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Argentina-NML dispute has implications for debt restructuring

A dispute between Argentina and hedge fund NML Capital over the former's unpaid debts has become the subject of what has been termed "the debt trial of the century". At stake in the dispute, which is being played out in the US court system, is not only Argentina's financial and economic well-being but also the ability of developing countries in general to undertake restructuring of burdensome sovereign debts.

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Argentina and hedge fund square off in "debt trial of the century"

An ongoing court case brought by a hedge-fund creditor threatens to deprive the Argentine government of valuable foreign exchange reserves and, more broadly, derail prospects for restructuring developing countries' sovereign debts.

by Bhumika Muchhala

NEW YORK: In what has been called "the debt trial of the century", the protracted court battle between hedge fund NML Capital Ltd and Argentina went before a three-judge appeals panel in New York on 27 February.

There were strong arguments from three attorneys: Jonathan Blackman, representing Argentina, Theodore Olson, representing NML Capital (the hedge fund that is pursuing this litigation), and David Boies, representing the Exchange Bondholder Group (holders of Argentina's restructured debt), as well as Bank of New York Mellon (the financial trustee for the restructured bonds).

The current debt trial against Argentina has shaken bond markets, worried bankers, lawyers and diplomats, captivated financial analysts and economic pundits, and generated a vigorous debate over various issues, including the role of holdout creditors in sovereign debt restructuring, the *pari passu* clause in debt contracts which ensures equal treatment to all creditors, and the bankruptcy concept of fairness.

According to legal analysts, the court may not rule for several months. However, the appeal proceedings have significant repercussions on the ability of countries to restructure their debt successfully. In November 2012, a lower court order in New York obliged Argentina to pay the defaulted bonds of the holdout creditors, NML Capital and Aurelius Capital Management, amounting to a sum of $1.3 billion, whenever it makes payments on its restructured debt.

The argument of the holdout creditors uses the *pari passu* clause that enforces equal treatment to all creditors, including restructured and holdout creditors. This parity clause is embedded in sovereign debt agreements and is one of the key legal issues highlighted in this ongoing case.

The federal appeals court of New York consequently froze Argentina's payout and heard new arguments in the 2nd US Circuit Court of Appeals.

In the 27 February hearing, Argentina's attorney said that the lower court's ruling violates Argentina's sovereignty, threatens to trigger a new financial crisis in the country and quadruples the number of Argentine bond cases in New York federal courts, rather than resolving them. "We would not voluntarily obey such an order," Blackman said. "We're representing a government and governments will not be told to do things that fundamentally violate their principles."

The ruling by US District Judge Thomas Griesa has been described by news reports as an unusual proposal to force Argentina to pay. The judge wanted US financial institutions, such as Bank of New York Mellon which processes Argentina's payments to its bondholders, to become enforcers by diverting the payments that Argentina makes to its restructured bondholders if it doesn't first pay an equal amount to the holdout bondholders.

The purpose of the judge's ruling last year was to make it impossible for Argentina to settle any of its debts without also paying the hedge funds, thus putting it under more pressure to abide by the court's judgments. However, cries of protest rang out from banks, bondholders and the US Treasury Department, who collectively argued that the judge's solution unfairly punished bondholders who are not a party to the dispute between NML Capital and Argentina.

More than 92% of the debt from Argentina's world record $100 billion default in 2001 was restructured in 2005 and 2010. Argentina gave these "exchange bondholders" new bonds initially worth less than 30 cents on the dollar. Over the last decade, these exchange bondholders are slowly regaining their original investments, having been paid 71 cents for each dollar invested.

Argentina said that a ruling in favour of the holdout creditors would

create an additional $43 billion in claims, which exceeds the nation's $41 billion in foreign exchange reserves. A spate of capital flight in the wake of this court case has further exacerbated the nation's potential solvency crisis.

Meanwhile, financial market analysts have argued that Argentina has numerous other sources of liquidity, including physical assets and state-owned enterprises, and is one of the Group of 20 (G20) major economies.

The court debate

The central debate between restructured bondholders and holdout bondholders is at the heart of this case. NML Capital says getting paid immediately in full, plus interest, is more than fair, because the plaintiffs spent millions litigating while the holders of swap bonds were getting regular payments. The exchange bondholders counter that there's nothing fair about taking other people's property, or getting as much as a 1,500% return on debt bought for pennies on the dollar.

The attorney for the Exchange Bondholder Group, Boies, argued for differential treatment between restructured, legitimate creditors and holdout creditors, saying that it is "inequitable" that the holdout creditors get multiple amounts of the face value of their debt. Boies also said that the jurors should prevent a second loss for exchange bondholders when they have already taken a haircut. "The right to payment for legitimate creditors should not be taken away when losses have already been internalized."

In response, one of the three appeals judges, Judge Reena Raggi, sharply clarified that "We're just here to enforce the existing contracts, not rewrite them."

Meanwhile, the attorney for NML Capital, Olson, claimed that "Argentina has not offered any proof that it cannot afford to pay the full amount we're asking for. Lack of ability to pay has not been addressed". He added, "This is not 2001. Argentina has sufficient resources now, based on the amount of their foreign exchange reserves."

Other remarks by Olson cast the hedge fund as a "victim of a default" and the country's character as suspect. "Argentina has a lot of history in defaulting on its obligations. In fact, it goes back a couple hundred years," Olson said.

(The two attorneys Boies and Olson have some shared history, having argued against each other in the litigation that decided the US presidential election in 2000. Olson had represented Republican George W Bush and Boies represented Democrat Al Gore.)

Meanwhile, Argentine President Cristina Fernandez has vowed to pay the holdout creditors nothing unless they accept the same deal as the other bondholders. In response, NML Capital has aggressively pursued Argentina's assets around the globe, as witnessed by the seizure of an Argentine naval ship, the *Libertad*, in a port in Ghana. Argentina and the hedge fund have been warring in court since 2004; however, the latest instalment of the case was being watched closely by the international media, bankers, lawyers and other financial actors because of its potential impact on unrelated debt disputes.

A bankruptcy concept of fairness

Argentina's contention that "equal treatment" could be provided through a new debt swap giving holdouts the same terms others accepted, is based on a bankruptcy concept of fairness. This concept says that when debtors cannot pay, all creditors must suffer, accepting less so that recovery can happen more quickly.

Indeed, sovereign debt relief depends on such a bankruptcy concept of fairness, and many of the legal briefs produced on the case reflect a desire that the courts invoke it while engineering a comprehensive solution to Argentina's debt problems. Unfortunately though, as seen by the point-blank responses of the appeals panel, the judges are more likely to base their ruling in simple contract terms, as in, "They owe the money, and they need to pay."

The worst-case scenario is one where Argentina would have to either begin paying the holdouts or default on all of its restructured debts. This could trigger a new economic crisis in the country. With this awareness, both the Obama administration and Argentina have argued that the judge's remedy could make debt relief harder for troubled economies, dooming their citizens to more years of poverty than necessary.

A White House brief highlighted that this ruling could damage US foreign policy, threaten US assets overseas and even harm the dollar by persuading nations to take their bond business elsewhere.

The spectre of vulture funds

Argentina's government officials have publicly named the holders of the defaulted debt as "vulture funds". Although the country's legislature passed a law barring payment to such funds in 2005, the government has spent the past decade opposing claims brought forth in US courts by holders of the defaulted bonds.

In these legal cases, many holders of the defaulted Argentine bonds have won US court rulings requiring the country to pay them. But despite the favourable rulings, courts have generally prevented the holders of defaulted debt from moving to seize the country's assets, citing the Foreign Sovereign Immunities Act, which limits the ability of plaintiffs to sue foreign countries in American courts.

Vulture funds are a type of highly profitable financial investment in which a fund buys sovereign debt cheaply and then sues to enforce it. Benefiting from tax and jurisdiction loopholes, vulture funds create obscure societies or task forces to lobby for their interests in tribunals, legislative bodies and the media. Many of the nations that face vulture fund lawsuits are Heavily Indebted Poor Countries, including several countries in sub-Saharan Africa.

Vulture funds purchase debt claims as secondary lenders. This means that vulture funds are not primary lenders, but rather entities that have purchased the debt from some other source, such as a bank. Generally, these funds purchase debt involving highly distressed countries. Sellers are usually more than willing to rid themselves of these debts, because many of these debts may soon come into default or face restructuring negotiations.

The vulture funds purchase this debt as it is about to be written off. Then, they sue the debtor or borrower for the full value of the debt, plus interest and penalties. The lawsuits occur in national courts, often in the United States, Paris or Brussels. Through litigation and negotiation, vulture funds have been able to secure a payout greater than the cost of the vulture fund's purchase.

One of the primary reasons why vulture funds are successful is that courts have been willing to enforce a vulture fund's right to collect the full value of the debt. Nations such as Zambia, Peru and Argentina have all lost lawsuits to vulture funds.

