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Towards fairness in WTO dispute settlement reform

The prevailing impasse in making appointments to the Appellate Body has trained attention on a WTO dispute settlement system in urgent need of review and reform, as highlighted over the last four editions of *Third World Economics*. In the fifth and final part of this series, *Chakravarthi Raghavan* proposes changes in the system with a view to ensuring fairness, propriety and balance in the resolution of trade disputes between WTO member states.

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Dispute panels, AB must abide by principles of natural justice

Chakravarthi Raghavan sets out proposals for reform of a WTO dispute settlement system that has been the subject of concerns raised by developing countries and, more recently, the US.

GENEVA: In undertaking a complete review and reform of the WTO's Dispute Settlement Understanding (DSU), a cardinal principle to be borne in mind and implemented is that strict adherence to the principles of natural justice is fundamental and fully applicable to dispute panels and the Appellate Body (AB).

This is dealt with in detail below, after a discussion of some US complaints against the functioning of the DSU.

In voicing complaints against the AB at meetings of the WTO's Dispute Settlement Body (DSB), the US has flagged some issues but without elaborating or engaging on them with other member states, despite repeated prodding. It has even shown some disdain at the attempts of other members to address the US complaints by proposing changes to the DSU rules.

Among the complaints voiced by the US are that: the WTO is becoming a forum for litigation and not negotiation; the timelines for the conclusion of appellate proceedings and reports are exceeding the stipulated 90-day period; the AB is practising "judicial activism"; and AB rulings cannot be binding precedents in subsequent disputes. [See *South-North Development Monitor (SUNS)*, Nos. 8536 dated 21 September 2017, 8831 dated 24 January 2019, and 8841 dated 7 February 2019.]

In the US itself, the US Trade Representative (USTR) and other administration officials have been speaking in greater detail about the US grievances. A prominent US complaint voiced there is over the AB rulings in disputes raised by other members against US use of the "zeroing" methodology in anti-dumping investigations. These and some others are briefly set out and analyzed below.

According to US media reports, in remarks on 18 September 2018 in Washington DC, the USTR Robert Lighthizer expressed the administration's unhappiness with the WTO's dispute settlement process, pointing to numerous cases where he claimed dispute panels had overstepped their jurisdictions. He

claimed that there were a number of issues on which there was "pretty broad agreement" that the DSU was "deficient", such as transparency issues and issues with the staff.

The USTR (who had been counsel to the US steel industry in his previous avatar) said there were many cases involving anti-dumping and countervailing duties where the (panel and AB) decisions had been "really indefensible." He also cited as an example the AB decision in February 2000 holding the US Foreign Sales Corporations (FSC) law as WTO-illegal. Lighthizer claimed the rulings had diminished what the US had bargained for or had imposed obligations that the US did not believe it had agreed to.

The US complaints on the anti-dumping and FSC cases are analyzed below. Before doing so, it needs to be pointed out that in respect of all the US complaints set out above, it was the US itself (in the early days of the WTO-DSU) that had "pioneered" and forced the WTO onto this path and cheerlead the rulings that made these possible.

(When the WTO came into being, the legal division of the secretariat, which "serviced" dispute panels, was headed by a US national, and the AB secretariat by a national of Canada, a close US ally against the rest of the membership on trade issues in those days.)

This has been brought out in a previous article ("The WTO, its secretariat and bias against the South", *TWE* No. 680/81) which cited a run of panel/AB rulings against key developing countries. The US was a party or third party in these disputes, but either the three-member division benches hearing them included US nationals, or US nationals who were AB members participated in the deliberations of all seven AB members on the appeals under the AB's procedural rules on "collegiality".

All these rulings were adopted by the DSB and frequently cited in pleadings on subsequent disputes by the US

itself as a party or third party, and even more by the AB in its own opinions, applying the *stare decisis* (principle of precedent) doctrine for its rulings.

“Zeroing”

Now for some specific complaints voiced by the USTR or his officials and reflected in some pro-USTR media.

The complaints relate to the consistent AB rulings till now that the US use of the “zeroing” methodology to determine dumping is illegal under the WTO’s Anti-Dumping Agreement (ADA).

(The term “zeroing”, not found in the ADA itself, has been used in respect of cases where the US takes account of export prices which are below the “normal value” but ignores those above the normal value.)

However, the latest ruling on an anti-dumping dispute has seen a dispute panel depart from the long line of AB rulings against “zeroing”, claiming “cogent” reasons for deeming the US use of “zeroing” valid. This ruling, issued in a dispute raised by Canada against the US on imports of softwood lumber, has been acclaimed in the US. Canada has however given notice of appeal against it to the AB.

In its report on this ruling, the *Inside US Trade* newsletter of 18 April cited an unnamed US trade lawyer for the view that the US arguments against the previous AB rulings on “zeroing” centre on the wording in Article 2.4 of the ADA on comparing export price and normal value, and in Art. 2.4.2 on how and in what circumstances a normal value “established on a weighted average basis” may be compared against prices of individual export transactions. The US contention has been that the ADA has not forbidden “zeroing”.

In weighing the merits of the US complaints, it may be useful to first consider briefly the relevant parts of the scheme of the ADA in the family of WTO agreements and how the anti-dumping issue had previously been treated under GATT 1947.

Before the establishment of the WTO (and the ADA), GATT 1947 had an anti-dumping code after the Tokyo Round negotiations. Prior to that, in the Kennedy Round talks, an attempt had been made via a code approach to elaborate on some of the provisions of GATT 1947, but this

did not get anywhere since the US Congress had given the US President authority only to negotiate tariff concessions. The Tokyo Round marked the first time that Congress gave the President “fast track” authority to negotiate non-tariff issues, binding itself to only vote either “yes” or “no” to any negotiating outcome and not attempt to modify it – a necessary precondition before other nations would agree to negotiate with the US on non-tariff trade issues.

Compared with the ADA, the Tokyo Round anti-dumping code could perhaps best be described as sketching out for the first time some ideas and concepts without much detail and which were thus amenable to various interpretations.

Subsequently, under the ADA, Art. 1 makes the application of its provisions conditional on the existence of the “circumstances” set out in Art. VI of GATT 1994. The use of the term “shall be” in Art. 1 makes this mandatory.

Art. 2.1 sets out how a product is to be considered “dumped” when exported and introduced into the commerce of another country. The subsequent provisions in Articles 2.2, 2.3, 2.4 and 2.5 set out conditions under which the provisions of Art. 2.1 need not be used, and the alternative ways that can be used to determine “normal value”, “dumping” and “dumping margins.” As such, these are exceptions to the provisions in Art. 2.1.

In outlining various methodologies that can be used, Art. 2.4 makes clear that under any methodology there has to be “fair comparison.” Art. 2.4.2 details, in a kind of descending hierarchy, several methodologies that may be used for comparison and determination during an anti-dumping investigation in the importing country. These are: W-to-W (weighted-average-normal-value with weighted-average-of-prices-of-all-comparable-export-transactions) or T-to-T (comparison of normal value and export prices on a transaction-to-transaction basis). Art. 2.4.2 allows also for comparison of a weighted average normal value with prices of individual export transactions “if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of [W-to-W or T-to-T] compari-

son”.

The burden of proof in invoking Articles 2.2, 2.3, 2.4 and 2.5 rests on the party invoking them. As such, it is difficult to accept the US argument that “zeroing” can be used since it is not prohibited.

Moreover, at each stage, the ADA makes clear that the investigating authorities’ decision has to be based on facts and the evidence, and not surmises.

Thus, Art. 17.6(i) of the ADA stipulates that a dispute panel, in a dispute involving the ADA, “shall determine” whether the establishment of facts was proper and the evaluation of those facts was unbiased and objective. Under Art. 17.6(ii) (commonly known as the “standard of review” provision), where provisions of the agreement permit more than one permissible interpretation, the panel shall find the investigating authorities’ measure to be valid if it rests upon one of those permissible interpretations.

[While a Marrakesh Ministerial decision called for this standard of review to be reviewed after three years and a decision taken whether it was capable of wider application, the WTO membership decided against it (when the EU tried to get it made applicable to disputes under the Agreement on Subsidies and Countervailing Measures [SCM]).]

