AB will be reduced to just one member if the current three vacancies are not filled and the second term for a sitting member (Shree Babu Chekitan Servansing) is not extended by end-September.

“If rules cannot be enforced, is there a point to negotiating them?” the AB

chair pointedly asked.

Bhatia cautioned WTO members that the AB is now facing the terminal existential crisis because of continued attempts to block the selection process for filling vacancies in the body and terminate the principle of “negative consensus” under the WTO Dispute Settlement Understanding (DSU).

The AB chair urged members to enter into an urgent “political dialogue” to address two fundamental challenges facing the WTO dispute settlement system – “the burgeoning pressure of increasingly complex disputes at various stages” and “the way the DSU should be used to resolve disputes” – failing which “these challenges can cripple, paralyze or even extinguish the system.”

The AB chair made his comments when presenting the AB’s annual report, a few hours after the US trade envoy to the WTO, Ambassador Dennis Shea, had

launched a searing critique at the WTO Dispute Settlement Body (DSB) of the AB’s failures to circulate its reports within the 90-day deadline under Article 17.5 of the DSU.

Shea also threatened that any report or ruling issued by the AB after the 90-day deadline should not be adopted under the principle of negative consensus. (This principle, which is mandated by the DSU, requires an AB report to be adopted unless there is complete consensus among WTO members to reject the report. This effectively entails automatic adoption since the member favoured by the report will almost certainly withhold such consensus.)

Several members sharply disagreed with the US trade envoy’s assessment on the 90-day deadline as well as on the negative consensus framework.

“We find it striking [for the US] to criticize the Appellate Body for delays while at the same time not allowing the new appointments [to the AB] to take place,” the European Union said pointedly.

The EU also squashed the US proposal for not adopting the negative consensus principle if an AB report is delayed beyond 90 days. It argued that the principle is “absolute” and valid for both “late” and “timely” AB reports.

US complaint

At the DSB meeting, the US again blocked a proposal from more than 66 countries for establishing an expeditious selection process to fill the three vacancies in the AB.

This came after Shea had launched the scathing attack on the AB for failing to respect Article 17.5 of the DSU and “the mandatory requirement to complete appeals in no more than 90 days, with no exceptions.”

Shea said the AB had respected this rule prior to 2011 and “when there were deviations, it was only with the agreement of the parties.” But since 2011, the AB resorted to “inexplicable” practices, with the “appeals taking longer and longer”.

The US envoy said “there are serious consequences for the WTO dispute settlement system of the AB’s repeated, flagrant breach of Article 17.5.”

He, however, remained silent on the US failure to implement the WTO dis-

pute settlement recommendations and the AB rulings in several cases for more than 16 years.

Shea said Article 17.5 “does not accord discretion to the Appellate Body to issue reports beyond the 90-day deadline.” He said “if any Member considers today that Article 17.5 does not mean exactly what it says, we would simply point out that, some 20 years ago, the Appellate Body understood Article 17.5 to mean exactly what it says.”

The US trade envoy pointed to several instances before 2011 when members cooperated to facilitate the ability of the AB to meet the 90-day deadline. “At the request of the parties to the dispute, the DSB several times agreed to take DSB decisions to extend the time period for adoption or appeal of panel reports so that the appeal could be considered at a time when the Appellate Body would be better placed to issue its report within 90 days,” he said.

From 2011, the AB began ignoring the 90-day requirement, he said. “Some WTO members had expressed significant concerns,” the US envoy said, suggesting that “starting with the appeal in [the] US-Tyres (China) [dispute], the Appellate Body, without explanation, departed from the long-established practice of consulting and obtaining parties’ consent where it considered it could not meet the 90-day requirement.”

During the last eight years, the AB “has frequently and increasingly breached its 90 days obligation,” said Shea.

“This problem may also relate to other systemic concerns Members have expressed [the systemic concerns have been largely raised by the US]. For example, an appeal will take longer where the Appellate Body spends valuable time addressing issues that [are] not necessary to resolve a dispute.”

The US repeatedly said the AB deviated from the covered agreements even though the complexity of the disputes required a thorough examination of all issues coming under the purview of the dispute.

The US envoy said “the AB creates reasons for breaching the rule rather than changing its behaviour to ensure compliance with the rule”. Thereby, the AB “diminishes the rights of WTO Members contrary to DSU Article 3.2 and undermines confidence in the WTO as a

whole.”

Therefore, “it is past time for WTO Members to meet their responsibility to administer the WTO rules-based system according to the rules,” Shea argued.

Because of the AB’s flagrant violation of Article 17.5 of the DSU, he said, any report issued by the AB after 90 days would “no longer qualify[y] as an Appellate Body report for purposes of the exceptional negative consensus adoption procedure of Article 17.14 of the DSU.”

“No party should bear uncertainty as to the adoption of a report due to the adjudicator’s unwillingness to follow the rules or obtain the DSB’s agreement to deviate from those rules,” the US envoy said.

Unsurprisingly, the US did not address the growing complexity of trade disputes as mentioned by several members during the 22 June DSB meeting.

Twin challenges

A few hours after the US envoy launched the attack on the AB, AB chair Bhatia presented the AB’s annual report for 2017.

Bhatia began by saying “these are extraordinary times” for the WTO’s dispute settlement system, which is now facing two “contrasting and yet related challenges that threaten its legitimacy as well as its existence.”

“On the one hand, the dispute settlement system, which has for two decades established its credentials as an efficient and impartial mechanism, faces the burgeoning pressure of increasingly complex disputes at various stages. On the other, some recent critiques have raised fundamental questions about the way the DSU should be used to resolve disputes.”

It is an open secret that the US has been arguing for the past one year that WTO members should revert to the pre-1995 phase of resolving trade disputes by negotiating the findings issued by panels. The US has also argued against the negative consensus principle of the DSU.

The AB chair urged members to address the twin challenges as they are “clearly beyond the capacity of the dispute settlement system itself to resolve, and they call for determined political dialogue among WTO Members.”

“Left unaddressed,” he warned, “these challenges can cripple, paralyze

or even extinguish the system.”