The most important (and successful)

argument justifying full enforcement is the standard *pari passu* clause in many sovereign debt agreements. This clause requires that all creditors be treated equally. Accordingly, a prominent Brussels court has held that *pari passu* clauses forbid states from paying only the restructured portion of their national debt without paying the vulture funds as well.

Therefore, if there is not enough money to go around, all creditors receive a pro-rata share and debtors are not allowed to pay off one creditor in full while leaving others unpaid. Because these clauses contractually prohibit a state from paying off one creditor before other holdouts, these clauses act as the key enforcement tool in the hands of holdout creditors.

States are thus forced to choose between appealing against court decisions that stop the restructuring because of the *pari passu* clause, and paying up in a settlement agreement with the vulture fund so that national debt restructuring can take place.

The tactics of vulture funds are deeply disruptive to debt restructuring processes that facilitate economic recovery in countries. The threat of a holdout may discourage other creditors from agreeing to a restructuring because creditors now can collect the full amount of the debt by suing, and because restructuring may be stopped by the courts under the *pari passu* argument.

Vulture funds put sovereign states in a difficult double bind. If a state chooses not to pay the vulture fund, that fund could call a default. On the other hand, when the state is prevented from paying the other creditors by a vulture fund, those other creditors may call for a default.

The likelihood of debt default may prompt a rush to grab the country's limited foreign exchange reserves, as creditors will attempt to get at whatever they can before a state goes into default. Most importantly, the ability to call a default by a vulture fund can trigger cross-default clauses in other debts.

Elliott Associates

The hedge fund holdout creditor in the Argentine case, NML Capital Ltd, is a subsidiary of Elliott Associates based in the tax haven of the Cayman Islands.

The head of Elliott Associates is conservative financier Paul Singer, who is widely credited for enacting some of the most aggressive litigation cases against countries. In 1996, Singer won a lawsuit against the Peruvian government for a 400% profit. Subsequently, he sued the Republic of Congo for $400 million for a debt he acquired for $10 million. He ended up with $127 million from the litigation. One of the ways in which Singer's fund secures political support is through the American Task Force Argentina (ATFA), a lobby group that targets the US Congress to take sides with its litigation cases.

Argentina's post-default experience

The exorbitant payments to vulture funds are valuable foreign exchange resources that should be financing domestic development and growth needs of developing countries. As the Argentine Minister of Foreign Relations Hector Timerman said in a Huffington Post article published on 14 November 2012, "This is money that should be going to build roads, schools and other poverty reduction programmes. Even worse, these nations are often on the receiving end of debt alleviation and international funding – which then goes to line the pockets of said vulture funds."

Ultimately, the overwhelming danger of vulture fund litigation cases is the risk of countries falling into financial crisis and economic recession. Conversely, equitable debt restructuring plays a significant role in enabling countries to recover from economic recession and prioritize their first duty to the welfare and rights of their own citizens over that of international financial actors and markets.

After Argentina defaulted over a decade ago, it reversed the austerity measures promoted by the International Monetary Fund (IMF), re-nationalized key productive sectors like aviation, pensions and most recently oil, increased social protection and income transfers to the poor, and reduced poverty substantially.

The ratio of debt service payments to exports fell to less than 20%. Unemployment decreased from around 22% to close to 7%. Real wages increased and wage inequalities narrowed. As the nation became one of the fastest-growing economies in the world, it demonstrated that its debt default and restructuring enabled a pathway out of economic recession and increasing poverty, and into domestic economic and social development.

NGO support for Argentina

On 27 February, the day of the appeals hearing, the US arm of the global Jubilee debt campaign and Third World Network held a vigil outside the New York court building. The two organizations issued a joint press release to the media, titled "Arguments End in 'Debt Trial of the Century': 2nd Circuit Court of Appeals to Rule on Vulture Funds and Argentine Bonds", that included statements by both organizations.

The statement by the Jubilee debt campaign said, "If the judges rule in favour of these hedge funds, it will mean these funds will more aggressively target poor countries in fragile financial recovery. If they rule with Argentina, it will mean that it will be harder for these types of funds to exploit countries in financial distress. The actions of NML Capital and Aurelius Capital hurt legitimate investors and poor people."

Third World Network said, "This case has huge implications for the international debt system precisely because it determines the ability of sovereign states to restructure their debt without being taken to court and held ransom by holdout creditors. Debt restructuring plays a significant role in enabling countries to recover from economic recession and prioritize their first duty to the welfare and rights of their own citizens over that of international financial actors and markets.

"Currently, there is no international debt restructuring mechanism, the absence of which allows hedge funds such as NML Capital to take Argentina to court. Vulture funds such as NML Capital speculate on the misfortune of countries and saddle developing countries with huge debt loads, depriving them of valuable financial resources badly needed for domestic development and growth."

The need for a debt restructuring mechanism

Various proposals on debt restructuring, including the IMF's sovereign debt restructuring mechanism (SDRM) proposed by its then First Deputy Managing Director Anne Krueger in 2001, have circulated in international organizations and within sovereign states.

One particular proposal is to establish a statutory sovereign debt restructuring mechanism by drawing on three key principles of Chapter 11 of the US bankruptcy law. First is the enactment of temporary standstills on external debt, whether debt-servicing difficulties are due to solvency or liquidity problems. The decision for a standstill should be taken unilaterally by the debtor country and sanctioned by an independent panel

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South supports LDCs' TRIPS transition period, North creates obstacles

While it gained widespread backing from developing nations, a request by the least developed countries for a waiver from implementing the WTO's intellectual property treaty has met with reservations from developed countries.

by Simran Gathani

GENEVA: A "duly motivated request" by least developed countries (LDCs) to obtain an exemption from obligations under the World Trade Organization's intellectual property rights agreement for as long as a country remains an LDC has received overwhelming support from many developing countries.

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement explicitly recognizes, in Article 66.1, the "special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base". Accordingly, LDCs are currently not required to apply the provisions of the TRIPS Agreement (other than Articles 3 to 5), and upon a duly motivated request by an LDC member, the WTO's TRIPS Council "shall" grant extendable transition periods.

This latest request was discussed during the TRIPS Council meeting in Geneva on 5-6 March.

However, hopes that the Council would decide in favour of the poorest and most vulnerable segment of the international community by adopting the draft decision text proposed by the LDC Group were dashed, particularly as several developed countries backtracked on their legal commitments under Article 66.1 and resisted adoption of the proposed text.

No decision was reached on the matter, and it will be taken up again at the next TRIPS Council meeting on 11-12 June. In the interim, the newly appointed Chair of the TRIPS Council, Ambassador Alfredo Suescum from Panama, will conduct informal consultations.

The LDC Group had submitted the "duly motivated request" to the TRIPS Council last November. Annexed to the request is a draft decision text for the consideration of the TRIPS Council which states: "Least developed country Members shall not be required to apply the provisions of the Agreement, other than Articles 3, 4 and 5, until they cease to be a least developed country Member."

An extension of the transition period will give LDCs maximum flexibility in determining the level of intellectual property (IP) protection and enforcement that should be in place nationally. The TRIPS Agreement recognizes that this flexibility is important for LDCs to address the developmental needs as well as to develop a viable technological base.

The previous extension of the transition period granted to LDCs in 2005 comes to an end in June 2013. Unless it is extended, LDCs will have to fully implement the TRIPS Agreement.

That extension was subject to conditions such as "no rollback", which prevents an LDC from undoing existing IP protections and from providing reduced protection once its laws contain provisions that move towards becoming TRIPS-compliant. It also contains elements on technical cooperation for TRIPS implementation, issues not linked to an extension of the transition period.

Members' views

At the TRIPS Council meeting, Nepal, on behalf of the LDC Group, officially presented the request and called on the Council to adopt the proposed decision text.

The LDCs argued for an extension on the basis of their worsening socioeconomic situation, weak innovative and technological capacities, and uncertainty when LDCs would be able to overcome their constraints and develop a viable technological base. LDCs also argued that developed countries had not fully fulfilled their commitments to transfer technology to LDCs as required by Article 66.2 of the TRIPS Agreement.

They stressed that the TRIPS Agreement mandated an "automatic extension" once a "duly motivated request" was submitted to the TRIPS Council and does not allow other WTO members to condition the request on clauses such as the "no rollback" clause found in the previous extension decision. LDCs also stressed that WTO members should not confuse the extension flexibility provided under Article 66.1 with the technical assistance for implementing the TRIPS Agreement, which is a separate matter under Article 67 of the Agreement.

According to an LDC delegate, the interventions by the US, the European Union, Canada, Switzerland and Japan focused on LDCs' compliance with the TRIPS obligations, and subjecting any further extension to a series of conditions, thus effectively limiting the policy space intended by Article 66.1.

The US, according to sources, said that its support for previous extensions was "premised on promoting IP protection and enforcement", adding that it was "essential to preserve" LDCs' implementation of IP laws and enforcement. It added that it had "questions and significant concerns" and thus was "not in a position to support" the LDC request at the TRIPS Council meeting.