The US, which has been blocking the filling up of vacancies in the AB since 2017, is alone in its argument that its use of “zeroing”, despite consistent AB rulings against it, is valid, since it is not forbidden! According to the *Inside US Trade* report, the US may lift its blockage of AB appointments in return for an accord in revising the DSU to enable continued use by the US of “zeroing”.

In response to the panel ruling on the softwood lumber dispute, Canada has given notice of appeal to the AB. If the AB (with its currently depleted membership) is able to function, hear and dispose of this appeal (giving priority to it over other pending appeals), and reverses itself on the use of “zeroing”, it will be seen as a case of yielding to US “blackmail”. The AB would lose whatever credibility and legitimacy it has.

On a careful reading of the panel ruling, beyond use of the adjective “cogent”, it is difficult to see the logic in the panel’s reasoning to differ from the reasoning in the long line of AB rulings against “zeroing”. Perhaps the “cogent reasons” cited could have a connection

to the possible “invisible hand” of the WTO secretariat in its role of “servicing” the panel, to meet the US demand to make “zeroing” valid.

The rest of the WTO membership, particularly the developing countries, the main targets of the US in its anti-dumping investigations, might as well wind up the WTO rather than yield to the US on this.

Behind this US demand is an issue pending accord in the ongoing US-China trade talks which the “luminaries” in the Trump administration (USTR Lighthizer, National Security Advisor John Bolton et al.) have made clear they will thereafter try to import into the DSU, namely, that everyone in the WTO must abide by the WTO rules and DSB recommendations, but that the US, like the sovereigns of Europe in the medieval era, is above the law and need not abide by it.

FSC law

On the issue of the FSC law, the USTR's comment on the relevant DSU ruling ignores trade disputes on both the FSC law and its predecessor, the Domestic International Sales Corporations (DISC) law. Even under GATT 1947, a panel had ruled against the DISC law for providing tax credits and benefits to US corporations using at least 50% of US inputs in their foreign sales. In turn, the US had at that time challenged the laws and practices of four European Economic Community (EEC) member states.

The panels, consisting of the same persons in both disputes, held the DISC law illegal, and some tax provisions of the EEC members equally illegal. Both sides blocked adoption of the panel rulings. (Under GATT 1947, unlike in the WTO, adoption of rulings could be, and was often, blocked by the two leading trading entities, the US and Europe.) In 1979, a subsidies code under the Tokyo Round was concluded. And in 1981, the two sides allowed the two panel rulings to be adopted. As part of the adoption of the rulings, there was also an understanding reached at the GATT Council.

In pursuance of all this, the US changed its DISC law and enacted the FSC law. FSCs are offshore shell corporations (mostly incorporated in the Virgin Islands, Guam and Barbados) with little or no economic activity at location

but at best a room and a fax machine to receive and send out messages.

Under the FSC law, these offshore corporations, wholly owned by US corporations, get more favourable tax treatment for products exported (in their name) and containing no more than 50% in value of (non-US) imports. And unlike the “arm's length” relationship required for such parent-subsidiary transactions under the US tax code, the FSC law enables administrative pricing.

The favourable tax treatments give benefits of between 15-30% of the foreign trade income to the parent. The FSC law divides the foreign source income of an FSC into “foreign trade income” and all other foreign source income, including investment income and income from patents, licensing etc. The foreign trade income of an FSC is divided into exempt and non-exempt foreign trade income.

In the US, the foreign source income of a foreign corporation is taxable to the extent of it being effectively connected to trade or business conducted in the US, to be ascertained by a factual inquiry by the US tax authorities. In the case of an FSC, the exempt portion is set by the law, and thus not subject to any factual inquiry.

In normal cases where the income earned by a foreign corporation controlled by a US corporation is taxed on repatriation, the parent corporation or shareholder is required to include in gross income a pro-rata share of the undistributed foreign income. In contrast, the parent of an FSC is not required to declare its pro-rata share.

The dividends received by the parent US corporation from foreign corporations and from an FSC are also treated differently. Under the FSC law, the US parent corporation is generally not taxed on dividends received that are derived from the foreign trade income of the FSC. All these benefits are dependent on exports and the exported products having no more than 50% of fair market value as imports.

The US, in its arguments before the WTO dispute panel and the AB, had tried to inject into the WTO rules, including the SCM Agreement (which for the first time defined a subsidy), the 1981 understanding in the GATT Council reached at the time of the adoption of the panel rulings on the DISC law and the EEC

laws.

Both the panel and the AB turned down this attempt, and ruled that the FSC tax exemptions involved subsidies contingent upon export performance and thus constituted a “prohibited subsidy” under Art. 3.1(a) of the SCM Agreement.

The panel held that the tax credits or exemptions under the US tax regime (but for the FSC law) also provided a marketing subsidy for marketing agricultural products. As such, they were subject to a reduction commitment in terms of Art. 9.1(d) of the WTO Agreement on Agriculture (AoA), and thus violative of Art. 3.3 of the AoA (which provides for a ceiling on export subsidies and subjects them to a reduction).

The AB agreed that the FSC measures involved a subsidy contingent upon exports, in terms of the SCM Agreement. It also agreed that it was a subsidy contingent upon export performance under the AoA.

It held that the FSC measure created a legal entitlement for the recipients to receive export subsidies, not listed in Art. 9.1 of the AoA, on agricultural products – both those scheduled and those not scheduled in the US schedule of commitments. The legal entitlement accrued to the recipient when it complied with the statutory requirements of the FSC law, and at that point the US government must grant the FSC a tax exemption, with no discretionary element vested with the government.

The AB also held that the FSC law involved application of export subsidies, not listed in Art. 9.1 of the AoA, in a manner that at the least “threatens to lead to circumvention”. In this light, the AB reversed the relevant panel finding and held that the US had acted inconsistently with its obligations under Art. 10.1 of the AoA by applying export subsidies, with respect to both scheduled and unscheduled agricultural products, in a manner that at the very least threatened to circumvent its export subsidy commitments under Art. 3.3 of the AoA. And by providing export subsidies inconsistent with Art. 10.1 of the AoA, the US had acted inconsistently with its obligations under Art. 8 of the AoA.

The FSC scheme's main beneficiaries at that time included such political heavyweights as Microsoft, leading aircraft maker Boeing and automotive gi-

ant General Motors. The tax breaks for these companies over the next five years was then estimated to be worth some \$15 billion, according to the Congressional research office.

DSU review proposals

In these instances of the past detailed by USTR Lighthizer, the analyses above show the hollowness of the US grievances.

Nevertheless, in the DSU review, the complaints of the US must be considered along with those of developing countries and any others. If they are found to be justified, the relevant DSU rules should be revised by consensus.

A few changes to the DSU rules are important to restore the negotiation-litigation balance at the WTO:

1. As mentioned at the outset, observance of the principles of natural justice by panels and the AB is fundamental. The most important of these principles, commonly voiced in judicial, quasi-judicial or administrative proceedings, are best summed up in the two Latin phrases "*Audi alteram partem*" and "*Nemo iudex in causa sua*".

"*Audi alteram partem*" ("let the other side be heard as well") is considered to be a principle of fundamental justice or equity in most legal systems. It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them. In modern times, this includes the rights of a party or his/her lawyers to confront the witnesses against him/her, to have a fair opportunity to challenge the evidence presented by the other party, to summon his/her own witnesses and to present evidence, and to have counsel, if necessary at public expense, in order to make his/her case properly.

This, as well as the other principle, "*Nemo iudex in causa sua*" ("no one should be a judge in his own case"), has been commonly accepted and found in ancient Greek and Eastern systems (Dharma in India and Confucian in China), in Anglo-Saxon and Continental jurisprudence, and in the Islamic Hadith. It is part of public international law and, as per the UN General Assembly mandate to draw upon all systems of law, was codified by the International Law Commission and

adopted by the UN General Assembly as the Vienna Convention on the Law of Treaties.

2. In accord with the above, the WTO secretariat should not be allowed to brief (and guide) panels and the AB behind the backs of the parties to a dispute under the guise of "servicing" the panels and AB. Any briefs or notes provided to panels should be made available simultaneously to the parties (complainant, respondent and third parties) to enable them to respond.