The AB chair maintained that 551 disputes have thus far been initiated by WTO members under the dispute settlement system, resulting in 230 circulated panel reports and 136 circulated AB reports.

“Aside from the sheer number of disputes that Members have submitted to dispute settlement – which is a sign of empirical legitimacy – it is worth mentioning the almost total absence of instances where Members have chosen not to implement a ruling upon losing it,” he said. “While losing parties have criticized individual rulings, these critiques have rarely challenged the overall authority or legitimacy of the WTO judicial mechanism.”

Bhatia said “given the number, size, and complexity of appeals, coupled with the resources provided to it, the AB cannot be realistically expected to deliver high-quality reports within the timeframes prescribed in the DSU.”

“Long delays in filling vacancies in the AB obviously do not help either,” he said.

“Given the daunting mismatch between its workload and resources, the AB has undertaken several initiatives to simplify and streamline the content of its reports and its legal analysis,” he said.

Bhatia said “the growing incongruence between the disputes being referred to the WTO dispute settlement system, the resources allocated to it, and the rules and procedures governing it are together leading to very significant delays.”

Interpretative issue

The AB chair went on to offer a detailed explanation as to what the WTO’s highest adjudicating body is required to do under its mandate set out in Article 3.2 of the DSU.

He said that “while many provisions of international treaties are agreed upon in clear and detailed language, certain provisions may be couched in what international lawyers call ‘constructive ambiguity’, where consensus on precise language could not be reached during negotiations.”

“In the WTO context, when a dispute arises in relation to such an unclear or ambiguous provision, adjudicators are to examine that provision in accordance with customary rules of interpretation

and to apply them to the particular case," he said.

Without naming the US, Bhatia said "some [members] argue that where adjudicators encounter such ambiguity or lack of clarity, they should refrain from examining it and instead leave it for WTO Members to deal with."

"Others support the need for resolving the interpretative issue so as to make sure that disputes are not left unresolved," he said.

Given the "constructive ambiguity" in rules, he said, it is imperative for the AB to strictly follow the "customary rules of interpretation of public international law" as codified in the Vienna Convention on the Law of Treaties.

"When adjudicators, having applied these interpretative tools, conclude that certain conduct is outside the scope of application of the treaty obligation invoked, they should have no hesitation in ending their analysis there," he said, stating that "if an issue is not regulated in WTO law, WTO Members are entitled to act as they please." He gave the example of the Havana rum trademark dispute, saying the AB "agreed with the panel that this definition has been left to the legislative discretion of individual countries."

The AB chair said "Article 3.2 provides that the dispute settlement system serves to clarify WTO provisions in accordance with customary rules of interpretation." But "how far should the dispute settlement system go in 'clarifying' ambiguous provisions, and where are the limits?"

Again without naming the US, Bhatia said "there appears to be a tension between the minimalistic approaches favoured by some and the requirements under Article 11 of the DSU for panels to make 'an objective assessment of ... the applicability of and conformity with the relevant covered agreements' and under Article 17.12 for the Appellate Body to 'address' each issue of law and legal interpretation covered in the panel report that is raised during an appellate proceeding".

"When we sit in judgement of specific cases, these issues are not always easy to resolve," he argued.

The AB chair raised several questions: "[D]o ... DSU provisions provide WTO adjudicators with the discretion to deny clarifying WTO provisions where

such clarification is necessary to resolve the dispute? Do they permit adjudicators to deny exercising jurisdiction to resolve the dispute when it has been properly established?"

He said "it is important to note that a decision not to fully address an issue could, in effect, be a decision in favour of one of the participants, possibly altering the rights and obligations of WTO Members."

"There are also cases in which Members raise an issue on appeal concerning a 'legal interpretation developed by the panel', as contemplated by Article 17.6, without challenging the ultimate conclusion that the panel reached," he said.

"Security and predictability"

Bhatia said "the issue of consistency of rulings in WTO dispute settlement is closely connected to the mandated requirement for 'security and predictability'".

"As is well known, one reason for creating the Appellate Body was to provide greater guarantees to WTO Members that panel reports would be subject to review, in the context of the adoption of the reverse consensus principle. The Appellate Body has taken the view that ensuring 'security and predictability' implies that, absent cogent reasons, an adjudicator will resolve the same legal question in the same way in a subsequent case," he maintained.

The AB chair said "each case has to be considered on its own merits, and cases or issues that appear to be similar may be decided differently when they can be distinguished from earlier cases or when factual scenarios are different."

In a riposte to the US charge that the AB deviates from the covered agreements, Bhatia said that a *tabula rasa* approach which consciously sweeps aside the past could not meet the requirements of "security and predictability" as outlined in the DSU.

Citing the rulings issued by international investment arbitration tribunals, which have caused difficulties to parties because of the "lack of consistency in first-instance arbitration rulings", he saw this as "an immediate counterfactual of a system without a review mechanism for ensuring coherence and predictability."

Debilitating impasse

Bhatia pointed to the challenges confronting the WTO dispute settlement system. "Given the urgency for decisions regarding the AB, inaction is no longer an option," he said, arguing that "the year-long impasse on the process for appointing AB Members is debilitating the Body."

The AB's "reduced strength is undermining the collegiality of our deliberations, and the lack of proper geographical representation threatens its legitimacy."

"I need not point out that the reduction in our numbers will cause further delays in appellate proceedings," he warned.

"Unless WTO Members take swift and robust action to remedy this situation, there may soon come a time when appellate proceedings are paralyzed if fewer than three AB Members are available," Bhatia cautioned.

"Such a paralysis would have profound implications on panel proceedings," he said, arguing that "the Appellate Body and panels are part of one dispute settlement mechanism, and one cannot properly function without the other."

"Where a panel report is appealed, but an Appellate Division cannot be formed to hear that appeal, the adoption of the panel report is suspended until the Appellate Body can complete its proceedings," he said. "This would lead to the de facto demise of the negative consensus rule that has characterized the WTO dispute settlement system since 1995. Any losing party would be able to prevent the adoption of the panel report by appealing it to a paralyzed Appellate Body."

"If rules cannot be enforced, is there a point to negotiating them?" asked Bhatia.