The EU said that it was "willing to consider an extension" but it was important to consider "where we are now" and "where we are going". It said that a study on LDCs' progress in implementing IP systems could be a "valuable starting point for our discussion and the question of what challenges are outstanding regarding TRIPS implementation." The study is financed by the Swedish government and facilitated by the WTO secretariat.

It added that the LDC proposal "lacks both a clear and predictable perspective and remains silent on how IP and the TRIPS Agreement could specifically help LDCs in building a viable technological base".

Switzerland, according to sources, countered the LDC request, stating that it had "systemic implications" for the WTO, while questioning whether the transition period will benefit LDCs. Canada and Australia also questioned the parameters of the LDC request.

(Commenting on the outcome, Professor Brook K Baker from the Northeastern University School of Law in the US said: "There's no excuse for the TRIPS Council having failed at its March meeting to grant what is a mandatory extension of the LDC transition period pursuant to LDC's proper motivation. Grant-

ing monopolies to transnational IP companies in the poorest countries in the world is guaranteed to slow development in both technology and human capacity. Access to medicines, educational, informational, and cultural resources, agricultural inputs, and green technologies is critical to human rights and survival in these countries. The efforts of the US and EU to pare down and conditionalize this extension-of-right must be condemned.")

"An important flexibility"

Ambassador Shanker Das Bairangi from Nepal, on behalf of the LDC Group, in officially presenting the LDC request and draft decision text to the TRIPS Council, said the extendable transition period was "an important flexibility" granted to LDCs.

Nepal argued that "LDCs need the continuation of flexibility as their situation has not changed significantly over the years", "their marginalization continues", and "they have not been able to develop their productive capacities which limit their meaningful integration into the world economy".

"LDCs continue to be characterized by multiple structural constraints that include low per capita income, low level of human development and extreme vulnerabilities to external shocks. LDCs are home to more than 50% of over a billion people who live in extreme poverty. These countries are the most off-track in the achievement of the internationally agreed development goals, including the Millennium Development Goals. They bear considerable health burdens – of both communicable and non-communicable diseases. In 2011, according to UNAIDS, some 9.7 million of the 34 million people living with HIV worldwide lived in the LDCs. Of these people, only 2.5 million had access to antiretroviral treatment," Nepal stressed.

Nepal also said "LDCs' economic indicators have not changed since 2005. Trade in goods and services has not improved much – in fact trade deficit in both goods and services have increased; per capita GDP growth has fallen".

Nepal further said: "All LDCs are net payers of royalties. These countries have not been able to spend even a small fraction of their national budget to research and development as they have to concentrate more on basics like health and education. The developmental schemes for transfer of technology provided in TRIPS Article 66.2 have not effectively and adequately materialized."

Nepal also argued, "The level of technological development in the LDCs has remained low. In UNDP's Technological Achievement Index, LDCs are at the bottom. So are they in UNIDO's Competitive Industrial Performance Index and UNCTAD's Innovation Capability Index. Numbers from WIPO reports indicate that LDCs have not been able to enter the race of technology and innovation."

"In Istanbul Programme of Action, we all recognized that LDCs are lagging behind in the critical areas of science, technology and innovation. Unless LDCs have flexibilities to adopt policies to stimulate technological catch-up with the rest of the world, they will continue to fall behind other countries and face deepening marginalization," Nepal said.

"In terms of future outlook, the 2012 UNCTAD LDCs report has noted that 'LDCs have to prepare for a relatively prolonged period of uncertainty, with possible escalation of financial tensions and real economic downturn'," Nepal added.

Nepal further argued that the transition period has been granted in consideration of LDCs' special situation and it is not possible to predict when LDCs will be able to overcome their constraints. It added that the TRIPS Agreement recognizes in its preambular language that LDCs have "special needs" and thus need "maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base".

Nepal argued that in its view "the most logical and predictable approach is not to set an artificial timeframe". "Our proposed approach gives more certainty and predictability – once you graduate, you need to comply. We find precedence of such exemption in Article 15(2) of the Agreement on Agriculture," Nepal added.

It said that LDCs' request has been motivated by the need for policy space to "conserve the autonomy to determine appropriate development, innovation, and technological promotion policies, according to local circumstances and priorities", quoting from a United Nations Development Programme (UNDP) policy brief on the matter.

"They need such space to ensure access to various technologies, educational resources, medicines and tools necessary for development. Most IP-protected goods and services are simply beyond the purchasing power of least developed countries and their people," Nepal stressed.

It also quoted Michel Sidibe, Executive Director of the Joint UN Programme on HIV/AIDS (UNAIDS), who stated, "An extension would allow the world's poorest nations to ensure sustained access to medicines, build up viable technology bases, and manufacture or import the medicines they need."

Nepal highlighted that Article 66.1 of the TRIPS Agreement "specifies an obligation to grant extensions" once the TRIPS Council receives a duly motivated request from LDCs. It also referred to paragraph 2(iii) of the Uruguay Round Decision on Measures in Favour of LDCs, which states that "sympathetic consideration shall be given to specific and motivated concerns raised by the least-developed countries in the appropriate Councils and Committees".

Nepal recalled the statement of UN Secretary-General Ban Ki-moon in 2007 at the opening of the UN Economic and Social Council (ECOSOC) session, which said, "The rules of intellectual property rights need to be reformed, so as to strengthen technological progress and to ensure that the poor have better access to new technologies and products." Nepal added, "What LDCs are seeking today does not go to the extent of reform of IPR [IP right]. We are simply asking for the continuation of flexibility already agreed in 1995 – with reasons."

Nepal also highlighted that the LDC request and draft decision text has received strong support from the UN development agencies, civil society as well as from industry.

Nepal called on WTO members to extend support to the LDCs' request, which is duly motivated, and to adopt the draft decision.

Policy space and autonomy

Cambodia, a member of the LDC Group, stressed that an extension of the transition period "will preserve the policy space and autonomy to determine policies and to develop the necessary policy and law to balance IP".

Cambodia said that it had benefited from the exemption to exclude pharmaceutical product patents, giving an example of generic medicines that are now priced at $140 compared to $10,000. This extension will definitely enable LDCs to gain access to affordable generic medicines. Cambodia sought full support for the LDC request and draft decision.

The Solomon Islands, also a mem-

ber of the LDC Group, said that it found it extremely difficult to take on TRIPS compliance, adding that it does not have the capacity or infrastructure to implement IP let alone to ensure compliance. It also said that research and development (R&D) is not even on the agenda of its institutions, adding that the level of education of its people is quite basic.

It also pointed out that developed countries had yet to fulfil their technology commitments under Article 66.2 of the TRIPS Agreement, adding that developed countries had yet to agree to the reporting format on its technology transfer commitments. It stressed that LDCs needed the continuation of flexibility as the LDC situation had not changed.

On the issue of the duration of the transition period, the Solomon Islands stressed that the proposed period was "the most realistic, predictable and transparent", adding that the "process of graduation is a gradual process. It does not happen overnight. To opt for a given timeframe is an arbitrary option with no basis".

Morocco, on behalf of the African Group, said that it fully supported the cause of LDCs, adding that Article 66.1 does foresee the possibility of renewing the transition period based on economic and financial constraints.

Ambassador Wayne McCook from Jamaica, on behalf of the African, Caribbean and Pacific states (ACP Group), expressed strong support for the LDC request, adding that once LDCs submit a request, Article 66.1 states that the "Council of TRIPS shall accord" the extension. The ACP Group said that there can be no question that the extension must remain as long as LDCs face constraints.

Brazil said it was ready to support the LDC request and the draft decision text proposed by LDCs. It based its support on three reasons:

(i) Provisions on special and differential treatment to be found in the various agreements that form the acquis of the WTO, including the TRIPS Agreement, are an important systemic component. The role performed by this systemic component is to ensure that the international trading system becomes an effective instrument of social and economic development for all member states.

(ii) Brazil supports the principle that the international IP system should have policy space for countries to adjust and calibrate their national legislation in accordance with their respective stages of social and economic development.

(iii) The incorporation of developing countries, in particular the least developed ones, into the so-called knowledge economy has proved to be a daunting challenge, the complexity of which could barely be assessed almost 20 years ago when the Uruguay Round was completed.

Comprehensive

India supported the motivated request, and said that the LDC request was a comprehensive one, highlighting the vulnerability of their poor population, the marginal role their economies still play in world trade and the very limited productive capacity and technological infrastructure that they possess.

It added that the framers of the TRIPS Agreement rightly understood the special needs of the LDC members and their need for maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base. Article 66.1 of the Agreement therefore mandates the TRIPS Council to grant them an extension from the obligations of the Agreement on the basis of a motivated request. The provisions of Article 66.1 are precise and do not provide discretion to the TRIPS Council to either deny the request or impose any further conditions on the LDCs, India stressed.