3. Panellists named to a dispute panel and the AB division bench members hearing an appeal must reach conclusions on their own and draft their own reports. At best, a small secretariat of legal officers (not under the WTO Director-General) may be envisaged to help in the drafting. It may even be worthwhile to set up a small unit outside of the WTO secretariat (perhaps as part of the UN Commission on International Trade Law secretariat or even of the International Court of Justice) to "service" panels and the AB. This servicing could be outsourced to such a unit by the WTO, with the costs borne on the WTO budget.

4. Both dispute panels and the AB are creatures of the DSU in terms of the relevant rules on these; as such, they have no independent or inherent residuary powers, only those vested in them by the DSU rules. Nor can panels or the AB empower themselves beyond what is spelt out under the DSU. It follows that the AB practice where members of a division bench hearing an appeal consult the other AB members who are not part of the division bench, has to end.

5. In carrying out their mandates and responsibilities (Art. 11 of the DSU), panels are obliged to make an objective assessment of matters before them, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant WTO agreements. It is not clear whether panels can exercise "judicial economy" in not providing clear findings and rulings on all the matters before them. However, it is clear that Art. 17.12 of the DSU, read with Art. 17.6, gives no scope for the AB to exercise "judicial economy" and refrain from ruling on all points of law raised in appeal.

6. Under GATT 1947, it was the

GATT Contracting Parties, acting jointly in terms of Art. XXIII.2, that considered and adopted panel rulings, thus making them part of the GATT acquis. In contrast, WTO rulings adopted by "negative consensus" have no such basis for application of the *stare decisis* doctrine. That doctrine does not apply in any event under international law, but only in national jurisdictions, in particular among those following Anglo-Saxon jurisprudence, where the country's superior court is a court of record and decisions of that court are the law, until that court reverses itself or until the law and/or the Constitution is changed according to prescribed provisions and procedures.

7. Nevertheless, adoption of rulings by negative consensus is essential to settle particular disputes. However, for a WTO ruling adopted by negative consensus to constitute any basis or precedent to be followed to avoid future disputes and bring some certainty, it must be considered (separated from the facts of the particular case) and adopted by positive consensus at the DSB, perhaps excluding the parties to the particular dispute in this instance of decision-making. Better still would be its consideration and formulation as an "authoritative interpretation" of the relevant rule(s) in the relevant agreement by the WTO General Council, where voting, if no consensus decision is feasible, is possible.

8. As former GATT law official Frieder Roessler had advocated (cited in "The WTO, its secretariat and bias against the South", TWE No. 680/81), the delicate balance in the WTO between the deliberative/legislative remit of the WTO bodies and the adjudicatory role of the DSU to prevent abuse needs to be respected and restored.

9. Developing countries would also do well, in the DSU review, to take up the several suggestions and recommendations for revision of the DSU that are still valid and relevant from the monograph "The World Trade Organization and Its Dispute Settlement System: Tilting the balance against the South" (C. Raghavan, 2000, <https://www.twn.my/title/tilting.htm>). (SUNS8898) □

This article is the last in a five-part series on the current AB impasse and other issues related to the WTO dispute settlement system. The first four parts were published in TWE Nos. 676, 677, 678/79 and 680/81. The author acknowledges that he

has benefitted from comments and suggestions on earlier drafts from some former trade officials and negotiators, in particular Bhagirath Lal Das and

B.K. Zutshi, former Indian Ambassadors to the GATT. Any errors of omission or commission are entirely those of the author.

South reject moves to curtail policy space to pursue industrialization

Faultlines around the issue of WTO reforms were evident at a recent meeting of trade ministers, with developing-country participants opposing reform proposals seen as eroding their policy space and calling instead for a more inclusive and development-oriented trading system.

by D. Ravi Kanth

GENEVA: Trade ministers and senior officials of South Africa, India and the Group of 90 (G90) countries rejected on 23 May in Paris attempts by developed countries to curtail "policy space" for developing countries to pursue their autonomous industrial development.

The attempts of the developed countries have been put forward under the pretext of reforms of the World Trade Organization.

At an informal trade ministerial meeting hosted by Australia on the margins of the annual Organization for Economic Cooperation and Development (OECD) ministerial meeting in Paris, South Africa's trade minister Rob Davies told his counterparts from developed countries that "adequate policy space" was imperative for pursuing "our industrialization."

According to a participant in the meeting, trade ministers from the European Union, Canada, Norway, Switzerland and Japan among others insisted that "WTO reforms" were essential for bringing about differentiation among developing countries to avail of special and differential flexibilities.

Prior to the informal ministerial meeting, the trade ministers of the trilateral group – the US, the EU and Japan – issued a joint statement on WTO reforms, including on issues concerning "the special and differential treatment in current and future WTO negotiations."

The three trade ministers called on "advanced WTO Members claiming developing country status to undertake full commitments in ongoing and future WTO negotiations."

Without naming Brazil, which intends to forgo the special and differential flexibilities in the current and future trade negotiations, the trade ministers of

the US, the EU and Japan applauded "some WTO Members [that] have indicated their intent to do so."

The US, the EU and Japan also expressed their intention to bring about new rules at the WTO to prohibit industrial subsidies, discipline state-owned enterprises and proscribe forced transfer of technologies, along with stringent transparency and notification requirements at the WTO.

(The joint statement of the US, the EU and Japan did not however indicate how they would be able to bring about change in the WTO rules that would need unanimous acceptance, in terms of Article X.2 of the WTO's foundational Marrakesh Agreement. – SUNS)

Several developed-country trade ministers in Paris also spoke about the progress made in their joint statement initiatives on electronic commerce, disciplines for micro, small and medium enterprises (MSMEs), domestic regulation of services, and investment facilitation.

The US said that its concerns about the WTO Appellate Body (AB) over the past 16 years were being acknowledged by several members. The US said it remained opposed to a proposal from the EU, China and India that called for an impartial and independent adjudicating body.

China said that it wanted outcomes on electronic commerce, investment facilitation, and domestic regulation of services.

In a separate development on the margins of the OECD ministerial meet, a group of 31 countries issued a ministerial statement for finalizing the schedule of specific commitments concerning domestic regulation of services by the 12th WTO Ministerial Conference in Nur-Sul-

tan, Kazakhstan, in June 2020.

Significantly, when the floor was offered to the WTO Director-General Roberto Azevedo to make his concluding remarks at the Paris meeting, Azevedo simply said that he had nothing to say, according to a participant who asked not to be quoted.

Developmental dimension

Responding to the demands of the developed countries, particularly on the WTO reform proposals, South Africa's Davies said "any proposal for WTO reform will be looked through the lens of the Delhi declaration which has called for advancing the capacity of the multilateral trading system and for enhancing the developmental dimension in global trade through an inclusive framework."

"We have seen proposals that would need us to reclassify [for availing of special and differential treatment or S&DT]," he said.

South Africa, according to Davies, had undertaken onerous obligations as a developed country during the Uruguay Round, hindering the prospects for industrial and economic development. "Therefore, we are very much determined to safeguard our policy space as a developing country so as to address our 'developmental' tasks," he said.

The South African trade minister called on his counterparts from the developed countries to first address the "unfinished agenda of the existing mandates" for delivering "outcomes in agriculture, reduction commitments in domestic support, cotton, permanent solution for food security and the special safeguard mechanism for developing countries."

He reminded developed countries about the G90 proposals on S&DT, saying South Africa was determined to "pursue industrialization and regional integration in Africa."

"Policy space", he said repeatedly during the meeting, was a sine qua non for economic development of Africa.

Davies emphasized that members must first address the systemic crisis at the AB caused by one member so as to ensure that there was an independent and impartial adjudicating body for resolving global trade disputes. He said any proposals to address the AB crisis must "not be unjustifiable and must safe-

guard the interests of the developing countries."

Commenting on the fisheries subsidies negotiations in the WTO, Davies said South Africa "continues to engage" in the talks to ensure that there was an "equitable" outcome that would squarely address the overfishing and depletion of fish stocks caused by large fleets from developed countries.

He urged his counterparts to be "realistic" on what can be accomplished at the WTO Ministerial Conference in Nur-Sultan in 2020.

