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US pushes for "new approaches" in WTO talks

With the future of the Doha Round trade talks cloaked in uncertainty, the US has been calling for "new approaches" and a "clean slate" in tackling issues under negotiation in the WTO. This push – seen, among others, as an attempt to do away with special and differential treatment flexibilities for larger developing economies – was in evidence at recent WTO meetings on services trade and rules.

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US opposes discussion of Mode 4 issues under GATS

When the WTO's services bodies met on 17-18 March, the US sought to block discussion on calls to ease restrictions on the cross-border movement of service-providing workers.

by Kanaga Raja

GENEVA: A cluster of services meetings at the World Trade Organization on 17-18 March found the United States strenuously opposing and blocking discussion of a proposal by India that amongst others called for commercially meaningful market access for short-term services providers under Mode 4 of the WTO's General Agreement on Trade in Services (GATS).

The six-page Indian proposal, introduced at a meeting of the WTO Council for Trade in Services on 18 March, cited several escalating barriers to Mode 4 in the US, Canada and the United Kingdom, as well as other measures that act as disincentives for movement of natural persons or act as barriers for market access.

The US, backed by Canada, also blocked a request by India for updating of the assessment by the WTO secretariat on the continued barriers in the movement of natural persons under Mode 4 since 2009.

Apart from the Indian communication on Mode 4, the cluster of services meetings also took up other issues such as the ratification by Brazil of the fifth protocol on financial services annexed to the GATS, the operationalization of the LDC services waiver post-Nairobi, an update on the plurilateral negotiations on the Trade in Services Agreement (TiSA) by its participants, as well as concerns raised by Canada on new regulations on foreign suppliers of online publishing services in China.

In the Working Party on Domestic Regulation, Australia and Canada announced that their proposal on transparency in domestic regulation, which had been put forward before the WTO's Nairobi Ministerial Conference, was no longer on the table, as it had been developed specifically in the pre-Nairobi context. India however said that its proposal on increasing transparency in Mode 4 was still on the table (see following article).

According to trade officials, some members suggested restarting text-based negotiations, but there was no consensus on this, as the US voiced its opposition. According to the US, members were still in a reflective state on the broader negotiations. It said that domestic regulation was an important part of a larger puzzle on services.

The US said that "until there is a firm understanding on where we are going, it does not make sense to restart negotiating on neither the 2009 nor the 2011 Chair's text. The only option is to start with a blank page."

The US further said that it could not restart negotiations unless there was an assurance that the large emerging economies would take on new commitments without resorting to special and differential treatment (S&D) provisions.

Australia proposed an exchange of views to hear where members wanted to take the services negotiations in the post-Nairobi era. This proposal, trade officials claimed, received strong support.

According to trade officials, at the Committee on Trade in Financial Services, Brazil indicated that it had completed its internal procedures to ratify the fifth protocol annexed to the GATS. It had signed the protocol back in December 1997 but had not ratified it.

The Council for Trade in Services will now reopen the protocol for Brazil to formally notify the WTO of the completion of the process. It has until 25 March 2016 to do so.

The Council for Trade in Services on 18 March took up the issue of the operationalization of the services waiver for least developed countries (LDCs).

Trade officials said that there had been no new notifications since the Nairobi Ministerial Conference last December. Between October 2015 and Nairobi, nine notifications were received.

Uganda, on behalf of the LDCs, said that the group was still reviewing the most recent notifications, adding that overall, it was pleased with the fact that the number of preferential treatment measures exceeded the number of like

measures in goods.

It said it would come back later with further conclusions. It also asked members to provide some summaries of their notifications, as these were complex.

Mode 4 barriers

The Council for Trade in Services also took up the communication from India on Mode 4, which trade officials said illustrated the increasingly complex nature of barriers to Mode 4 entry experienced by its services suppliers.

According to trade officials, India's proposal called for all members to address such barriers to ensure that the Mode 4 access being committed actually resulted in effective and commercially meaningful market access.