It noted that the link between Article 66.1 and Article 67 "was unnecessary and had created confusion", adding that there is absolutely no relation between the transition period, which is meant to assist the LDCs in developing a viable technological base, and Article 67, which is an obligation on the developed countries to provide technical assistance to the LDCs to help them implement the TRIPS Agreement.

India also emphasized that the "no rollback" provision in the previous extension decision has no place in the TRIPS Agreement and had in fact reduced the policy space for the LDCs in utilizing the TRIPS flexibilities during the transition period to engage in technological development and ensure access to affordable goods for their citizens.

China said it recognized that LDCs faced constraints and needed maximum flexibility to meet their developmental challenges, expressing hope that the extension will give maximum flexibility to LDCs to address access to essential goods that would allow them to participate more effectively in the global trading system.

South Africa, in expressing support for the transition period, said that the circumstances that gave rise to the transition period had not changed and that LDCs face resource and human constraints and weak innovative capacities. This, it said, makes a strong case for an extension which should remain in force as long as a country remains a LDC.

Bolivia also expressed support for the LDC request and draft decision text on the basis that it was reasonable as the data showed that LDCs' situation had worsened. It also pointed out that intergovernmental organizations and non-governmental organizations (NGOs) had expressed their support for the transition period. It stressed that the issue of extension should not be considered as part of the package of issues that will be addressed at the WTO Ministerial Conference in Bali (in December 2013), adding that the issue pertains to the regular work of the TRIPS Council.

Cuba also supported the LDC request. It similarly stressed that it was not an issue that should be linked to the Bali Ministerial Conference.

Rwanda, a member of the LDC Group, reiterated that the economic situation of LDCs has not changed, and the technological base has not been developed due to lack of technological infrastructure, qualified personnel, necessary skills and technology transfer. This is evidenced by the composition of exports, which is dominated by a handful of commodities without any technological and skill-intensive products. Rwanda added that the share of LDCs in total trade was 3% in 1954 compared to the current share of only 1%!

Referring to the language of Article 66.1 of the TRIPS Agreement, Rwanda said that "all WTO members including developed countries have a legal obligation to accept the proposed decision text".

It stressed that conditions attached to the previous extension, especially the "no rollback" clause, "should and shall not" be attached to the current decision text, adding that the LDC Group's request is a new request under Article 66.1 and thus LDCs are not bound by the conditions of the previous decision. The "no rollback" clause severely hindered use of the flexibilities by LDCs, Rwanda said, adding that such a provision was provided for in TRIPS Article 65.5 but it per-

tained only to developing countries and not to LDCs.

Rwanda also stressed that the transition period provided by Article 66.1 is to address the special needs of LDCs and to develop the technological base and is not for TRIPS compliance, adding that the issue of technical assistance is a separate issue under Article 67 of the Agreement.

On the duration proposed by LDCs, Rwanda said it was specific and practical and any shorter period would not be practical, adding that the last negotiated extension of 7.5 years was absolutely inadequate for LDCs to deal with their development challenges and to develop a viable technological base. Such a limited timeframe is of limited practical value to LDCs and creates uncertainty as to whether LDCs will obtain another transition period, making it impossible for LDCs to maximize use of the policy space available during the transition period. The timeframe is also insufficient to develop a technological base, it added. Developed countries also get predictability and certainty as they are clear that as an LDC nears graduation it will comply with TRIPS obligations, Rwanda said.

Rwanda also highlighted that the LDC request and draft decision text received very strong support from civil society groups, certain UN agencies as well as from industry. Letters and statements in support have been received from more than 375 civil society organizations including trade unions from around the world representing millions of people, from UNDP and UNAIDS, from the Electronic Information for Libraries (EIFL) that works with libraries worldwide to enable access to digital information in developing countries, and from the Computer and Communications Industry Association (CCIA), an organization that represents the interests of a wide range of companies in the computer, Internet, information technology and telecommunications industries such as Google, Facebook and Yahoo.

Rwanda mentioned that the CCIA in its press statement noted that the implementation of the TRIPS Agreement would be counterproductive, adding costs to public health systems and other administrative burdens at a moment when these countries are contending with human and technological barriers to modernization. It cited CCIA President and CEO Ed Black as saying, "We look forward to the day when there are no more LDCs. But as long as any country's people are living on two dollars a day, they should have complete flexibility in IP protection." This statement is in line with the preamble of the TRIPS Agreement and consistent with the empirical evidence, Rwanda said.

LDC challenges

Angola called on the WTO membership to support the LDC proposal, stressing that LDCs represent the poorest and face many challenges, suffering from a high disease burden, inadequate sanitation and low agricultural productivity. The situation of LDCs had not changed since 2005, Angola said, adding that their productive capacities continue to be limited and they face serious problems in infrastructure and technology transfer.

Zambia said that the LDC request has been necessitated by the multiple difficulties LDCs had to deal with over the past transition periods in developing the necessary national conditions that would facilitate access, assimilation, adaptation and enforcement issues in the face of weak institutional capacities and limited but often competing financial resource needs. It is clear from the 2005 extension that the challenges faced by LDCs require a timeframe that is not arbitrarily determined, but one that takes into account the prevailing economic, financial and administrative constraints faced to ensure that IP facilitates the creation of a sound and viable technological base, added Zambia.

It further said that the LDC economies are faced with economic, financial and administrative constraints as well as special needs and requirements that necessitate maximum flexibilities under the TRIPS Agreement to enable them to build the necessary conditions that would facilitate the effective protection of IP while maximizing economic benefits from exploitation of IP.

"The need for maximum flexibility is not an invention of our own. This is something acknowledged in the preamble of the TRIPS Agreement and the objective is clear: to enable LDCs to create a sound and viable technological base," Zambia said, adding that it looked forward to members' positive consideration of the LDC Group's request.

Tanzania said that no country wants to remain an LDC. Short extensions will not give LDCs the time to overcome capacity constraints and to develop a viable and competitive technological base. Overcoming these problems takes contextually specific strategies, policy flexibility, greater financial resources, but it also takes time – decades not years.

Bangladesh explained that LDCs are not asking for full autonomy. Even under the transition period, LDCs will need to implement Articles 3, 4 and 5 of the TRIPS Agreement. The idea behind the flexibility is to create a sound and viable technological base, and not for LDCs to become TRIPS-compliant.

It stressed that the extension anticipated by Article 66.1 was "automatic" as it states "shall", and there is no way of interpreting it otherwise. The last extension was granted seven years ago. Out of this, for four years LDCs suffered financial and food crises. LDCs were hardest hit and their marginalization increased. Imports rose more than exports, while no technology transfer took place from developed countries. Thus, it is only natural that LDCs are assisted by this extension.

According to sources, other countries that supported the LDC request for an extension of the transition period were Saudi Arabia, Argentina, Mexico and Sri Lanka. *(SUNS7541)* ❐

(continued from page 4)

rather than by the IMF because the countries affected are among the shareholders of the Fund, which is itself a creditor.

This sanction would provide an automatic stay on creditor litigation. Such a procedure would be similar to safeguard provisions in the World Trade Organization that allow countries to take emergency actions to suspend their obligations when faced with balance-of-payments difficulties. Debt standstills would need to be accompanied by regulations to stem capital flight.

A second principle is debt restructuring, including rollovers and writeoffs, based on negotiations between the debtor and creditors, and facilitated by the introduction of automatic rollovers and collective action clauses in debt contracts. This would essentially comprise a combination of voluntary and statutory mechanisms. However, if the debtor and creditors fail to reach agreement, there should be a process of fair and independent arbitration.

A third principle is that of automatically granting seniority status to debt contracted after the imposition of the standstill (the so-called debtor-in-possession financing in US law). Any lending into arrears provided by international financial institutions should be oriented towards trade financing, not the financing of debt payments or capital outflows. It should also be accompanied by the above principle of temporary standstills. *(SUNS7542)* ❐

World Bank safeguards should conform to human rights norms

A UN expert on the right to adequate housing has called for the strengthening of World Bank policy and practice with a view to upholding this basic human right.

by Kanaga Raja

GENEVA: The United Nations Special Rapporteur on the right to adequate housing has urged the World Bank to seize the opportunity of its current two-year consultative process on reviewing and updating its environmental and social safeguard policies to commit to human rights standards in all its activities.

In a report presented to the UN Human Rights Council in the week of 4 March, Special Rapporteur Raquel Rolnik said: "This will ensure that the Bank can effectively champion and help fulfil human rights, and maintain its position as a central player in the effort to combat social exclusion, empower communities as actors for their own development and eliminate poverty at its roots."

Rolnik recommended, amongst others, that the World Bank commit to undertake (and require borrowers to undertake) human rights due diligence in all of its activities, including investment lending, development policy lending and the newly adopted Programme-for-Results. The Bank should also ensure that effective mechanisms are in place to implement these policies and identify, prevent, mitigate and account for how to address actual and potential adverse human rights impacts.