Serious challenges

In a hard-hitting statement delivered at the meeting, a senior Indian trade official reminded his counterparts that "we are meeting again at a time when the multilateral rules-based trading system continues to face serious challenges, which include a spate of unilateral measures and counter-measures, deadlock in key areas of negotiations and the ongoing impasse in the Appellate Body, which is now threatening to completely paralyze the dispute settlement mechanism of the WTO."

The Indian official said that the recent New Delhi meeting of developing countries, broadly representing the sentiments of over 100 countries, emphasized the need to work "collectively to strengthen the WTO to promote development and inclusivity."

The Delhi meeting, according to the capital-based Indian official, underscored the need to ensure that "the process of WTO reform must keep development at its core, promote inclusive growth and fully take into account the interests and concerns of developing Members."

Commenting on the fisheries subsidies negotiations, the Indian official emphasized that "while negotiating the disciplines, members must be mindful of the mandates of SDG [Sustainable Development Goal] 14.6 and MC11 [the 11th WTO Ministerial Conference] on fisheries subsidies."

"Both clearly mandate that there should be appropriate and effective special and differential treatment for developing countries. These mandates need to be honoured in letter and in spirit," the Indian official insisted.

"Special and differential treatment

should not be replaced or derailed by new proposals and it would not be right to cherry-pick elements from the mandate," he emphasized.

According to the Indian official, "any new disciplines must also consider the capacity constraints of developing countries in conducting regular stock assessment based on the best scientific evidence available to them."

He warned against the recent US-Australia proposal for capping fisheries subsidies at the current level, saying that this approach "will unfairly impact developing countries and it will reward the big subsidizers by giving them higher caps, and thus create a permanent asymmetry."

"Further, the capping proposals do not have an S&DT component, thereby denying much-needed policy space to developing countries to develop their livelihood-oriented fisheries sector," the Indian official maintained.

According to the Indian official, "subsidies, both specific or non-specific, have the same adverse effect on sustainability of fish stock." "The attempt by some Members to discipline only specific fuel subsidies will result in a large proportion of operating cost subsidies being left out of the disciplines," he argued.

Without naming the US and other countries seeking "graduation and differentiation" among developing countries for availing of S&DT, the Indian official said "the reality remains that developing countries continue to face formidable challenges in integrating with global trade and in addressing their development goals."

"India cannot agree to any approach which undermines the centrality of the development dimension in the WTO," the Indian official said. "Hence, it would be best to refrain from this divisive debate now and instead focus on strengthening the WTO and reviving the negotiating agenda."

Commenting on the WTO reform proposals, he said India remained concerned about the proposals on the table as they lacked balance, while pushing "for one-sided narrative with disregard for issues of importance and concern to developing countries."

He said that "WTO reform initiatives must keep development at the centre, promote inclusiveness and non-discrimi-

nation, build trust and address the inequalities and glaring asymmetries in existing agreements, which are against the interest of developing countries."

Moreover, said the Indian official, "the first priority for us should be to address the ongoing impasse in the Appellate Body with a sense of urgency to launch the process of filling up the vacancies before December 2019."

Seeking clarification

A representative of the Africa, Caribbean and Pacific (ACP) Group of more than 90 countries said "the question of WTO reform is not limited to simply updating of the rules." The Group wanted clarification of what was being sought to be achieved through the WTO reforms, the official said. Absence of such clarification was "inimical to what should be our collective efforts to build and maintain an open, inclusive and transparent dialogue on the issue which enjoys the buy-in of the broader Membership."

The ACP Group cautioned against "a new or re-calibrated distribution of rights and responsibilities", arguing that it would not "support a reform agenda that does not preserve special and differential treatment in WTO agreements for all developing countries and LDCs [least-developed countries]."

"Members who so wish can voluntarily self-declare or opt out of those provisions," the ACP official added.

Commenting on transparency, he said the proposed punitive measures for not complying with transparency and notification requirements would result in "a fundamental rebalancing of the rights and responsibilities of Members."

"A greater understanding of and customized response to the unique circumstances of developing countries and LDCs is needed," the ACP official argued.

The ACP Group called for reaffirming "the paramount importance of preserving an independent, impartial and well-functioning dispute settlement system which is essential to preserving the legitimacy and credibility of the multilateral trading system, in all of its facets." It urged other WTO members to "redouble their efforts to unlock the selection process of Appellate Body members."

On fisheries subsidies, the ACP official said it was imperative that “the membership of the WTO concentrate their efforts on reconciling the shared commitment of all Members, as reflected in SDG Target 14.6 and the MC11 mandate, that is, not to subsidize fisheries in ways that harm the sustainability of those resources.”

The ACP Group underscored the need for “flexibilities to be accorded to developing countries and LDCs to, inter alia, develop fisheries sustainably, while accommodating the special needs of our vulnerable small-scale and subsistence fishing communities.” It demanded that there should be no onerous obligations under any future fisheries subsidies out-comes for developing countries.

It emphasized the need for “an inclusive, transparent and development-oriented approach by Members towards the negotiations”. It also urged members to “avoid expansion of the WTO’s mandate into fish management areas, including the rights of coastal states in areas under their jurisdiction.” Further, it called for policy space to provide subsidies that support communities in a manner that fosters sustained stocks, food security and livelihoods.

China, which has one leg in the controversial joint initiatives on electronic commerce, investment facilitation, domestic regulation of services and MSME disciplines and another leg in issues concerning developing countries, especially for safeguarding S&DT flexibilities, indicated at the Paris meeting that it would put forward “a proposal on cap-based approach” for fisheries subsidies in the coming days.

Chinese Ambassador to the WTO Zhang Xiangchen said its proposal would “suggest different approaches” that would allow members to choose in accordance with their own interests. There would be a “Green Box” for environmentally friendly subsidies that were in line with sustainable development goals and that would be exempt from reduction commitments.

Zhang said the proposal would contain transparency provisions for calculation of the caps for reducing subsidies. He added that “the specific concerns of developing members must be properly addressed, and LDCs should be exempted from subsidy caps.”

On WTO reforms, Zhang said that

China had tabled a proposal, suggesting that it was ready to engage on this issue.

The Chinese envoy also underscored the need for making “utmost efforts to achieve progress in areas including e-commerce, investment facilitation, and

domestic regulation by MC12.”

The Paris meeting showed that developing countries are increasingly coalescing around a common narrative on WTO reforms and policy space for achieving their developmental priorities. (SUNS8915) □

Trump steps up pressure on South to forgo S&DT

As part of the US push to restrict flexibilities accorded to developing countries in the WTO rules, Washington’s top trade official had written to his developing-country counterparts urging them to forgo such treatment.

by D. Ravi Kanth

GENEVA: The United States President Donald Trump has stepped up pressure on developing countries to “forego special and differential treatment [S&DT] in current and future WTO negotiations” on the grounds that it would make the intergovernmental trade body a viable forum for meaningful trade negotiations.

In a letter sent to trade ministers of developing countries on 26 April, the US Trade Representative (USTR) Robert Lighthizer said “at the direction of President Trump, I am reaching out to you to ask you to support this initiative by agreeing to forego special and differential treatment in current and future WTO negotiations.”

The two-page letter, obtained by the *South-North Development Monitor (SUNS)*, says that “currently, any WTO Member may ‘self-declare’ as a developing country in order to avail itself of special and differential treatment.” According to the letter, “while many developing-country designations are proper, some are clearly not, considering the great strides made by several Members in raising standards of living, increasing income, and expanding production and trade. These members seek special and differential treatment despite abundant evidence of economic strength.”

“The practice [of self-declaring as developing countries] for availing S&DT,” says Lighthizer, “has damaged the WTO’s negotiating arm by inhibiting the ability to differentiate among self-declared developing members.”

Consequently, “trade agreements do not materialize because many of the

more advanced economies are unwilling to assume trade commitments that are commensurate with their role in the global economy and in trade,” the USTR emphasized.

The US had tabled a proposal at the WTO General Council meeting in February, which it repeated in May, for establishing “four categories of members who, based on specific criteria, would forego new special and differential treatment under current and future negotiations.” These categories to be excluded from S&DT were WTO members which: are members of the Organization for Economic Cooperation and Development (OECD) or have begun the accession process; are members of the G20; are classified as a “high income” country by the World Bank; or account for no less than 0.5% of global merchandise trade (imports and exports).