Citing a 2009 WTO secretariat note, India quoted "shallow commitments" by developed and developing members in terms of Mode 4 market access. India asked the secretariat to update its report to reflect the current practices under Mode 4.

According to trade officials, the US, backed by Canada, expressed strong opposition to updating the secretariat document.

Trade officials noted that India has raised a dispute with the US and as a first step has sought consultations with the US over non-immigrant temporary working visas. An amendment to the request was sent by India on 18 March, and from this date both parties have 30 days to enter into consultations.

According to trade officials, the dispute relates to increased fees on certain applicants to the US for L-1 (relating to intra-corporate transferees) and H-1B (professionals engaged in speciality occupations) categories of non-immigrant temporary working visas and measures related to numerical commitments for H-1B visas.

Mode 4 deals with the movement of short-term service providers from a WTO member state to another member on a non-immigration framework for "trade in services".

Initially, in the Uruguay Round negotiations, the US had pushed for services as a trade issue, with a view to enabling its service providers to access services markets abroad through investment and establishing wholly-owned service enterprises in another country. However, as the negotiations continued, progress became possible only on the basis of a definition of "trade in services" that refers to supply of services in four modes.

The agreement itself, concluded at Marrakesh, also became possible only after the US and the EU agreed to enable Mode 4 supply by scheduling commitments to provide access for a specified number of personnel of service suppliers of other members. This was essentially negotiated by the US and the EU with India in the last stages of the Uruguay Round negotiations at official level in 1993, and multilateralized when scheduled.

But such access for Mode 4 supply has been undermined by regulatory measures such as "increased application fees for entry by certain categories of foreign professionals, increased salary thresholds for foreign professionals, or implementation of visa categories in a manner that renders effective market access meaningless and non-portability of social security benefits".

It is estimated that the US has collected around $375 million by way of visa application fees in the past five years. Effectively, higher visa fees have increased the cost of doing business for Indian service providers in the US. The US legislation has sharply raised the amount companies have to pay for two categories of visas. The fees for H-1B temporary visas for skilled workers have been doubled to $4,000 per application as of 1 April, while L-1 visa applicants will have to pay $4,500.

India is the biggest user of such visas. Its enterprises such as Infosys, Wipro and Tata Consultancy Services apply for up to 65,000 H-1B visas each year. The fee hikes apply only to companies that have more than 50 workers in the US and where 50% of these workers are foreign nationals.

The dispute threatens India's most valuable export. The country has become a tech services powerhouse and sends thousands of technology professionals on temporary assignments to countries around the world. The US accounts for 61% of the country's $108 billion information-technology services revenue.

According to the National Association of Software and Services Companies, the industry's trade group, Indian IT firms are estimated to have to bear an additional $400 million in annual costs under the new policies.

Moreover, the Indian non-immigrant service suppliers, who typically stay for a period of three to seven years, are forced to pay approximately $1.6 billion towards the US social security system. The cumulative contributions made by the Indian service suppliers in the past six years in the US range between $8-12 billion for social security. However, when such people return to India after performing their services, they do not obtain any benefits in respect of their social security contributions.

"In [a] nutshell, a service supplier on a non-immigrant visa loses all his social security contributions since there is no mechanism for refund, or of portability of such benefits to the home country," India has said.

According to trade officials, the US said that the Council for Trade in Services was not the appropriate forum to discuss the issue as it was now a Dispute Settlement Body issue. India had chosen this forum to discuss this issue, the US said, adding that therefore it was not in a position to comment.

Canadian and UK measures

In its communication, India also analyzed some measures imposed by Canada and the United Kingdom.

According to trade officials, on the Canadian measures, India specifically mentioned some reforms in immigration policy and the distinction of the entry of natural persons based on Canada's commitments under the WTO and free trade agreements, for which it claims that labour market tests will not apply, and the Temporary Foreign Workers Programme (TFWP) for which labour market tests will apply.