The Special Rapporteur had undertaken an official visit to the World Bank Group from 26 October to 1 November 2010. In January 2011, she had presented a preliminary note on her mission to the World Bank Group, which provided an overview of the relation between the policies and projects supported by the World Bank Group and the right to adequate housing.

On 21 December 2011, Rolnik said, she had sent a letter to the World Bank requesting additional information in the context of the preparation of her report. She expressed regret that the World Bank did not continue the positive exchange previously established and did not reply to the letter or provide the additional information requested.

"As Special Rapporteur on the right to adequate housing, I have witnessed the crucial impact the safeguards policies have on the right to adequate housing of people affected by Bank-financed projects," Rolnik said in her presentation to the Human Rights Council.

"When safeguards fail to address crucial aspects of the right to adequate housing, or are not adhered to in design or implementation, projects may result in forced evictions, displacement, involuntary resettlement and a general deterioration in standards of living of communities," she said. "At any given time, involuntary resettlement triggered by active Bank-financed projects affects over 1 million people, two-fifths of which are likely to be physically displaced."

Alignment with international standards

In her current report, the Special Rapporteur presented her observations and recommendations on the World Bank's safeguard policies, particularly on the right to adequate housing, in the context of its current two-year consultative process to review and update its environmental and social safeguard policies.

Rolnik welcomed the commitment by World Bank President Jim Yong Kim at the October 2012 Annual General Meeting in Tokyo not to dilute the Bank's safeguard policies, and recommended that the World Bank utilize the current review process to bring its safeguard policies into line with international human rights standards and strengthen its capacity to ensure effective implementation.

According to the Special Rapporteur, her report elaborates on particular aspects of the policies and operations of the International Development Association and the International Bank for Reconstruction and Development (referred to collectively as "the World Bank") in terms of their implications for the right to adequate housing.

Rolnik underscored the importance of the World Bank's Operational Policy and Bank Procedures on Involuntary Resettlement (OP 4.12 and BP 4.12) in encouraging respect for and the realization of the right to adequate housing for people resettled in connection with Bank-financed projects.

Highlighting a number of ways in which current policy and practice could be improved, she urged the Bank to build upon and strengthen the current policy and procedures on involuntary resettlement, taking due account of the experiences of the past decade, in the forthcoming revision.

The Special Rapporteur welcomed the Bank's commitment to examine "emerging areas", including land tenure, as a part of the safeguards review. Security of tenure is recognized as an essential element of the right to adequate housing and requires particular attention in the context of urban and rural development programmes.

She recommended the adoption of new policy requirements to secure and protect the tenure rights of vulnerable groups during the implementation and as a result of Bank-financed operations.

The Special Rapporteur also noted that current Bank operations include financing not only projects but also broader state reforms, such as development policy operations and Programme-for-Results financing, which can have adverse implications for the right to adequate housing but are not subject to the Bank's current safeguards policy framework or equivalent requirements to prevent harms.

Additionally, for certain types of investment lending operations that involve programmatic or sector-wide lending, Rolnik observed that safeguard policies as currently formulated are often ill-suited to address the impacts on the right to adequate housing of the different groups affected.

She recommended that the Bank conduct, support or require from the borrower that it conduct human rights due diligence of all of its operations and ensure that the risks of violations of the right to adequate housing are avoided or mitigated through robust risk management, genuine participation and accountability systems.

Due to its far-reaching large-scale development assistance and cooperation, as well as its important role in providing technical assistance and setting the reform agenda in several government policies, including housing, the Special Rapporteur believed that the World Bank is also uniquely placed to support governments around the world in meet-

ing their international human rights obligations during the process of development and, in particular, to progressively realize economic and social rights in their countries.

"The World Bank should adopt safeguards policies aligned with the international human rights obligations of its member States and clients. Incorporating human rights protections will help member States fulfil their human rights obligations and improve development outcomes by ensuring respect for the rights of those the Bank seeks to benefit."

Forced evictions

In her report, the Special Rapporteur addresses a number of issues with regard to the Bank's involuntary resettlement policy, making several recommendations in this area, as well as on the implementation of the safeguards.

She noted that forced evictions and the displacement of people from their homes, lands, livelihood sources and communities because of private and public development projects have had grave implications worldwide for the enjoyment of the right to adequate housing.

The World Bank has long recognized the severe impact that development-induced evictions and displacements can have on certain people; it was the first development agency to adopt guidelines on involuntary resettlement more than 30 years ago, she said, adding that the Bank has made important contributions since that time to the overall understanding of the risks of evictions and mitigation measures that can be put into place to prevent the risks from materializing into harms.

"The Bank's involuntary resettlement policy, which has undergone several changes over the past three decades, has been reflected in varying forms by several major public and private financial institutions, as well as a significant number of corporations, highlighting the extremely influential role the Bank has played in setting global standards."

However, Rolnik pointed out, World Bank-supported projects continue to cause substantial numbers of forced evictions, displacements and involuntary resettlements. The Bank's Independent Evaluation Group (IEG) estimates that "since the resettlement process lasts several years ... at any given time involuntary resettlement affects over 1 million people, two-fifths of which are likely to be physically displaced and three-fifths economically affected by active Bank-financed projects".

This estimate, derived from the documentation of the Bank's projects, includes only people that the Bank determines to be directly affected by its projects, which may be a significantly smaller group than the overall number of those displaced physically and economically as a result of Bank-financed projects worldwide, she added.

Rolnik stressed that as a part of the World Bank's duty to respect human rights, "it must take measures to ensure that any resettlement that occurs in connection with the projects financed by the Bank does not result in the violation of the human rights of affected people."

The involuntary resettlement amounts to a forced eviction when it occurs without the provision of, and access to, appropriate forms of legal or other protection. "Forced evictions constitute a gross violation of a range of internationally recognized human rights, in particular the right to adequate housing. The vulnerable situation in which victims of forced evictions are placed often results from structural discrimination and the lack of participation of those affected in project design and implementation."

The World Bank's policy and procedures on involuntary resettlement provide a number of important protections for people physically and/or economically displaced by Bank-financed projects. The Bank's adoption of the policy can be seen as an essential measure in satisfying its duty to respect human rights.

Rolnik recommended that as a gross violation of human rights, forced evictions should be explicitly prohibited in the policy. She also recommended that, in the introductory paragraphs of the revised policy, it be made clear that the Bank will not finance or otherwise provide assistance to any project or programme that causes or contributes to forced evictions.

The current policy objective to avoid where feasible, or minimize, involuntary resettlement, exploring all viable alternative project designs, reflects the World Bank's recognition that involuntary resettlement can give rise to severe hardships to displaced persons.

"In order to reinforce the current policy objective of avoidance and minimization, and harmonize with international human rights standards, the revised policy should be explicit in permitting involuntary resettlement in connection with Bank-financed projects only in exceptional circumstances, namely the promotion of the general welfare consistent with the State's international human rights obligations."

Rolnik emphasized that current policy protections, while generally compatible with human rights standards, fall short of guaranteeing that the right to an adequate standard of living, including adequate housing, will be upheld for displaced persons.

The Special Rapporteur recommended that the revised policy explicitly recognize the right to the continuous improvement of living standards, and require that measures are taken to ensure that resources and opportunities available to affected persons to enhance their own standards of living are in no way diminished or restricted as a result of resettlement.

Noting that "the dissemination of information and consultation on both project alternatives and resettlement options are often not done in a comprehensive and meaningful manner", Rolnik recommended that the Bank play a greater role in ensuring appropriate and effective dissemination of information to affected people about their entitlements under the policy.

"The Bank should support, through appropriate local organizations, the provision of legal advice and technical assistance to affected people from the earliest stages of the project and throughout the project cycle."

Tenure rights

Welcoming the Bank's commitment to examine new areas not currently covered by its safeguards framework, including land tenure, as a part of the review process, Rolnik recommended that the new safeguard policy framework contain provisions to ensure that tenure rights are not weakened or infringed as a result of Bank-financed operations (particularly land and agricultural sector development programmes).

"Particular attention must be paid to potentially vulnerable groups whose tenure bonds are not individual registered freehold, such as renters; people with plural, hybrid and informal tenure rights; those with secondary use and access rights; and those subject to communal, collective and customary tenure arrangements. In addition, women's rights should be promoted, with concerted efforts to reverse discriminatory gender patterns in tenure systems."

She noted that agricultural development programmes that promote large-scale commercial farming could also put at risk rural households with tenure arrangements that are not fully recognized and protected by law or in practice. The danger is particularly acute when there is intense competition over land and natural resources and multiple tenure systems.

"Heightened commercial interest and speculative investments in land (more common since the 2008 rise in food prices) pose substantial risks for households and communities with informal, secondary, communal, collective or customary tenure rights. In such contexts, safeguarding against increased vulnerability of these groups during the implementation and as a result of agricultural development programmes is vital."