In his letter to the developing countries, the USTR said that “to be clear, the United States is not requesting that a developing country change its special and differential treatment in existing WTO agreements.”

“All members will retain the ability to negotiate their priority interests in current and future negotiations,” the letter said.

Lighthizer said that he was not asking the developing countries to forgo S&DT in current and future WTO negotiations, but that by taking this step, “you would be making a significant contribution to ensuring that the WTO remains a viable forum for meaningful trade negotiations.”

Rejected

An overwhelming number of developing countries firmly rejected the US proposal at the General Council meetings in February and May.

In addition, trade ministers from 17 developing countries who met in New Delhi on 13-14 May categorically said that "special and differential treatment is one of the main defining features of the multilateral trading system and is essential to integrating developing members into global trade."

More important, "special and differential treatment provisions are rights of developing members that must be preserved and strengthened in both current and future WTO agreements, with priority attention to outstanding LDC [least developed country] issues," the trade ministers said.

The ministers rejected the concept of "differentiation" that the US has sought to introduce in the current and future WTO negotiations.

Commenting on the WTO reforms being proposed by the US and other developed countries, the trade ministers emphasized that "the process of WTO reform must keep development at its core, promote inclusive growth, and fully take into account the interests and concerns of developing members, including the specific challenges of graduating LDCs."

India had warned that "the attack on the right of developing countries to special and differential treatment, and efforts at differentiating among them can further erode trust and push the organization [WTO] into a deeper chasm."

At the WTO General Council meeting on 7 May, South Africa emphasized the principle of sovereignty and said: "More than two-thirds of the WTO Members are developing countries ... there is no agreed definition of what is to be considered a 'developed' or a 'developing' Member; it is the right of every Member to decide which category is most appropriate for itself, and not for any other Member to impose criteria for graduation."

(The history of the multilateral trading system shows that from the outset the US had been opposed to any such categorization. The concept of S&DT was brought in "on a best endeavour basis" by the then GATT Director-General Eric Wyndham White in his attempts to undercut the UN Conference on Trade and Development, which the UN General

Assembly had convened in 1963 as a result of an initiative by key developing countries dissatisfied with their treatment under the GATT. Subsequently, at every stage, the US tried to do away with S&DT but failed repeatedly. During the Uruguay Round negotiations, it attempted to restrict S&DT to the LDCs but

again failed. It found itself forced to accept, under the Marrakesh Agreement Establishing the WTO, the self-designation of developing countries, and their S&DT became part of the contractual rights and obligations of developing countries in the WTO. – SUNS) (SUNS8921) □

China lambasts US at WTO over Huawei ban

China has raised the issue of US trade restrictions against Chinese telecommunications firm Huawei at the WTO, criticizing what it said was an unjustified recourse to the WTO rules' security exceptions.

by Kanaga Raja

GENEVA: A meeting of the WTO Committee on Market Access on 28 May heard China criticizing the United States over the latter's recent prohibitions on the Chinese telecom giant Huawei Technologies Co Ltd purportedly on national security grounds.

China said that the abuse of the national security exceptions under Article XXI of the General Agreement on Tariffs and Trade (GATT) by the US was putting the rules-based multilateral trading system in danger.

According to trade officials, the matter was brought up under the agenda item of "Other business" by China, which addressed the issue of the Executive Order issued by US President Donald Trump on 15 May.

In the Executive Order on "Securing the Information and Communications Technology and Services Supply Chain", Trump had said that "foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services, which store and communicate vast amounts of sensitive information, facilitate the digital economy, and support critical infrastructure and vital emergency services, in order to commit malicious cyber-enabled actions, including economic and industrial espionage against the United States and its people."

He had further said "the unrestricted acquisition or use in the United States of information and communications technology or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries augments the ability of foreign adversaries to create and exploit vul-

nerabilities in information and communications technology or services, with potentially catastrophic effects, and thereby constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States."

The Executive Order gives the federal government the power to block US companies from buying foreign-made telecommunications equipment deemed a national security risk.

Subsequently, the US Department of Commerce added Huawei and some 70 affiliates to its "Entity List", effectively prohibiting Huawei from buying parts and components from US companies without US government approval, on grounds that Huawei has been involved in activities contrary to US national security or foreign policy interests.

The US ban has already resulted in several US chipmakers and software firms and platforms, such as Android, refusing updates to systems for Huawei products. Huawei and its affiliates are also being denied chips.

In turn, there are hints from China that it may restrict access to its rare earths and downstream products, essential for several high-tech appliances and activities. China has also published a draft regulation (for comments) on cybersecurity rules that may affect several US enterprises manufacturing for Chinese markets or exports.

"Great concern"

At the 28 May meeting of the Committee on Market Access, China, voicing deep concerns, asked the US to notify subsequent administrative measures to

the WTO without delay.

It also called on the US to respect the WTO rules in formulating implementation regulations regarding the export control measures.

According to trade officials, China pointed out that the US was in violation of Article I of the GATT, and that it was also not complying with the provisions in Article XXI of the GATT (on security exceptions).

It called on the US to "immediately lift all unilateral sanction measures against Chinese companies."

China further said that it would use all available means to safeguard its national interests.

It underlined that the repeated over-generalization of national security by the US and the abuse of Article XXI of the GATT "has caused great concern in the membership" of the WTO.

While the US has pointed out on many occasions that strengthening the economy would contribute to national security and that preserving innovation and technology is vital to its national defence, China was of the view that not all issues related to the economy, or innovation and technology, could be equated with national security.

According to trade officials, in this context, China pointed out that according to the 2019 US trade policy agenda and the latest data, the US economy was currently in a healthy state with a recent boom in jobs, including manufacturing jobs. This was squarely contradictory to the US logic for invoking Article XXI, it said.

It also said that to date the US had not presented any convincing evidence when invoking the national security exception, whether in its latest Executive Order or in previous measures under Section 232 of its Trade Expansion Act of 1962.

China underlined that the WTO was based on rules and invoking Article XXI must also be based on certain rules, including the principle of good faith. The determination of a security threat should be based on objective proof rather than subjective perception, it added.

The abuse of Article XXI without any objective evidence would severely impact other members' rights under the WTO and had put the rule-based multi-lateral trading system in danger, China warned.

China cited a quote by the US delegation during a GATT negotiating session in Geneva in July 1947, in which the

US recognized the "great danger of having too wide an exception that would permit anything under the sun."

Indeed, when that happened, said China, the rules would not be rules anymore, exceptions would become the rules, and that would cause a significantly negative impact on international trade and the global trade order.

According to trade officials, the US declined to make any substantive de-

tailed comments on China's intervention as the item was not inscribed in the agenda of the meeting and was raised instead under "Other business".

The US merely invited interested members to find more information on the Executive Order of 15 May, and said that more information regarding additions to the Entity List could be found in the 21 May issue of the Federal Register. (SUNS8918) □

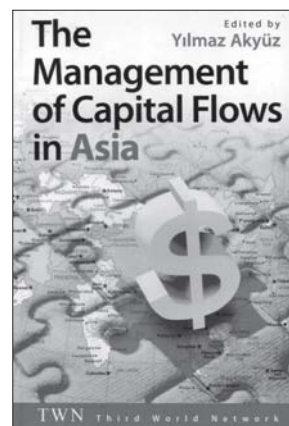
The Management of Capital Flows in Asia

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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UK austerity policies causing great pain and misery

The UK government's austerity policies, which have led to sustained and widespread cuts in social support, "amount to retrogressive measures in clear violation of the country's human rights obligations", a UN rights expert has said.

by Kanaga Raja

GENEVA: The policies of austerity introduced by the government of the United Kingdom back in 2010 continue largely unabated despite the tragic social consequences, with 14 million people living in poverty, rising homelessness and falling life expectancy for certain groups.

This is one of the main conclusions highlighted by Philip Alston, the United Nations Special Rapporteur on extreme poverty and human rights, in a report released on 22 May.