The chair said "while the WTO dispute settlement system has to enforce existing international obligations, it also has to respect the limits of those rules and identify areas where national sovereignty is not constrained".

"But WTO Members also need to bear in mind the consequences of their actions on the effectiveness of the international system. In an interdependent world, global problems demand global solutions, and even national problems

often require international cooperation," he said.

In conclusion, the AB chair's assessment points to a grim situation that could

lead to the demise of the AB by end-2019, unless the WTO members act on a war footing to strengthen the highest adjudicating body. (SUNS8708) □

Australia wins major WTO ruling over tobacco plain packaging

Australian regulations requiring standardized packaging for tobacco products have been deemed not to fall foul of WTO rules, in a decision welcomed by tobacco control advocates.

by Kanaga Raja

GENEVA: In a landmark ruling that could have major implications for the enactment of tobacco control policies by other countries, a WTO panel has rejected complaints that Australian tobacco plain packaging regulations violated the WTO's Agreement on Technical Barriers to Trade or trademark rights under the TRIPS Agreement.

The ruling was handed down by a dispute panel that heard the complaints raised by Honduras, the Dominican Republic, Cuba and Indonesia.

A number of WTO member states that had kept ready similar regulations held up their moves when the Australian regulations were challenged at the WTO.

The ruling can be appealed by any of the parties to the dispute, and according to media reports, Honduras has indicated that it would appeal, arguing that the ruling contained a number of legal and factual errors.

Also known as "standardized packaging", plain packaging prohibits the use of logos, colours, brand images and promotional information on tobacco products and packaging, other than brand and product names in a standardized colour and font.

In its much-anticipated ruling, which runs to over 880 pages, the panel found that the complainants had not demonstrated that the tobacco plain packaging measures enacted by Australia are inconsistent with Australia's obligations under the relevant provisions of the Agreement on Technical Barriers to Trade and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

In respect of a claim by Cuba, the panel also found that Cuba had not dem-

onstrated that the plain packaging measures are inconsistent with Australia's obligations under Article IX.4 of the General Agreement on Tariffs and Trade (GATT) 1994.

Importantly, the panel further found that, individually, each of the four alternative measures proposed by the complainants – an increase in the minimum legal purchasing age, increased taxation of tobacco products, social marketing campaigns and a pre-vetting mechanism – would not make a contribution to Australia's objective that is equivalent to the contribution made by the plain packaging measures as part of Australia's broader regulatory framework regarding tobacco control.

In conclusion, the panel declined the complainants' requests that the panel recommend that the WTO Dispute Settlement Body request Australia to bring the measures at issue into conformity with the Agreement on Technical Barriers to Trade and the TRIPS Agreement (in the case of Cuba's claim, also the GATT 1994).

Some 40 WTO members had participated as third parties in at least one of the four disputes. In addition, some 41 *amicus curiae* briefs were submitted during the panel proceedings.

Ukraine was also initially a complainant but, following its request to suspend the proceedings in its dispute with Australia, the authority for the establishment of the panel in that dispute lapsed.

"Resounding victory"

Media reports cited Australian Trade Minister Steven Ciobo and Rural Health Minister Bridget McKenzie as saying in

a statement following the issuing of the ruling: "Australia has achieved a resounding victory."

In its statement, the World Health Organization (WHO) said that the ruling "clears another legal hurdle thrown up in the tobacco industry's efforts to block tobacco control and is likely to accelerate implementation of plain packaging around the globe."

WHO noted that in December 2012, Australia was the first country to fully implement tobacco plain packaging. Today, six other countries have implemented plain packaging laws (Hungary, Ireland, France, New Zealand, Norway and the United Kingdom), another six have passed laws yet to be implemented (Burkina Faso, Canada, Georgia, Romania, Slovenia and Thailand) and a number of other countries are examining the policy.

WHO and the secretariat of the WHO Framework Convention on Tobacco Control (FCTC) had provided the WTO panel with a joint submission or *amicus* brief.

According to the WHO statement, the WTO complaints brought by the four countries were not the only legal challenge brought against Australia's tobacco plain packaging law.

A domestic Constitutional challenge to the legislation was dismissed in August 2012, and in December 2015, an international tribunal hearing a claim brought by tobacco company Philip Morris Asia under a bilateral investment treaty between Australia and China (Hong Kong Special Administrative Region) held that it did not have jurisdiction to hear the claim.

Legal claims challenging plain packaging laws in other countries, including France (5), Norway (6) and the United Kingdom (7), have also been dismissed, said WHO.

A Reuters news report cited Vera Luiza da Costa e Silva, the head of the FCTC secretariat, as saying that it was a huge day for tobacco control. "What this shows in reality is that plain packaging is a reality."

"It will happen anyway, and parties will progressively adhere more to plain packaging," da Costa e Silva added.

(continued on page 12)

Trade rules are deeply flawed but Trump's tariff fixation is hurting America and the rest of the world

Donald Trump's tariff-centric policies won't right the wrongs of an unfair global trade system.

by Kevin P. Gallagher

There's no end in sight to the tariffs US President Donald Trump will impose on imports from the nation's best customers.

He has hiked tariffs on goods and services from China, Canada, Mexico, Europe and beyond, prompting a wave of retaliation in kind that is sure to crimp American exports of everything from pork and soybeans to synthesizers.

The tweeter-in-chief has even speculated that tariffs alone perhaps could raise enough revenue to fund the government and ditch the income taxes he recently slashed altogether. And Trump is reportedly mulling whether to quit the World Trade Organization (WTO) – the global body that governs world trade – rather than follow its rules regarding tariffs.

Having studied the globalization of trade, finance and investment for over two decades, I agree with Trump that international trade rules are unfair. Even so, I believe Trump's tariff-centric trade policies are a raw deal that won't fix what's broken about the global trading system.

Globalization's golden age

Today's trading system began to emerge towards the end of World War II when 730 delegates from 44 nations gathered in Bretton Woods, New Hampshire, to lay the foundation of a new international economic order.