The Special Rapporteur also noted the Bank's desire to move towards a safeguards model that enhances the use of country systems, adding that she supports the notion of placing greater emphasis on strengthening capacities of country institutions to identify, assess and manage social and environmental risks associated with development.

However, she underscored the continuing importance of the application and enforcement of the Bank's safeguard system (especially the involuntary resettlement safeguard) unless and until country systems are equipped to guarantee human rights protections for people affected by development projects.

Stressing that the necessary conditions to guarantee protections are not present in many countries in which the World Bank operates, she said that in many cases, legal and regulatory frameworks governing land acquisition, eviction and resettlement are incomplete or fall far short of both Bank policy and international law; institutional capacity to plan and implement resettlement is weak; and judicial and administrative accountability and review systems are unable to protect the rights of affected people owing to corruption, political interference or low capacity.

"Placing greater emphasis on the discretion of Governments of countries lacking the necessary conditions to guarantee protections heightens the risk of forced evictions and other violations of the right to adequate housing caused by Bank-financed projects," Rolnik said, cautioning against reliance on incomplete and inadequate country systems. *(SUNS7543)* ❒

Pressure grows on US to pass IMF governance reforms

The US Congress is being urged to approve a package of reforms that would give developing countries a bigger say in decision-making at the International Monetary Fund.

by Carey L Biron

WASHINGTON: More than 130 scholars, former government officials and policymakers are calling on the US Congress to enact pending legislation enabling broad governance reforms within the International Monetary Fund (IMF) that would strengthen the voice of developing countries within the institution.

A new open letter, sent to both houses of Congress on 11 March, came as President Barack Obama's administration has formally requested approval to affirm the reforms. Although officials at the IMF's Washington headquarters agreed on the changes in 2010, the effort has since been stymied by lack of action from the United States, the Fund's most powerful member.

Ironically, it was the United States, together with rising "middle-income" economies, that spearheaded the push for a reallotment of IMF "quotas", or voting rights based on economic shares, in the first place. Due to Washington's inability to greenlight the new changes, the process has already blown two deadlines.

"Realignment of IMF quota shares, while preserving US influence in the IMF, will enable the IMF to respond to shifts in the global economy, involving emerging powers more deeply in the institution and avoiding their disengagement," the open letter, obtained by Inter Press Service (IPS), states.

"Congressional enactment ... will sustain US leadership in global financial matters. Failure to act would diminish the role of the United States in international economic policy-making and undermine US efforts to promote growth and financial stability."

Those taking part in the new letter include former officials from previous presidential administrations, Washington think-tanks, universities, and activist and watchdog organizations.

In the previous week, a similar letter was sent by 19 former high-ranking US officials, including former World Bank presidents (Robert Zoellick and James Wolfensohn), Treasury secretaries (Henry Paulson, John Snow, Lawrence Summers), foreign policy luminaries (Zbigniew Brzezinski, William Cohen) and others.

Legislative proposal

Although the president has been delegated the power to oversee US dealings with multilateral lending institutions, Congress still needs to approve any related actions. While President Obama's administration continues to support the IMF governance changes, it put off broaching the subject until after the presidential elections in November.

In the week of 4 March, reports arose that the US Treasury, the administration's lead department on dealing with international financial institutions, had finally proposed a legislative provision that would formally allow the president to approve the reforms. Given that the changes would also double the size of the IMF's holdings to around $720 billion, the new legislation would also allow for a reallocation of previously approved US support for the Fund.

This last point is important, as the administration would be able to transfer some $65 billion from an emergency IMF fund into the US quota – maintaining its predominance without allocating any extra money (the United States' overall commitment to the IMF is around $100 billion). That would be quite a feat in the current economic climate of austerity, with some Republicans opposing giving any new money to the Fund.

"The United States is committed to implementing the 2010 quota and governance reform," a Treasury spokesperson told IPS. "We are actively working with Congress to get quota legislation completed as soon as possible. As the only country with a veto, implementing the quota reform will enable the US to preserve its leadership in the IMF without any new financial commitments."

Indeed, while the quota changes would significantly increase the currently under-weighted influence of fast-rising economies such as Brazil, China,

India and Turkey, it would not do so by cutting down on the United States' nearly 17% voting share within the Fund. Rather, it would decrease the cumulative share of European members, which nearly all observers say is currently outsized in terms of gross domestic products. The Netherlands and Spain, for instance, both have voting shares similar in size to Brazil's, despite the fact that the Spanish economy is less than two-thirds the size of the Brazilian.

Loss of legitimacy

The hold-up in reforms passage is widely seen, including by many signatories of the new letter, as a potential loss of legitimacy both for the IMF and for the United States' longstanding control of the organization.

Increasingly frustrated "middle-income" countries, for instance, are already in discussions on how to create parallel multilateral lending institutions outside of the IMF – in which their voices would be far more influential.

"The United States took the initiative on these reforms in order to sustain US leadership in the IMF, and many now feel that Washington needs to see through those commitments – US leadership will weaken if [it] doesn't pass these reforms," Nathan Coplin, a coordinator with New Rules for Global Finance, a Washington watchdog, and an organizer of the new letter, told IPS.

"The legitimacy of the Fund overall is probably the most poignant and relevant issue at stake in this reforms process. The next few years will really tell whether the stakeholders will become a lot more engaged and help to set new standards. Beyond lending, the Fund can also start to define a different kind of leadership role."

Still, for many who have been pushing for changes to the IMF's functioning, the most important aspect of this governance tweaking is that it would open the door to further modifications.

"We actually feel that these reforms are not comprehensive enough, but the Fund also won't be able to push forward with any new reforms until these go through," Coplin says. Indeed, another round of changes is already due by January.

"The quota reforms of 2010 are steps, baby steps, in the right direction for better IMF governance," Eric LeCompte, executive director of Jubilee USA Network, a Washington-based alliance working on debt reduction for developing countries, told IPS. "The IMF has a long road to walk before it is as inclusive as the United Nations, but these reforms point in the right direction."

The new US legislation has already run into trouble, however. Members of Congress are currently at work on a major finance bill that needs to pass before 27 March, in which the Treasury's proposal could be inserted. Yet Republicans in the House of Representatives – many of whom, in 2010, tried to end US contributions to the IMF – have refused to include the provision. It now remains to be seen whether the Democratic-controlled Senate will include the IMF language in its version, which observers say would significantly increase the proposal's chance of passage in March.

If the provision is not included in the end-March legislation, the reforms process could again be forced into limbo for several additional months. *(IPS)* ❒

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Integrating fiscal and finance issues into a transformative post-2015 development agenda

The global development framework to be put in place following the expiry of the Millennium Development Goals in 2015 must not only address issues of finance but also accept a reinvigorated role for the state in pursuing financial reform.

by Rick Rowden

Currently there are many efforts underway by the international donor agencies and the aid community to draft proposals and plans for establishing a new post-2015 global development paradigm to replace the Millennium Development Goals (MDGs) when they expire in a few years. One important set of issues that any new global development agenda must include is that of finance. The new agenda must ensure new mechanisms are in place to address the ways in which national and international finance systems affect the ability of governments to pursue just and inclusive economic development while protecting and supporting human rights. This article describes several exciting ways in which civil society groups and social movements are today linking up nationally and globally to advocate for more just and stable financial systems.

Central to their efforts, however, is a reinvigorated role for national governments in both domestic financial regulation and in the international financial architecture. Two important problems with the previous MDGs agenda were that: (1) they neglected the importance of finance to development and (2) the role of the nation-state in regulating markets was greatly downplayed. These mistakes must not be repeated in any post-2015 agenda.

Contributing to these blind spots in the MDGs were two different focuses of development with often competing areas of emphasis: one of these represents a prioritization of globalization and a country's integration into the global economy, while the other is more fixed on community-level projects and programmes. While both of these are important and worthwhile in their own right, there was little discussion on the proper role of the state in promoting economic development – or the need for appropriate financial regulation. Many donor agencies promoting free markets and global integration believed that the state should have either no role or a minimal one in promoting economic development and should simply open up and integrate into the global economy.

However, as we can see from many examples of civic activism today in the wake of the 2008 global financial crisis, growing numbers of advocates are calling for measures which will require a reinvigorated state that is more inclusive, participatory, democratic, accountable and responsive to national economic development needs and more capable when it comes to better regulating finance.

After three decades of a free-market model that set out to weaken and undermine the state's role in economic development, a stronger and more proactive state must be at the centre of a post-2015 framework, particularly when it comes to effectively regulating a host of financial issues that are inextricably tied to more successful development. Any such framework must address the shortcomings in several aspects of the international monetary and financial systems. Fortunately, there are many advocates around the world who have made very useful proposals that must inform and guide the post-2015 agenda.