The Special Rapporteur undertook a mission to the UK on 5-16 November 2018, and his full report is now before the forty-first session of the UN Human Rights Council, which takes place from 24 June to 12 July.

In the report, the rights expert said that although the UK is the world's fifth largest economy, one-fifth of its population (14 million people) live in poverty, and 1.5 million of them experienced destitution in 2017. Close to 40% of children are predicted to be living in poverty by 2021, he added.

"Food banks have proliferated; homelessness and rough sleeping have increased greatly; tens of thousands of poor families must live in accommodation far from their schools, jobs and community networks; life expectancy is falling for certain groups; and the legal aid system has been decimated."

Alston said that the social safety net has been badly damaged by drastic cuts to budgets of local authorities, which have eliminated many social services, reduced policing services, closed libraries in record numbers, shrunk community and youth centres, and sold off public spaces and buildings.

The bottom line, said the Special Rapporteur, is that much of the glue that has held British society together since the Second World War has been deliberately removed and replaced with a harsh and uncaring ethos.

"The results of the austerity experiment are crystal clear," said Alston. "There are 14 million people living in poverty, record levels of hunger and homelessness, falling life expectancy for some groups, ever fewer community services, and greatly reduced policing, while access to the courts for lower-income groups has been dramatically rolled back by cuts to legal aid."

"The imposition of austerity was an ideological project designed to radically reshape the relationship between the Government and the citizenry," said the Special Rapporteur.

"UK standards of well-being have descended precipitately in a remarkably short period of time, as a result of deliberate policy choices made when many other options were available."

"The Government's 'work not welfare' mantra conveys the message that individuals and families can seek charity but that the State will no longer provide the basic social safety net to which all political parties had been committed since 1945," said Alston.

"It is hard to imagine a recipe better designed to exacerbate inequality and poverty and to undermine the life prospects of many millions," he said. "But in response to this social calamity, the Government has doubled down on its policies."

He said: "The endlessly repeated response that there are more people in employment than ever before overlooks inconvenient facts: largely as a result of slashed government spending on services, close to 40 percent of children are predicted to be living in poverty two years from now; 16 percent of people over 65 live in relative poverty; and millions of those who are in-work are dependent upon various forms of charity to cope."

"Given the significant resources available in the country, the sustained

and widespread cuts to social support, which have caused so much pain and misery, amount to retrogressive measures in clear violation of the United Kingdom's human rights obligations," said Alston.

"The Government should restore local government funding to ensure that crucial social protection can help people escape poverty, reverse particularly regressive measures such as the benefits cap and two-child limit, and audit the impact of tax and spending decisions on different groups."

Rising poverty

In his report, the Special Rapporteur said the UK is a leading centre of global finance, boasts a "fundamentally strong" economy and currently enjoys record low levels of unemployment. But despite such prosperity, one-fifth of its population (14 million people) live in poverty. Four million of those are more than 50% below the poverty line and 1.5 million experienced destitution in 2017, unable to afford basic essentials.

Following drastic changes in government economic policy beginning in 2010, the two preceding decades of progress in tackling child and pensioner poverty have begun to unravel and poverty is again on the rise. Relative child poverty rates are expected to increase by 7% between 2015 and 2021 and overall child poverty rates to reach close to 40%. "For almost one in every two children to be poor in twenty-first century Britain would not just be a disgrace, but a social calamity and an economic disaster rolled into one," said the rights expert.

"But statistics alone cannot capture the full picture of poverty in the United Kingdom, much of it the direct result of government policies. Official denials notwithstanding, it is obvious to anyone who opens their eyes."

Alston said that government reforms have often denied benefits to people with severe disabilities and pushed them into unsuitable work, single mothers struggling to cope in very difficult circumstances have been left far worse off, care for those with mental illnesses has deteriorated dramatically, and teachers' real salaries have been slashed. The number of emergency admissions to hospitals of homeless people ("of no fixed abode") increased sevenfold between 2008-09 and

2017-18.

In the past, the worst casualties of these “reforms” would have received at least minimal protection from the broader social safety net. But austerity policies have deliberately gutted local authorities and thereby effectively eliminated many social services, reduced policing services to skeletal proportions, closed libraries in record numbers, shrunk community and youth centres, and sold off public spaces and buildings including parks and recreation centres.

“It is hardly surprising that civil society has reported unheard-of levels of loneliness and isolation, prompting the Government to appoint a Minister for Suicide Prevention,” said Alston.

The Special Rapporteur however noted some positive developments as well. The 2018 budget introduced several changes to the government’s flagship benefits programme, Universal Credit (UC), including a welcome increase in work allowances, as a consequence of which an estimated 2.4 million households will be better off in 2019, and some 200,000 people will rise out of poverty. And the introduction of a minimum wage has helped reduce low pay.

But these developments have not stemmed the overall direction of the tide. The country’s most respected charities, its leading think-tanks, its parliamentary committees, independent authorities like the National Audit Office and many others have all drawn attention to the dramatic decline in the fortunes of the least well-off.

The Special Rapporteur said that he met with people who depend on food banks and charities for their next meal, who are sleeping on friends’ couches because they are homeless, who have sold sex for money or shelter; children who are growing up in poverty unsure of their future; young people who feel gangs are the only way out of destitution; and persons with disabilities who are being told they need to go back to work – against their doctor’s orders – or lose support.

State of denial

In the face of these problems, he said, the government has remained determined in a state of denial. While local authorities throughout England and Wales are outsourcing or abandoning

services, and devolved authorities in Scotland and Northern Ireland are frantically trying to “mitigate” or counteract the worst features of the government’s policies, ministers insist that all is well and running according to plan.

Despite some reluctant policy tweaks, there has been a deeply ingrained resistance to change. Most of the political debate around social well-being in the UK has focused only on the government’s explicit goals, the rights expert noted. They include a focus on employment, a quest for greater efficiency and cost savings, a determination to simplify an excessively complicated benefits system, a desire to increase the uptake of benefits by those entitled to them, removing the “welfare cliff” that deterred beneficiaries from seeking work and a desire to provide more skills training.

But in the area of poverty-related policy, the evidence suggests that the driving force has not been economic but rather a commitment to achieving radical social re-engineering – a dramatic restructuring of the relationship between people and the state.

Successive governments have brought revolutionary change in both the system for delivering minimum levels of fairness and social justice to the British people, and especially in the values underpinning it. Key elements of the post-war “Beveridge social contract” are being overturned. In the process, some good outcomes have certainly been achieved, but great misery has been inflicted unnecessarily.

The government has made no secret of its determination to change the value system to focus more on individual responsibility, to place major limits on government support and to pursue a single-minded focus on getting people into employment.

Many aspects of this programme are legitimate matters for political contestation, but it is the mentality informing many of the reforms that has brought the most misery and wrought the most harm to the fabric of British society. British compassion has been replaced by a punitive, mean-spirited and often callous approach apparently designed to impose a rigid order on the lives of those least capable of coping, and elevate the goal of enforcing blind compliance over a

genuine concern to improve the well-being of those at the lowest economic levels of British society, said Alston.

“It might seem to some observers that the Department of Work and Pensions has been tasked with designing a digital and sanitized version of the nineteenth century workhouse, made infamous by Charles Dickens, rather than seeking to respond creatively and compassionately to the real needs of those facing widespread economic insecurity in an age of deep and rapid transformation brought about by automation, zero-hour contracts and rapidly growing inequality.”

Disconnect

There is a striking and almost complete disconnect between the picture painted by the government, and what people across the country told the Special Rapporteur, he said. People said they had to choose either to eat or heat their homes. Children are showing up at school with empty stomachs, and schools are collecting food and sending it home because teachers know their students will otherwise go hungry.

And 2.5 million people in the UK survive with incomes no more than 10% above the poverty line – just one crisis away from falling into poverty.

In England, homelessness rose 60% between 2011 and 2017, and rough sleeping rose 165% from 2010 to 2018. The charity Shelter estimates that 320,000 people in Britain are now homeless, and recent research by Crisis suggests that 24,000 people are sleeping rough or on public transportation – more than twice government estimates. Almost 600 people died homeless in England and Wales in 2017 alone, a 24% increase in the past five years. There were 1.2 million people on the social housing waiting list in 2017, but less than 6,000 homes were built that year.