These diplomats and economists sought to create a system that would stave off global wars and foster shared prosperity by spurring more trade. They laid the groundwork for the International Monetary Fund (IMF), the World Bank and the precursor of the institution that later became the WTO, to support this new economic order.

Highly influenced and shaped by US

President Franklin D. Roosevelt's New Deal policies, the initial trade rules were calibrated towards the pursuit of financial stability and full employment.

A golden age of capitalism ensued. Between 1950 and 1973, average incomes in the US and the rest of the world grew at a faster rate than they had for the prior century – and haven't been beaten since. There were few financial crises and strong employment. In many parts of the world, workers gained important civil and human rights.

Corporate power elbows in

Beginning in the 1980s, the nature of trade and investment treaties changed significantly. Trade, finance and investment became ends in and of themselves, rather than the means to shared prosperity that the international economic order had been centred on.

On top of the WTO's establishment in 1994, more than 2,000 regional and bilateral trade deals, such as the North American Free Trade Agreement (NAFTA), proliferated.

Rather than tightly regulating the financial sector so that finance, trade and investment flow towards productive investment and good jobs, these deals seek to deregulate finance and investment. They make it illegal for participating countries to enforce regulations meant to ensure productive investment, meaningful employment and social welfare. What is more, many of these treaties allow corporations to sue governments through private tribunals that usually side with foreign firms over host-country regulations on finance, public welfare and the environment.

Free trade has been very, very good to the US, but it is yielding diminishing returns. By all accounts, the era of corporate globalization hasn't delivered like

the golden age did. The Peterson Institute for International Economics, a think-tank, estimates that trade liberalization injected \$1 trillion into the US economy between 1947 and 2002, yet more than 90% of those gains had already occurred by 1982. The benefits of trade deals since that time have been marginal, and are shrinking.

Indeed, the definitive study of NAFTA by members of the US Federal Reserve, the National Bureau of Economic Research and Yale University found that the pact only led to a marginal US economic boost equal to a one-time 0.08% increase in GDP. If all the tariffs in the world were completely eliminated, there would only be a one-time bump in the world economy of just 0.7%.

As the gains from trade shrank, its costs grew. Financial crises became more frequent. Indeed the IMF found that the countries that liberalized their financial services industry, as many trade and investment pacts required them to do, were among the worst hit by the Great Recession.

MIT economists have found that the WTO accentuated American deindustrialization, likely costing as many as 2.4 million jobs.

Rather than investing the profits from globalization into productive and employment-generating activity, global corporations have been choosing to speculate with their profits and buy back their own stock.

The government isn't investing the gains from trade either. Research at the Brookings Institution shows that the people who lose their jobs because of free trade are not compensated enough to make up for their losses through Trade Adjustment Assistance, a programme that pays for people who wind up unemployed due to overseas outsourcing to get professional training and the like.

And these losses for American workers have not translated into widespread gains overseas. Indeed, NAFTA boosted Mexico's trade and investment yet its per capita growth has hardly budged. Environmental damage, however, has followed since NAFTA shifted pollution-intensive manufacturing south of the Rio Grande. Rural communities have suffered since more than 2 million Mexican farmers and farmworkers lost their livelihoods to cheap imported corn and other agricultural products exported from the US.

Bound for failure

Trump's tariff fixation and predisposition to renege on every trade deal his predecessors adopted won't right these wrongs. Some of these moves may give temporary relief to workers and industries in areas long battered from bad policy. But this strategy will ultimately fail for three reasons.

First, the tariffs that do improve conditions for some workers will eventually squeeze workers in other businesses – and in foreign countries. For example, higher tariffs on imported steel and aluminium will harm the automotive industry and construction, which are big employers. That was a lesson the White House should have learnt from reviewing what happened when President George W. Bush experimented with similar across-the-board tariff hikes in 2002.

Second, Trump's alternatives to the trade entanglements he inherited – as seen in his NAFTA renegotiation proposals – would still tilt the rules towards big oil, gas and pharmaceutical companies over consumers, citizens and the environment.

Third and most importantly, trade policies are simply tools that should help

achieve broader economic goals. And so far, Trump has not given any hints that his team is hatching a parallel set of economic policies that will benefit all Americans, let alone the world economy.

Rather than providing incentives for corporations to invest more in productivity and create more good jobs, Trump is doing his best to dismantle regulations adopted after the most recent financial crisis that were supposed to force the financial sector to act more responsibly. To pay for his tax cuts, he is aiming to slash spending on research and development and on other programmes that make the country more competitive.

If he really does want to make America – and the world economy – great again, I believe that Trump should look to globalization's golden age for inspiration rather than haphazardly slapping tariffs on imports from our trading partners and expanding many of the failed policies that got him elected in the first place. □

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“We have to redefine policies for sustainable development”

Jens Martens outlines measures to reinvigorate the flagging effort to achieve the global Sustainable Development Goals.

When United Nations member states adopted the 2030 Agenda for Sustainable Development, they signalled with the title “Transforming Our World” that it should trigger fundamental changes in politics and society.

But three years after its adoption, most governments have failed to turn the proclaimed transformational vision of the 2030 Agenda into real policies. Even worse, the civil society report *Spotlight on Sustainable Development 2018* shows that policies in a growing number of countries are moving in the opposite direction, seriously undermining the spirit and the goals of the 2030 Agenda.

The problem is not a lack of global financial resources. On the contrary, in recent years we have experienced a mas-

sive growth and accumulation of individual and corporate wealth worldwide.

The policy choices that have enabled this unprecedented accumulation of wealth are the same fiscal and regulatory policies that led to the weakening of the public sector and produced extreme market concentration and socioeconomic inequality.

The extreme concentration of wealth has not increased the resources that are available for sustainable development.

As the *World Inequality Report 2018* states, “Over the past decades, countries have become richer, but governments have become poor” due to a massive shift towards private capital.

But even where public money is available, all too often public funds are

not allocated in line with the 2030 Agenda and the Sustainable Development Goals (SDGs) but spent for harmful or at least dubious purposes, be they environmentally harmful subsidies or excessive military expenditures.