These proposals promote solutions in such areas as: breaking apart the "too big to fail" banks and better regulating the remaining systemically important financial institutions and markets, including markets for commodity derivatives; establishing an international mechanism for orderly sovereign debt workouts; better regulating international capital movements, including with the use of capital controls; establishing better norms for regulating foreign aid and foreign direct investment (FDI) in developing countries; listening to the voices of developing countries which are calling for greater degrees of trade protection for their nascent domestic industries; rethinking the dominant export-led model of development and instead offering greater support for industrial policies to better promote new manufacturing and services industries; and ensuring that countries have the policy space and freedom to choose their own macroeconomic policies – aid should not be conditioned on economic policy reforms demanded by external actors.

The UNCTAD alternative

Those working on a post-2015 framework for development should take their lead from the United Nations Conference on Trade and Development (UNCTAD), which for years has warned about the flaws in the dominant development model promoted by the International Monetary Fund (IMF), World Bank, the G20 and commercial advocates of free trade and investment agreements based on rapid and premature trade, FDI and finance liberalization. As an alternative, UNCTAD has called for an overhaul of the global financial system to benefit developing countries and for rethinking the dominant export-led growth model for developing countries, and it has urged the poorest countries to prioritize domestic economic growth over exports. In a major break with the Washington Consensus model of laissez faire that has sought to weaken the role of the state, it has called for developing countries to use a strong "developmental state" which can effectively pursue an industrial policy to build up domestically owned manufacturing and service sectors over time. It has called for a range of alternative fiscal, monetary and financial policies targeted at better scaling up long-term public investment and employment.

For example, UNCTAD was the first to call for an internationally coordinated sovereign debt cancellation initiative, even when it was still taboo. It was the first to argue for orderly workout mechanisms for sovereign debt, more than a decade before this issue found a place on the IMF's agenda (though those mechanisms have still not been established). But since the sovereign debt crisis erupted in Europe, civil society organizations and advocacy networks and UN agencies such as UNCTAD have been reasserting the need for the establishment of a fair and transparent sovereign debt work-

out procedure, also known as the "Raffer Proposal", which has been endorsed and propagated by many noteworthy economists, NGOs and the Jubilee movement as a concrete way to solve the problems of economic and financial instability associated with sovereign debt crises.

UNCTAD has been ahead of the curve in its warnings about how global finance was getting too politically powerful and was no longer merely providing useful services to the real economy, but had turned into a dangerous and destabilizing global casino. UNCTAD forecast financial crises in Mexico in 1994 and 1995, warned of the 1997 East Asian crisis and the 2001 Argentine crisis, and has consistently sounded the alarm of the dangers of excessive deregulation of financial markets and stressed the perils of rapid, non-reciprocal trade liberalization by developing countries.

Today more than ever, UNCTAD's overt call for moving away from the current finance-driven model of globalization is at odds with the policy advice of the IMF and World Bank, and with the proliferation of regional and bilateral investment treaties (BITs) and free trade agreements (FTAs) being negotiated between industrialized and developing countries. Instead of continuing to neglect these problems, those currently crafting a post-2015 development framework should heed these warnings and support efforts by advocates to reform key parts of the international financial architecture and the need to better manage international capital flows – indeed, UNCTAD's longstanding call for the use of capital controls is today being vociferously called for by the BRICS countries (Brazil, Russia, India, China and South Africa). In fact, even the IMF has changed its longstanding opposition to the use of capital controls and now concedes its earlier blind support for capital account liberalization was wrong. Despite the flaws and limitations of the IMF's new position, it is still remarkable that they are finally acknowledging there is indeed a role for the state in the regulation of capital flows. One hopes those designing the post-2015 agenda are listening.

Unfortunately, many of the biggest donor governments and lending agencies which are seeking to influence the shape of the post-2015 development agenda also remain politically committed to promoting financial liberalization and are at odds with this new acceptability for capital controls. Many of these governments are still pushing aggressively for explicit prohibitions on such capital controls within the rules of the General Agreement on Trade in Services (GATS) talks at the WTO and in many regional and bilateral FTAs and BITs. Under current and proposed agreements, rules stipulate that governments may not be allowed to adequately re-regulate their financial sectors to ensure stability, and may not be able to implement capital controls or use adequate levels of trade protection for their nascent manufacturing industries, thus blocking their capacity for economic development. Any post-2015 framework can address these problems by taking steps to ensure that countries are given the policy space to adequately regulate their financial sectors, and to renegotiate many of the current FTAs and BITs in this regard.

On the issue of FDI, those championing the free-market approach to development have long expressed a blind faith that any types of FDI are good for development and state regulations on such investments are unnecessary. Unfortunately, many developing-country leaders who were eager for FDI believed them, and the MDGs agenda was silent on the question. But it is by now clear that while some types of FDI can indeed be beneficial for development, other types of investments can destroy the environment, violate the human rights of local people and wipe out domestic businesses when there is a lack of effective regulation. Addressing this issue in September 2012, UNCTAD released its Investment Policy Framework for Sustainable Development (IPFSD), a document that intends to serve as a comprehensive point of reference for policymakers formulating national and international investment policies on how developing countries can use FDI most constructively. To complement this advice, advocacy networks such as the European Network on Debt and Development (Eurodad) have proposed contractual changes to foreign aid loan and private foreign investment contracts, such as the Charter on Responsible Financing. Again, those drafting a post-2015 agenda must take note and ensure such proposals are integrated into the next global development framework.

Useful proposals

More broadly, on these and a host of other issues related to reforms needed in the global financial architecture, there have been many useful proposals articulated, such as those by UNCTAD, the Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System (the Stiglitz Commission) and the Group of 77 (G77), which is a group of some 130 developing countries that caucuses together in the UN General Assembly. The G77 has called for a host of policy and structural reforms to the foreign aid system and the global economic architecture.

In addition to the proposal by the G77, the post-2015 global development framework must also be informed by the voices of other groupings of developing countries, such as the Group of 33 (G33). The G33 is a group of 46 developing countries currently engaged in the agriculture liberalization talks within the WTO who are advocating for some of their goods to be designated as "special products" (SPs) for purposes of food security, and thus for the right to use a "special safeguard mechanism" (SSM), or temporary increases in tariffs, when their domestic producers are threatened by floods of cheaper imports. Just as the BRICS countries and others want to be able to use capital controls to protect themselves from the destabilizing effects of rapid inflows of speculative capital, the G33 countries want to be allowed to adopt better trade protection from rapid flows of agricultural imports that threaten their existing companies and farmers.

Similarly, the post-2015 framework must be informed by calls from the NAMA 11 countries, another group of developing countries opposed to the dramatic cuts in trade protection on manufactured goods currently being demanded by the rich countries in the WTO's Non-Agricultural Market Access (NAMA) talks. One would think the experts on the Stiglitz Commission, and the developing countries themselves who comprise the G77 in the UN General Assembly and the G33 and NAMA 11 within the WTO, ought to know a few things about the necessary reforms to the global financial architecture, and those drafting a post-2015 framework should integrate their proposals.

Allowing a stronger role for the state in regulating finance and FDI as well as in trade protection for safeguarding the success of domestic industries is important for more successful development. In the absence of a strong state and with prohibitions against the use of industrial policies by developing countries, we have seen in the last few decades a failure of industrialization and development in many countries. This problem was noted by the African Development Bank's *Annual Development Effectiveness Review 2012*: "… Africa's growth tends to be concentrated on a limited range of commodities and the extractive industries. These sectors are not generating the employment opportunities that would allow the majority

of the population to share in the benefits. This is in marked contrast to the Asian experience, where the growth of labour intensive manufacturing has helped lift millions of people out of poverty." The *Review* also notes: "Promoting inclusive growth means finding solutions to some deep structural problems. It means broadening the economic base beyond the extractive industries and a handful of primary commodities."

Donor agencies and the biggest donor countries which are currently seeking to influence the shape of the new post-2015 development framework simply must not continue with this failed free-market policy advice that keeps developing countries locked into dead-end primary commodities and extractive industries. As the Ghanaian presidential candidate Nana Akufo-Addo warned earlier this year: "About 30 years ago, some African nations, beginning with Ghana and Uganda, implemented liberal economic reforms to stop their economic decline. But in many cases we opened our markets to global competition when, beyond the extractive industries, we had nothing to compete with. So while the continent's share of global foreign direct investment projects has improved steadily over the past decade, much of this investment has reinforced the structural deficits of our economies." Therefore, a more successful global development framework can take heed of these insights and take bold steps towards supporting industrial policies of various kinds to promote a more rapid transition into manufacturing and services industries in developing countries.

Financial reform

The post-2015 agenda must absorb the lessons about the need for a strong national state to effectively regulate the financial sector. It has become clear that states must have the regulatory capacity to avoid another near-implosion of the world economy and the new development framework must support the regulation of finance to avoid the dangers posed by unregulated markets, greedy traders, "too big to fail" financial companies, opaque credit instruments and shadow financial institutions. Sadly, little has been done to date to address these dangers and the outsized role of the finance sector in all major economies continues unchecked, drawing needed investment capital away from creating jobs and productive investments and into the global casino.