And 2.5 million households in England, or 11% of the population, experienced fuel poverty in 2016. Food bank use increased almost fourfold between 2012-13 and 2017-18, and there are now over 2,000 food banks in the UK, up from just 29 at the height of the financial crisis.

Life expectancy rates have stalled, and the gap in life expectancy between

the most deprived and most affluent communities increased steadily from 2001 to 2016 and is now 7.9 years for women and 9.7 years for men.

The government says work is the solution to poverty and points to record employment rates as evidence that the country is going in the right direction. But the fact that a fifth of the population live in poverty, despite record employment levels, makes clear that employment alone does not keep people out of poverty. Four million workers live in poverty, an increase of more than half a million in the last five years. In-work poverty is rising faster than employment and is higher than at any time in the last 20 years, driven by rising poverty among working parents.

Erosion of social services

The Special Rapporteur said the UK should be proud of its historically strong safety net. "Yet, it has been systematically and starkly eroded, particularly since 2010, significantly compromising its ability to help people escape poverty."

Alston said he heard time and again about important public programmes being pared down, the loss of institutions that previously protected vulnerable people, social care services at a breaking point, and local government and devolved administrations stretched far too thin.

"Considering the significant resources available in the country and the sustained and widespread cuts to social support, which have resulted in significantly worse outcomes, the policies pursued since 2010 amount to retrogressive measures in clear violation of the country's human rights obligations."

The ideological rather than economic motivation for the cutbacks is demonstrated by the fact that the UK spends £78 billion per year to reduce or alleviate poverty, quite apart from the cost of benefits; £1 in every £5 spent on public services goes to repair what poverty has done to people's lives.

"By treating work as a panacea for poverty while dismantling the social safety net, the Government has created a highly combustible situation that will have dire consequences, especially if and when there is prolonged economic contraction," said Alston.

He also said that benefits reductions since 2010 have saved money for the government but undermined the capacity of beneficiaries to escape from the grip of poverty.

Legal aid has also been dramatically reduced in England and Wales since 2012. The LASPO Act (Legal Aid, Sentencing and Punishment of Offenders Act) made most housing, family and benefits cases ineligible for aid; ratcheted up eligibility criteria; and replaced many face-to-face advice services with telephone lines. Consequently, the number of civil legal aid cases declined by a staggering 82% between 2010-11 and 2017-18.

As a result, many poor people are unable to effectively claim and enforce their rights, have lost access to critical support, and some have even reportedly lost custody of their children. Lack of access to legal aid also exacerbates extreme poverty, since justiciable problems that could have been resolved with legal representation go unaddressed.

According to the Special Rapporteur, in 2010, the government pledged to radically change public services by cutting funding to local authorities in England. As a result, the National Audit Office estimates that local governments in England saw a 49% real-term reduction in government funding allocations from 2010-11 to 2017-18, at the same time that demand for key social services was rising. This has had extremely negative consequences for critical social services, since English local authorities have extensive social care responsibilities, limited authority and ability to raise their own revenue, and are obligated to balance their books.

As a result, local governments have reduced services, shuttered many public facilities and transferred a greater share of service costs to users, who are often the least able to pay. More than 500 children's centres closed between 2010 and 2018, and between 2010 and 2016 more than 340 libraries closed and 8,000 library jobs were lost.

Abandoned to the private sector

Alston noted that the UK was a pioneer in privatizing previously public services across a wide range of sectors. In 2018, the National Audit Office con-

cluded that the private finance initiative model had proved to be more expensive and less efficient than public financing in providing hospitals, schools and other public infrastructure. Studies of the results of privatization in sectors such as water, energy and public transportation suggest that prices have been raised excessively while access for low-income households has been restricted and capital investments have been inadequate.

The Special Rapporteur said he heard a great many complaints from people in rural areas that the privatization and deregulation of public transport outside London had made trains unaffordable and led to many bus routes being cut. The resulting isolation and inability to afford basic transport had serious negative consequences in terms of access to jobs, schools, healthcare and community engagement.

Local authorities have often simply abandoned their responsibilities by relegating key services to the private sector and failing to take any regulatory measures to ensure basic service provision.

"Abandoning people to the private market in relation to services that affect every dimension of their basic well-being, without guaranteeing their access to minimum standards, is incompatible with human rights requirements," said the rights expert.

The Special Rapporteur also highlighted the shortcomings of the Universal Credit programme. Social support should be a route out of poverty, and UC should be a key part of that process. Consolidating six different benefits into one makes good sense in principle. But many aspects of the design and ongoing rollout of the scheme raise grave concerns about the adequacy of the country's flagship benefits programme, he said.

The Special Rapporteur said he heard countless stories of severe hardships suffered under UC. These reports are corroborated by an increasing body of research that suggests UC is being implemented in ways that negatively impact claimants' mental health, finances and work prospects. Where UC has fully rolled out, food bank demand has increased, a link belatedly acknowledged by the Work and Pensions Secretary in February 2019.

"Local authorities, devolved administrations and the voluntary sector de-

scribed their preparations for the rollout of UC as if they were preparing for an impending natural disaster or health epidemic. They have expended significant money and energy to protect people from what is supposed to be a support system."

The Special Rapporteur also highlighted that women, racial and ethnic minorities, children, single parents, persons with disabilities and members of other historically marginalized groups face disproportionately higher risks of poverty.

He further said that devolved administrations have tried to mitigate the worst impacts of austerity, despite experiencing significant reductions in block grant funding and constitutional limits on their ability to raise revenue. Scotland and Northern Ireland each report spending some £125 million per year to protect people from the worst impacts of austerity, and unlike the UK government, the three devolved administrations all provide welfare funds for emergencies and hardships.

But mitigation comes at a price, and is not sustainable. The Scottish government said it had reached the limit of what it can afford to mitigate, because every pound spent on offsetting cuts means reducing vital services. The mitigation package in Northern Ireland runs out in 2020, leaving vulnerable people facing a "cliff edge" scenario.

For devolved administrations to have to spend resources to shield people from government policies is a powerful indictment, said Alston. (SUNS8915) □

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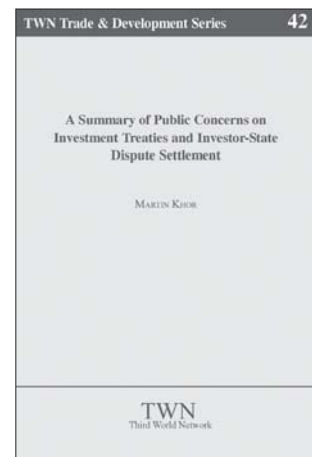
A Summary of Public Concerns on Investment Treaties and Investor-State Dispute Settlement

by Martin Khor

International investment agreements, specifically bilateral investment treaties and the investment chapters in free trade agreements, have come under the spotlight for what are seen as skewed provisions that grant excessive rights to foreign investors and foreign companies at the expense of national policymaking flexibility. Of particular concern is the investor-state dispute settlement framework embedded in many of these treaties, which enables foreign investors to sue host-country governments in opaque international tribunals.

The serious risks involved have prompted a rethink of investment pacts in developing and developed countries alike.

In place of the current lopsided system, calls are growing for agreements which would balance legitimate investor rights with the rights of the state to regulate investment and formulate policies in the public interest.



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Finance's new avatar

Finance has now come to overshadow, dominate – and destabilize – the productive economy, write *Jomo Kwame Sundaram* and *Michael Lim Mah Hui*.

Over recent decades, the scope, size, concentration, power and even the purpose and role of finance have changed so significantly that a new term, financialization, was coined to name this phenomenon.

Financialization refers to a process that has transformed not only finance itself, but also the real economy and society. The transformation goes beyond the quantitative to involve qualitative change as finance becomes dominant instead of serving the needs of the real economy.

Financialization involves the growth and transformation of finance such that with its hugely expanded size, scope and concentration, finance now overshadows, dominates and destabilizes the productive economy. The role and purpose of finance has been qualitatively transformed.