According to the Stockholm International Peace Research Institute (SIPRI), global military expenditure rose again in 2017, after five years of relatively unchanged spending, to \$1.739 trillion. In contrast, net official development assistance (ODA) by members of the OECD Development Assistance Committee (DAC) was only \$146.6 billion in 2017, less than a tenth of global military spending.

“The world is over-armed while peace is under-funded,” states the Global Campaign on Military Spending.

Particularly alarming has been the decision of the NATO member countries to increase military spending to at least 2% of their national gross domestic product (GDP). Even just for the European NATO members, this decision would mean a minimum increase of €300 billion per year, most likely at the expense of other parts of their national budgets. The 2% goal represents a kind of “Unsustainable Development Goal” and is in sharp contradiction to the spirit of the 2030 Agenda.

Gaps and contradictions exist not only in fiscal policy and the provision of the financial means of implementation for the SDGs. The most striking examples are climate and energy policies.

Instead of tackling unsustainable production patterns and taking the “polluter pays” principle seriously, action is postponed, placing hope on technical solutions, including research on geoengineering, i.e., dangerous large-scale technological manipulations of the Earth's systems.

Of course, major technological shifts are necessary to unleash the transformative potential of the SDGs and to turn towards less resource-intensive and more resilient economic and social development models. But this must not mean an uncritical belief in salvation through technological innovations, whether with regard to climate change or to the potential of information and communications technologies.

UN Secretary-General Antonio Guterres recently called on member states to address the “dark side of innovation”. This includes the new challenges

of cybersecurity threats, the intrusion into privacy by artificial intelligence, its impact on labour markets, and the use of military-related "cyber operations" and "cyber attacks".

The "dark side of innovation" could also be the leitmotif characterizing the dominant fallacies about feeding the world through intensified industrial agriculture. While the prevailing industrial agriculture system has enabled increased yields, this has come at a great cost to the environment as well as to human health and animal welfare. At the same time, it has done little to address the root causes of hunger or to deal with inherent vulnerabilities to climate change.

Alternatives to business as usual

But despite these gloomy perspectives, there is still room for change.

Contradicting policies are not an extraordinary phenomenon. They simply reflect contradicting interests and power relations within and between societies – and these are in constant flux and can be changed.

Bold and comprehensive alternatives to business as usual exist in all areas of the 2030 Agenda, and it is up to progressive actors in governments, parliaments, civil society and the private sector to gain the hegemony in the societal discourse to be able to put them into practice.

Some of the necessary political action and reforms can be summarized in the following four points:

1. *Turning the commitment to policy coherence into practice:* To date, the mainstream approach to sustainable development has been one of tackling its three dimensions (economic, social and environmental) in their own zones, complemented by (occasional) coordination between them. This approach has not created a strong institutional basis for decision-making and policy change across the three pillars. There is a need for a whole-of-government approach towards sustainability.

The implementation of the 2030 Agenda and the SDGs must not be hidden in the niche of environment and development policies but must be declared a top priority by heads of government.

2. *Strengthening public finance at all levels:* Widening public policy space requires, among other things, the necessary changes in fiscal policies.

In other words, governments have

to formulate Sustainable Development Budgets in order to implement the Sustainable Development Goals. This includes, for example, taxing the extraction and consumption of non-renewable resources, and adopting forms of progressive taxation that prioritize the rights and welfare of poor and low-income people.

Fiscal policy space can be further broadened by the elimination of corporate tax incentives and the phasing out of harmful subsidies, particularly in the areas of industrial agriculture and fishing, fossil fuel and nuclear energy. Military spending should be reduced and the resource savings reallocated, inter alia, for civil conflict prevention and peacebuilding.

3. *Improving regulation for sustainability and human rights:* Governments have too often weakened themselves by adopting policies of deregulation or "better regulation" (which is in fact a euphemism for regulation in the interest of the corporate sector) and trusted in corporate voluntarism and self-regulation of "the markets".

With regard to the human rights responsibilities of companies, there is still a need for a legally binding instrument. The UN Human Rights Council took a milestone decision in establishing an intergovernmental working group to elaborate such an instrument (or "treaty"). Governments should take this "treaty process" seriously and engage actively in it. The expected start of the negotiation process in October 2018 offers an historic opportunity for governments to demonstrate that they put human rights over the interests of big business.

4. *Closing global governance gaps and strengthening the institutional framework for sustainable development:* The effectiveness of the required policy reforms depends on the existence of strong, well-equipped public institutions at national and international levels.

It is essential to reflect the overarching character of the 2030 Agenda and the SDGs in the institutional arrangements of governments and parliaments. At the global level, the claim to make the UN system "fit for purpose" requires reforms of existing institutions and the creation of new bodies in areas where governance gaps exist.

Governments decided in the 2030 Agenda that the High-Level Political Forum (HLPF) under the auspices of the UN General Assembly and the Economic and Social Council should have the cen-

tral role in overseeing follow-up and review, provide political leadership, and ensure that the Agenda remains relevant and ambitious.

However, compared with other policy arenas such as the Security Council or the Human Rights Council, the HLPF has remained weak and, with only one meeting of eight days a year, absolutely unable to fulfil its mandate effectively.

The HLPF 2019 at the level of heads of state and government, the subsequent review of the HLPF, and the 75th anniversary of the UN in 2020 provide new opportunities for strengthening and renewal of the institutional framework for sustainable development in the UN. (IPS) □

Jens Martens is Director of Global Policy Forum and coordinates the Reflection Group on the 2030 Agenda for Sustainable Development.

(continued from page 9)

Meanwhile, in a statement released in Washington DC, Matthew L. Myers, President of the Campaign for Tobacco-Free Kids, said: "This is a landmark victory in the global fight against tobacco use and a resounding defeat for the tobacco industry, which has fiercely fought plain packaging laws."

He noted that to date, the tobacco industry has lost every legal challenge to plain packaging both in international and national courts, not only in Australia but also in the United Kingdom, France, Norway and the European Union.

"This victory for Australia provides a tremendous boost to the growing global movement to require that cigarettes and other tobacco products be sold in plain packaging, without colourful logos and other branding that attract youth, mislead consumers and increase the appeal of these deadly and addictive products," said Myers.