A post-2015 agenda can only be successful in supporting stable financial systems and economic growth if it goes further than the tepid proposals offered by, for example, the new global accord known as Basel III, which will require banks to hold higher reserves, or those of either Europe's "High-level Expert Group on reforming the structure of the banking sector" or the "Liikanen Report", which only calls for a partial separation of regular bank activities from institutional investment activities within the same companies. More fundamental reforms would include meaningful new internationally agreed regulations on speculative activities in financial markets and breaking apart the 29 global systemically important financial institutions (G-SIFIs) (17 European, eight American and four Asian firms), or those financial institutions deemed "too big to fail". Indeed, as UNCTAD has suggested, a post-2015 global development framework cannot afford developing countries any meaningful protection from further financial crises unless steps are taken to "close down the big casino".

Credit markets lie at the heart of many economic crises, shaping policy responses and reinforcing inequities. There are considerable power dynamics at play both in debt relationships – where there is a propensity for credit markets to create conditions of economic fragility – and in the interactions between financial markets and existing social stratifications. A September 2012 essay by James Heintz and Radhika Balakrishnan titled "Debt, power, and crisis" recently explored these power dynamics in case studies of credit markets and crises, such as racialized lending in the subprime mortgage markets in the US, the European sovereign debt crisis, the Latin American debt crisis and capital flight from sub-Saharan Africa. Like others who have called for the post-2015 framework to be based on internationally agreed human rights, Heintz and Balakrishnan propose suggestions for how economic and social rights can provide an alternative framework for financial governance. These insights are further reinforced by a task force of human rights organizations and global networks devoted to highlighting the growing concern about the impact of financial regulation on human rights and sustainable development. On Human Rights Day this year, the initiative – "A bottom-up approach to righting financial regulation" – launched a new information portal to expose direct and indirect human rights abuses involving the financial sector, and insist on the human rights duties of governments to properly regulate these bodies if sustainable and equitable development is to be achieved.

Similarly, in October 2012 the United Nations independent experts on extreme poverty, external debt, and the promotion of a democratic and equitable international order reminded European Union governments that economic reforms must be crafted in line with the human rights obligations of states, particularly on the issue of economic and social rights set out in the International Covenant on Economic, Social and Cultural Rights. The human rights experts noted that while Europe's Liikanen Report recommends a set of regulatory measures to shield taxpayers from future bailouts and avoid shocks to the financial system, its proposals do not go far enough to provide real security or financial stability. The human rights experts urged EU authorities to ensure that vital public funds are not used on collapsing financial firms in the future, and a post-2015 framework must follow this advice. Between 2008 and 2011, European countries diverted €4.5 trillion (equivalent to 37% of EU economic output) from public expenditures into rescuing their failing financial institutions, and these levels of extra and unforeseen spending have pushed governments into debt sustainability crises. In response to these sovereign debt crises, governments have adopted harsh budget austerity plans which have created unbearable hardship for citizens, especially people living in poverty, and thereby contradict states' legal obligations to realize economic, social and cultural rights for their people. The post-2015 development framework must avoid promoting the same old IMF approach to budget austerity that actually undermines economic and social rights, and instead recognize that states must protect budgetary resources from being compromised by future financial bailouts and commit to helping developing countries create a regulatory framework that ensures public resources are not redirected to failing financial firms.

Regarding the issue of food security in a post-2015 development framework, it is likewise necessary that global financial reforms be meaningfully addressed. Over the past several years it has become increasingly clear that global derivatives markets and instruments have played a large role in instigating the global food crisis that has been particularly devastating for the poorest food-importing countries. Those currently crafting a new post-2015 development framework who proclaim their intention to address food security in the poorest countries must integrate the findings of recent studies by Masters and White, Ghosh, Wise and, most recently, a paper

co-authored by the World Bank, IMF, UNCTAD and the UN Food and Agriculture Organization (FAO) (among other agencies), which have all pointed to the role of speculative commodity index trading in aggravating the food price crisis in 2007-08 – perhaps by as much as 20% – as well as in the run-up in global food prices in 2011. Derivatives markets and instruments are thus implicated as levers of inequality, as food price volatility does not affect all people in the same way. Any meaningful post-2015 framework must effectively tackle the need for greater regulation of commodity speculation in derivatives markets.

Again, it is disturbing that many of the biggest countries seeking to influence the post-2015 development agenda are also resisting both calls for greater financial regulation or for breaking apart the G-SIFIs. For example, judging by the recent efforts of the US and other rich countries to quash the global finance reforms advocated by UNCTAD, the prospects for them having a positive influence on a post-2015 framework do not look good. In the run-up to UNCTAD's thirteenth ministerial quadrennial conference in Doha in April 2012, Western states made a concerted effort to stop UNCTAD from working on global macroeconomic and financial issues. Although a last-minute deal was reached that safeguarded UNCTAD's mandate to keep working on such issues, we must ask what this attitude towards UNCTAD reforms says about the quality of such inputs by these governments to the post-2015 framework.

Fiscal policy

On fiscal policy advice, the failure of the austerity programmes in Europe to achieve their stated goals of reducing debt-to-GDP levels and restarting economic growth is causing a rethink on the efficacy of the austerity approach. For several decades, the major bilateral and multilateral aid agencies would not give aid to a country if the IMF did not first deem its macroeconomic policies to be "prudent" and "sound". This should be among the first features of the old system to be done away with in any post-2015 global development framework. But on 9 October 2012 the IMF made an historic and outrageous concession about how terribly wrong its models had been in estimating the degree of social and economic harm caused by the deep budget austerity it has long advocated. New IMF research found that the economic damage from aggressive austerity measures may be as much as three times larger than they had previously assumed, and now the IMF is actually warning the eurozone countries to ease up on their harsh budget-cutting because it is counterproductive to restoring economic growth (and eventually getting deficits down). Just as critics of the IMF have long argued, the Fund itself now concedes that deep public expenditure cuts in a time of recession actually make things worse, akin to digging oneself into a deeper hole, because the subsequent drops in employment, consumer demand and future growth rates all contribute to lower tax collections and thus make deficits bigger. The stunning concession left many developing countries that had previously fallen victim to IMF conditionality flabbergasted.

And then, just to highlight that politics and ideology continue to trump the facts, the IMF spoke out barely one week later admonishing Portugal to stay the course with its current harsh austerity programme – as if their newly announced research did not exist. This striking turn of events bears important lessons for any post-2015 global development framework: developing countries must have the policy space and freedom to choose their own macroeconomic policies and aid should not be conditioned on economic policy reforms demanded by external actors.

Wages

On the question of wages, too, a new post-2015 framework must do more than the MDGs to protect workers and ensure the basic working conditions the International Labour Organization (ILO) describes as "decent work" are better established and protected. In sharp contrast to the free-market philosophy which has long claimed driving down wages to make your exports more competitive is the best way to achieve higher economic growth, the approach taken in a post-2015 agenda must be based on important new research that is increasingly refuting these claims. For example, a recent ILO study shows that not only does pushing wages down actually lower overall economic growth rates, but when multiple major economies are all doing this at the same time, it has a cumulative negative impact on global GDP – just the opposite of what is needed at a time of global economic slowdown. This old view that it is good to lower wages is largely responsible for shifting the benefits of increased worker productivity into the hands of shareholders and exacerbating growing trends in economic inequality.

The policy conclusions of the ILO paper shed light on the limits of international competitiveness strategies based on wage competition in a highly integrated global economy, and point to the possibilities for correcting global imbalances through internally coordinated macroeconomic and wage policies in which stimulating domestic consumer demand plays a much more important role in achieving higher and more inclusive economic growth. Indeed, the post-2015 agenda must rethink the externally focused dominant export-led growth model and replace it with a model more focused on building new domestic industries and strengthening domestic consumer demand in developing countries.

While it may be the case that the most powerful countries and donor agencies currently seeking to influence the post-2015 agenda will be opposed to many of the reforms outlined above, it is also true that there are increasingly outspoken social movements and civic advocacy efforts around the world calling for these sensible reforms. These include the many groups that comprise the Europeans for Financial Reform coalition and its counterpart in the United States, Americans for Financial Reform, along with new social movements such as Strike Debt! and international efforts such as the Tax Justice Network. The growing strength of this movement inside the US was arguably reflected in the recent victorious US Senate campaign to elect Elizabeth Warren in the state of Massachusetts, despite overwhelming odds and tremendous counter-pressure by the US financial services industry.

Although the political struggle between advocates of greater financial regulation and those who wish to keep the global casino open for business is likely to continue, it is clear that any post-2015 global development framework must meaningfully address these and other national and international financial reform issues if it is to have any legitimacy or popular support. Moreover, these challenges will have to be confronted in the new agenda if it is to prove more successful than the previous MDGs. ❒

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