Finance used to profit from serving production and trade. Traditionally, financing production involved providing funds for manufacturers to finance production, and for traders to buy and sell. Financialization, on the other hand, turns every imaginable product or service into financial commodities or services to be traded, often for speculation. Instead of seeking profits by financing the productive economy and trade, finance is now more focused on extracting rents from the economy.

Finance is hegemonic, dominating all of society without appearing to do so, transforming more and more things into financial products and services to be traded and sold.

But financialization could not have happened on its own. Its nature and pace have been enabled and shaped by ideological, legal, institutional and deliberate policy and regulatory changes.

Regulatory authorities, both national and international, can barely keep up with its transformative consequences.

Size matters

One aspect of financialization refers to the size of finance relative to the whole economy, with the financial sector grow-

ing faster and securing more profit than other sectors.

The simplest and most popular measure of finance uses national income accounts for "finance, insurance and real estate" (FIRE). In the US, finance's share of GDP grew from 14% to 21% between 1960 and 2017, while manufacturing's fell from 27% to 11%, and trade's declined from 17% to 12%. The financial sector is almost twice as large as both the trade and manufacturing sectors.

The growth of shadow banking, referring to activities similar to traditional banking undertaken by non-bank financial institutions that are not regulated as banks, is an increasing and significant source of credit and accounts for much of the growth of finance. Such institutions include hedge funds, private equity funds, mortgage lenders, money market funds and insurance companies.

These financial institutions, including traditional banks, have used securitization, "off-balance-sheet" derivative positions and leverage to create, manage and trade securities and derivatives, ballooning its business volume.

With heightened concerns about growing financial fragility, more sophisticated measures have been introduced to estimate shadow banking. Most country-level measures show shadow banking increasing rapidly before and, more worryingly, after the 2008-09 global financial crisis!

At the same time, finance has also secured the most gains in the US, taking advantage of the sector's ability to leverage more than non-financial corporations, engaging in financial innovations and trading complex and opaque products netting super-profits.

During 1960-2017, finance almost doubled its profits, from 17% to 30% of total domestic corporate profits, while manufacturing's share shrank by almost two-thirds from 49% to 17%. Jim Reid of Deutsche Bank estimated that the US financial sector made around \$1.2 trillion in "excess profits", relative to the previous mean, in the decade before the 2008 global financial crisis.

Greater concentration

There are contrasting views of whether bank concentration leads to greater or less financial stability. But size certainly does not guarantee either good banking practices or financial stability.

In fact, the global financial crisis suggests that the "too big to fail" syndrome encouraged moral hazard. Big banks take on excessive risk as they believe they have a safety net – governments will bail them out to prevent a financial system collapse.

Over the years, US banking has become more concentrated. This accelerated with the abolition of the Glass-Steagall Act and its replacement with the Gramm-Leach-Bliley Act in 1999 which saw the creation of universal bank behemoths combining commercial and investment banking activities.

The top five banks in 1990 held less than 10% of total bank assets; by 2007, they had 44%. Seven years after the 2008-09 global financial crisis, the US banking industry is just as concentrated, with the top five banks – JPMorgan Chase, Bank of America, Wells Fargo, Citibank and US Bancorp – holding \$7 trillion, or 44% of total bank assets.

Meanwhile, asset management is even more concentrated than banking. Together, the "Big Three" – Blackrock, Vanguard and State Street – are the largest shareholders in four-fifths of listed US corporations, managing nearly \$11 trillion, thrice the worth of global hedge funds. Such asset management relies on banks for leveraged access to financial markets.

Undoubtedly, many regulators have replaced previously weak regulation, which failed to check spreading systemic risk before the 2008-09 global financial crisis, with new rules. But these do not seem to have effectively checked more recent abusive practices.

Recent technological, ideological, institutional and political changes have drastically transformed finance, enabling it to penetrate and dominate all spheres of life such that financialization is the new avatar. (IPS)

Jomo Kwame Sundaram, a former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007. Michael Lim Mah Hui has been a university professor and banker, in the private sector and with the Asian Development Bank.

Despite its new rhetoric, the IMF still promotes failed policies

Research and rhetoric on inequality aside, the IMF continues, through its loan programmes, to impose ruinous policies that hurt the majority.

by Lara Merling

An event titled "Income Inequality Matters: How to Ensure Economic Growth Benefits the Many and Not the Few" is not exactly what comes to mind when one thinks of the International Monetary Fund (IMF).

Yet, in April, at the latest Spring Meetings of the Fund and the World Bank, IMF managing director Christine Lagarde, along with the IMF's chief economist, discussed the urgency of addressing rising income inequality and the need for redistributive policies. While IMF staff in Washington were expressing their concern with inequality, people in Ecuador, Argentina and Tunisia were taking to the streets to protest against anti-worker austerity policies their governments are implementing as part of IMF programmes.

In the 1980s and 1990s, when a series of debt crises plagued the developing world, the IMF lent money to those countries as part of what it called structural adjustment programmes (SAPs). These programmes, part of what is now referred to as the "Washington Consensus", aggressively promoted an agenda of liberalization, deregulation and privatization, along with sharp cuts to social spending.

SAPs protected creditors and opened the doors for multinational corporations to do business in these countries, while the brunt of the adjustments was borne by the people.

As the growth and development that was promised as a result of these programmes never materialized, the IMF slowly lost some of its influence. The painful memories of the social costs that resulted from SAPs have made the IMF an extremely unpopular institution.

In recent years, the IMF has made substantial efforts to rebrand itself and create the image of an institution concerned with inclusive growth and social indicators. The IMF's research department has dedicated a significant amount of time and space to the issue of rising

inequality. This included research that showed that fiscal consolidation and liberalization of capital accounts – policies that are at the core of IMF programmes – increase income inequality. The Fund has also examined the effect of the labour market policies it promotes and their contribution to the decline in the share of income captured by labour.

Yet, while its research department tackled questions on how to pursue both growth and inclusion, the Fund's loan programmes have not incorporated these concerns.

More of the same

In the aftermath of the financial crisis in 2008, the IMF re-emerged as a major player on the global scene. The IMF stopped using the name SAP, but the structure of IMF loan conditions and the policy demands remained very similar, with the failure of previous programmes all but forgotten.

To make matters worse, the IMF continues a trend of underestimating the depth of recessions caused by the austerity policies it promotes, which prolongs economic crises and increases debt burdens as economies shrink.

The IMF's latest loan agreement with Ecuador has the typical features of a structural adjustment programme. It demands massive cuts in government spending, which directly target public sector employees, along with a series of neoliberal institutional reforms. The programme continues to impose failed policies that are shown by the IMF's own research department to increase inequality and have high social costs.

To go along with the IMF's new image, the programme does include a floor on social spending, along with a modest increase in spending on social assistance for the first year. However, the spending floor, which establishes a minimum amount of the budget to be allocated towards social assistance programmes, is

set at a low level, which is unlikely to keep up with the increased needs that will arise from Ecuador's recession.

The case of Argentina, which entered into an agreement with the IMF in the summer of 2018, has already shown the inadequacy of social spending floors. As the economic crisis has continued to worsen throughout the programme, poverty in Argentina has skyrocketed, increasing from 25.7% in mid-2017 to 32% by the end of 2018, a staggering 6.3 percentage points. Argentina also serves as an example of the failure of IMF austerity programmes, where growth projections had to be adjusted downwards by over 3% for a single year only three months after the initial agreement was signed.

An in-depth study of all IMF loans approved in 2016 and 2017 has shown that 23 out of a total of 26 programmes imposed austerity measures. The number of conditions attached to loans also continues to increase. Furthermore, the study has shown the inadequacy of social spending floors, which do not provide enough funding, even for the provision of basic healthcare.

The IMF has changed its rhetoric on inequality and social inclusiveness, but its operations continue to impose the same harmful policies of the past. While some symbolic steps have been taken on how to operationalize research on inequality, they have yet to be incorporated into lending agreements.

If the IMF is truly concerned about growth that benefits "the many", it needs to stop promoting policies that have time and again hurt working people. □

Lara Merling is an economics researcher with the International Trade Union Confederation. She is based in Washington DC, where she advocates for economic policies that work for all. This article is reproduced from the Equal Times website (<https://www.equaltimes.org/despite-its-new-rhetoric-the-imf?lang=en>).

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