"Plain packaging laws are both scientifically and legally sound. Other countries considering plain packaging should move forward with the confidence that they can defeat tobacco industry challenges," he added.

He pointed out that tobacco use kills more than seven million people worldwide each year and is projected to kill one billion people this century unless countries take strong action now to prevent it. (SUNS8712) □

The energy treaty that's boosting corporate power

A report published by Corporate Europe Observatory and the Transnational Institute sounds the warning over a relatively little known international agreement with potentially damaging consequences for economic well-being and the fight against climate change. We reproduce below an extract from the report highlighting the serious threats posed by the Energy Charter Treaty.

Two decades ago, and without significant public debate, an obscure international agreement entered into force: the Energy Charter Treaty (ECT). It acts like the secret, magical "One Ring to rule them all" from the Lord of the Rings trilogy, granting corporations enormous powers over our energy systems including the ability to sue governments, which could obstruct the transition from climate-wrecking fossil fuels towards renewable energy. And the ECT is in the process of expansion, threatening to bind yet more countries to corporate-friendly energy policies.

Today the ECT applies to nearly 50 countries stretching from Western Europe through Central Asia to Japan. Among its many provisions, those regarding foreign investments in the energy sector – also known under the infamous abbreviation ISDS or investor-state dispute settlement – are the ECT's cornerstone.

The ECT's ISDS provisions give foreign investors in the energy sector sweeping rights to directly sue states in international tribunals of three private lawyers, the arbitrators. Companies can be awarded dizzying sums in compensation for government actions that have allegedly damaged their investments, either directly through "expropriation" or indirectly through regulations of virtually any kind. Energy giant Vattenfall, for example, has sued Germany over environmental restrictions on a coal-fired power plant and for phasing out nuclear power. Oil and gas company Rockhopper is suing Italy over a ban on offshore oil drilling. Several utility companies are pursuing the EU's poorest member state, Bulgaria, after the government reduced soaring electricity costs for consumers.

Yet the ECT and its profiteers have largely escaped public attention. While the past decade has seen a storm of opposition to ISDS in other international trade and investment deals, the ECT has managed to steer surprisingly clear of this public outrage. Many investor lawsuits under the treaty remain secret. For others, there is only scant information available. And in countries in the process of acceding to the ECT, hardly anyone seems to have even heard of the agreement, let alone thoroughly examined its political, legal and financial risks.

Key findings

A report published in June by the non-profit research groups Corporate Europe Observatory and the Transnational Institute, "One Treaty to Rule Them All", shines a light on the "one ring" of the ECT which will greatly influence the battle over our future energy systems. The following are the key findings from the report:

1. No trade and investment agreement anywhere in the world has triggered more investor-state lawsuits than the ECT. At the time of going to press in June, the ECT secretariat listed a total of 114 corporate claims filed under the treaty. Given the opacity of the system, the actual number of ECT claims could be much higher.

2. In recent years the number of ECT investor lawsuits has exploded. While just 19 cases were registered during the first 10 years of the agreement (1998-2008), 75 investor lawsuits were filed in the last five years alone (2013-17).^{*} This trend

is likely to continue.

3. More recently, investors have begun to use the ECT to sue countries in Western Europe. While in the first 15 years of the agreement 89% of ECT lawsuits hit states in Central and Eastern Europe and Central Asia, today Spain and Italy head the list of the most-sued countries. The ECT remains the only effective treaty in which Western European states have accepted ISDS with countries that are also capital exporters to them. It is also the only agreement which allows for investor-state arbitrations against the EU as a whole.

4. More and more money is at stake for states and taxpayers. There are 16 ECT suits in which investors – mostly large corporations or very wealthy individuals – sued for \$1 billion or more in damages.^{*} Some of the most expensive claims in the history of ISDS include ECT cases such as Vattenfall's challenge to Germany over its exit from nuclear power (over \$5.1 billion) and the largest ISDS award ever, a \$50 billion order against Russia in the Yukos cases. Total legal costs average \$11 million in ISDS disputes but can be much higher.

5. Corporations claim compensation for loss of "future profits". Oil company Rockhopper is not just claiming from Italy the \$40-50 million which it actually spent on exploring an oil field in the Adriatic Sea. It also claims an additional \$200-300 million for hypothetical profits the field could have made had Italy not banned new oil and gas projects off the coast.

6. Governments have been ordered or agreed to pay more than \$51.2 billion in damages from the public purse^{*} – roughly equalling the annual investment needed to provide access to energy for all those people in the world who currently lack it. Outstanding ECT claims^{*} have a collective value of \$35 billion – far more than the estimated annual amount of money needed for Africa to adapt to climate change.

7. Investors who have filed lawsuits under the ECT come mostly from Western Europe. Companies and individuals registered in the Netherlands, Germany, Luxembourg and the UK (or in the tax haven Cyprus) make up 60% of the 150 investors involved in claims.^{*}

8. The majority of ECT claims are intra-EU disputes, yet sideline EU courts. Some 67% of ECT investor lawsuits^{*} were brought by an investor from one EU member state against the government of another member state, claiming large sums of public money arguably not available to them under the EU legal system. That means that nearly half of all known intra-EU investment disputes were launched under the ECT (the others being based on bilateral treaties). In March 2018 the European Court of Justice ruled that intra-EU ISDS proceedings under these bilateral treaties violate EU law as they sideline EU courts – an argument which could also apply to the ECT.

9. The ECT is prone to abuse by letterbox companies, which mainly exist on paper and are often used for tax evasion and money laundering. For example, 23 of the 24 "Dutch" investors who have filed ECT lawsuits^{*} are letterbox companies. They include Khan Netherlands (used by Canadian mining company Khan Resources to sue Mongolia even though Canada is not even a party to the ECT), and Isolux Infrastructure Netherlands and Charanne (both used by Spanish businessmen Luis Delso and Jose Gomis, two of the richest Span-

Fuelling the genesis of the ECT

The ECT was negotiated over a period of three years and was signed in December 1994. (It entered into force on 16 April 1998.) The idea was that of then Dutch Prime Minister and former businessman Ruud Lubbers, a “more markets, less government” neoliberal in the style of Margaret Thatcher and Ronald Reagan. Keen on accessing the vast oil and gas resources of the former Soviet Union, other Western European governments quickly jumped on his idea for a West-East framework for energy cooperation.

Non-European countries were also involved: Japan, Australia (which signed but never ratified the ECT), the US and Canada (both never signed). But the EU and its member states were clearly leading the project, “not only as a coordinator, but also as driving force behind the negotiations”. The UK and the Netherlands, both of which had developed their own bilateral investment treaties with significant input from giant oil company Shell, were especially influential in the talks. The ECT’s investor rules were even modelled along the standard UK treaty at the time – a fact that Shell must have ap-

preciated.

While negotiations “took place largely outside the pressure of external scrutiny”, large oil and gas corporations such as Exxon, Mobil (still separate US companies at the time), Shell, ENI, BP and Repsol closely tracked the talks from the outset. Fossil fuel industry lobby groups such as the E&P Forum (later renamed the International Association of Oil and Gas Producers), and Eurogas and Europaia (today known as FuelsEurope) had regular meetings with lead negotiators and were invited to comment on draft versions of the future treaty. They demanded that its “principal emphasis ... should be on guarantees for the protection of investments” and that the agreement “give investors the right to enforce certain key provisions directly against the host government through arbitration”. In other words: Big Oil had requested exactly those corporate privileges which later formed the core of the Energy Charter Treaty.

iards, to sue Spain). Thanks to the ECT’s overly broad definition of “investor” and “investment”, states can effectively be sued by investors from around the globe, including by their own nationals.

10. The ECT is increasingly being used by speculative financial investors such as portfolio investors and holding companies. In 88% of lawsuits over cuts to support schemes for renewable energy in Spain, the claimant is not a renewable energy firm but an equity fund or other type of financial investor, often with links to the coal, oil, gas and nuclear industries. Several of the funds only invested when Spain was already in full-blown economic crisis mode and some changes to the support schemes had already been made (which the funds later argued undermined their profit expectations). Some investors view the ECT not only as an insurance policy but as an additional source of profit.

11. The ECT is a powerful tool in the hands of big oil, gas and coal companies to discourage governments from transitioning to clean energy. They have used the ECT and other investment deals to challenge oil drilling bans, the rejection of pipelines, taxes on fossil fuels, and moratoria on and phase-outs of controversial types of energy. Corporations have also used the ECT to bully decision-makers into submission. Vattenfall’s €1.4 billion legal attack on environmental standards for a coal-fired power plant in Germany forced the local government to relax the regulations to settle the case.

12. The ECT can be used to attack governments that aim to reduce energy poverty and make electricity affordable. Under the ECT, Bulgaria and Hungary have already been sued for compensation in the hundreds of millions, in part for curbing big energy’s profits and pushing for lower electricity prices. Investment lawyers are considering similar action against the UK, where the government has proposed a cap on energy prices to end rip-off bills.

13. A small number of arbitrators dominate ECT decision-making. Twenty-five arbitrators have captured the decision-making in 44% of the ECT cases, while two-thirds of these super-arbitrators have also acted as legal counsel in other investment treaty disputes. Acting as arbitrator and lawyer in different cases has led to growing concerns over conflicts of interest, particularly because this small group of lawyers have secured extremely corporate-friendly interpretations of the

ECT, paving the way for even more expensive claims against states in the future.

14. Five elite law firms have been involved in nearly half of all known ECT investor lawsuits. Law firms have been key drivers of the surge in ECT cases, relentlessly advertising the treaty’s vast litigation options to their corporate clients, encouraging them to sue countries.

15. Third-party funders are becoming more and more established in ECT arbitrations. These investment funds finance the legal costs in investor-state disputes in exchange for a share in any granted award or settlement. This is likely to further fuel the boom in arbitrations, increase costs for cash-strapped governments, and make them more likely to cave in to corporate demands.

16. There are concerns about self-dealing and institutionalized corruption in institutions that administer ECT disputes. For example, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), prominent in ECT disputes, is problematic because its arbitrations are particularly secretive, prone to conflicts of interest, and potentially more biased against states than other proceedings.

17. Polluting companies and for-profit investment lawyers enjoy privileged access to the ECT secretariat, which puts into question the latter’s neutrality and ability to act in the interest of the ECT’s signatory states as well as a transition off fossil fuels. More than 80% of the companies on the ECT’s Industry Advisory Panel make money from oil, gas and coal. Two-thirds of the lawyers on the ECT’s Legal Advisory Task Force have a financial stake in investor lawsuits against states. Both advisory groups are given ample opportunities to influence the secretariat, ECT member states and the wider Charter process in their own interest. Several high-ranking officials at the ECT secretariat were with arbitration law firms before and/or after they worked at the secretariat.

18. Many countries across the world are about to join the ECT, threatening to bind them into corporate-friendly energy policies. Jordan, Yemen, Burundi and Mauritania are most advanced in the accession process (ratifying the ECT internally). Next in line is Pakistan (where investment arbitration

(continued on page 16)

The ECT's investor privileges – and 10 reasons why corporations love them

Many analysts have noted “the Energy Charter Treaty’s investor friendliness”. It is remarkably “asymmetric” in that it grants nothing but rights to foreign investors and offers nothing but obligations to the countries in which they invest. Some lawyers say it offers an even “more robust level of protection” for corporations than other investment treaties.

Here are 10 reasons why corporations love the ECT:

1. The treaty protects a vast universe of investments “associated with an Economic Activity in the Energy Sector” [Article 1(6)]. Activities cover all sources of energy (oil, gas, coal, nuclear, renewables) all along the supply chain – from extraction and refining to energy storage, transport, distribution, trade, sale and the disposal of related waste [Article 1(5)]. It is noteworthy that under the ECT, “investment” has been interpreted very differently from how it is commonly understood. In one case against Kyrgyzstan, for example, the arbitrators considered a mere business contract for the sale of gas as an investment, even though no money was actually spent on it. Thus it is hard to imagine an activity in the energy sector which would not be covered by the ECT.

2. If foreign investors feel that their rights have been violated, they can use the ECT’s far-reaching investor privileges to file expensive lawsuits against signatory states at international tribunals, bypassing their domestic legal systems [Article 26(3)(a)]. If a tribunal finds a violation of just one of the investor rights, it can order the defendant state to pay enormous and uncapped sums of taxpayers’ money in compensation – including for lost hypothetical future profits.

3. Rulings come from for-profit arbitrators who are paid lucratively by the case. At the most frequently used tribunal for ECT disputes, the International Centre for Settlement of Investment Disputes (ICSID), arbitrators make \$3,000 a day. This creates a strong financial incentive to decide in favour of those who can bring claims in the future: the investors. Investor-friendly decisions keep the ECT attractive for them, inviting even more lawsuits – and arbitrator income.

4. States should “encourage and create stable, equitable, favourable and transparent conditions for investors” [Article 10(1)]. While this “fair and equitable treatment” provision appears innocuous, it has proven extremely dangerous for taxpayers and regulators as some arbitrators have interpreted it in a way that de facto requires countries to pay compensation when they change the law. In one case, for example, the tribunal found that Spain had violated the ECT because it had “radically altered” regulations for renewable energy producers, replacing them with “new and very different” rules, which were less beneficial for them. Big oil, gas and coal corporations could easily build similar cases against tough climate actions by regulators.

5. The ECT protects investors’ “legitimate expecta-

tions”, according to how arbitrators have interpreted its “fair and equitable treatment” clause [Article 10(1)]. This gives corporations a powerful weapon to fight regulatory change, even if implemented in light of new knowledge (for example, on root causes and solutions for climate change) and/or democratic choice.

6. The ECT protects investors against expropriation (Article 13). From an investor-friendly point of view, almost any law or regulation, for example to protect the environment or social well-being, can be considered an indirect “expropriation” when it has the effect of reducing profits. A 2012 study published by the ECT secretariat found that the provisions on expropriation could lead to compensation orders against countries even in situations where a government decision might be considered non-compensable and legitimate under national law. In other words: under the ECT, investors can walk away with potentially large amounts of taxpayers’ money which would not be awarded to them in the domestic legal system.

7. ECT lawsuits can be filed by all kinds of dubious shell companies and financial vehicles; the treaty is prone to “treaty-shopping” (i.e., investors, including from non-ECT states, who file lawsuits via a shell company based in one of the ECT member states). To be able to sue, investors merely have to be legally incorporated in one ECT signatory state and (in)directly own or control an energy-related asset in another (for example, a licence or share in a company). This is thanks to the ECT’s extraordinarily broad definitions of “investor” and “investment” [Articles 1(6) and (7)], which expose states to unpredictable legal risk.

8. The ECT contains a dangerous “umbrella clause” which gravely multiplies the risk of costly lawsuits [last sentence of Article 10(1)]. It brings all obligations a state assumed with regard to an investment under the ECT “umbrella”, lifting them to the level of international law. It would, for example, empower an investor to file an ECT claim over the alleged breach of a mere contract with a municipality – even if the contract required recourse to domestic courts. Less than half of all the world’s investment treaties contain an umbrella clause; more recent agreements typically do not.

9. The ECT affords little room for regulatory action by states, for example, to reduce greenhouse gas emissions. While it does contain exceptions to protect health and the environment [Article 24(2)(i)], these explicitly do not apply to far-reaching investor rights such as “fair and equitable treatment” [Article 24(2)(b)].

10. If a country leaves the ECT, it can still be sued for 20 more years for investments made before the withdrawal. The “survival” or “zombie clause” [Article 47(3)] allows the ECT’s corporate super-rights to live on after the treaty’s death. Less than one-sixth of the world’s investment treaties include such a clause of 20 years. □

(continued from page 14)

is controversial, but which has already been invited to accede to the ECT), followed by a number of countries in different stages of preparing their accession reports (Serbia, Morocco, Swaziland – renamed eSwatini in April 2018 – Chad, Bangladesh, Cambodia, Colombia, Niger, Gambia, Uganda, Nigeria and Guatemala). Many more countries have signed the non-binding International Energy Charter political declaration, which is considered the first step towards accession to the legally binding Energy Charter Treaty.

19. There is an alarming lack of awareness about the ECT's political and financial risks in the ECT's potential new signatory states. Officials from ministries with experience in negotiating investment treaties and defending investor-state arbitrations are largely absent from the process, which is being led by energy ministries. This is worrying as many of these countries already have disastrous experience with investor lawsuits under other investment agreements, which could multiply if they sign on to the ECT.

20. The expansion process is aggressively promoted by the ECT secretariat, the EU and the arbitration industry, who are eager to gain access to the rich energy resources in the Global South and to expand their own power and profit opportunities. While they downplay or dismiss the risks to states of acceding to the ECT, they promote the agreement as a necessary condition for the attraction of foreign investment, and in particular clean energy investment for all. But there is currently no evidence that the agreement helps to reduce energy pov-

erty and facilitate investment, let alone investment into renewable energy.

But there is some good news. Around the world, the tide is turning against ECT-style super-rights for corporations. Campaigners, activists, academics and parliamentarians are beginning to ask critical questions about the ECT. The agreement and the investor lawsuits it has enabled could also come under legal fire from EU courts. More countries could follow the example of Russia and Italy, which have already turned their back on the ECT.

Just as in the Lord of the Rings, where the “fellowship” of nine companions around the little hobbit Frodo Baggins manages to destroy the One Ring, a fellowship of citizens, legal scholars, parliamentarians, courts and governments might be in the making which will eventually break the binding power of the ECT “ring”. □

The above is extracted from the report “One Treaty to Rule Them All: The ever-expanding Energy Charter Treaty and the power it gives corporations to halt the energy transition”, published in June by Corporate Europe Observatory and the Transnational Institute. The report was written by Pia Eberhardt, Cecilia Olivet and Lavinia Steinfort. For more on the ECT and to download the full report, go to www.energy-charter-dirty-secrets.org.

Note

* Figures refer to the total ECT cases known about up to the end of 2017. There are likely to be others that, due to secrecy in the claims process, have not come to light.

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