According to India, this categorization creates some uncertainties for services suppliers, particularly in the computer and related services sector, for which India believes that intra-corporate transferees should be allowed access without any labour market testing.

Canada said that it could have been more efficient to have discussed this bilaterally with India earlier.

According to trade officials, Canada also said it wished to correct some of India's "inaccurate" statements in its communication, particularly with regard to the distinction between the TFWP and the International Mobility Programme (IMP). According to Canada, the TFWP relates to the resort to foreign service suppliers in cases where there is no Canadian available to perform the task, whereas under the IMP, this is exempt.

With regard to the UK measures, according to trade officials, the Indian

communication analyzed some recommendations by the migration advisory committee that was commissioned by the UK government. The committee recommends a variety of aspects including minimum salary thresholds and annual immigration skills charge on all employers.

According to India, there is a clear intent by the migration advisory committee to impose measures that will reduce the number of foreign migrants working in the UK.

Acc ording to trade officials, the UK and the EU said that the migration advisory committee is an independent body advising the UK government through a report, so it is not a government measure or even a draft measure.

The UK said that it was fully complying with its WTO commitments and was happy to hold bilateral meetings with any interested member on this issue.

The EU said that it was surprised to hear this from India here, as a bilateral dialogue was taking place.

According to trade officials, India was backed by China, which said that it was alarmed by the increasing trend of regulatory barriers in Mode 4. China invited members to take concrete measures to live up to their commitments on Mode 4.

According to trade officials, South Africa, on behalf of the Africa Group, said that Mode 4 was of primary interest to the Group. It looked forward to engagement on this matter.

According to trade officials, several developing countries including Turkey, El Salvador and Nigeria also expressed support for India.

TiSA update

The Council for Trade in Services also heard an update from Australia on the TiSA negotiations. Australia said that ministers and ambassadors met at the margins of Davos (in January) and agreed to accelerate negotiations in 2016, with the aim of concluding the talks at the end of this year.

Australia said that good progress was made in the first round in 2016 (30 January-5 February), and that it would chair the next round from 10-15 April. The scope of the discussions would include Mode 4, e-commerce, transport services, telecoms and financial services.

Another round has been scheduled in May at which TiSA participants expect to revise their market access offers, with another round in July. A further round will be held in October, at which there will be an exchange of further revised market access offers.

Australia said the TiSA participants were reflecting on the best way to increase transparency, as a certain number of WTO members had expressed their serious concerns in various meetings of the Council for Trade in Services. These countries pointed to a lack of transparency in the TiSA talks and the fact that the agreement is being negotiated outside of the WTO.

Australia reported that it was meeting bilaterally and with regional groups to provide any details about the TiSA.

China said it heard from the TiSA participants that this process was meant to be transparent, open and inclusive and its objective was to reinvigorate the multilateral trading system, as the TiSA was open to be multilateralized later.

But on transparency, China said, there still wasn't enough information to analyze whether the TiSA was consistent with the GATS. Expressing concern, it urged the TiSA participants to take practical actions to demonstrate their sincerity that the process is not undermining the multilateral trading system.

Meanwhile, under "other business", Canada raised some concerns on new regulations on foreign suppliers of online publishing services in China.

According to trade officials, it referred specifically to new administrative rulings released by the Chinese government in February that prohibit foreign firms from publishing online services through either a joint venture enterprise or a wholly-foreign-owned enterprise.

Canada said the measure came into force on 10 March, and it asked China whether it intended to notify the Council for Trade in Services under GATS Article III on transparency.

According to trade officials, Canada was backed by Japan. The US said that it was concerned about the regulations in services trade. It was disappointed about the inability of members to comment on the draft before it came into force, as it was not notified.

Australia also asked China to notify the measure. According to trade officials, China said that it would relay the message to capital. *(SUNS8206)* ❐

This article was written with inputs from D. Ravi Kanth.

US salvo to end S&D flexibilities for "emerging" DCs

Also during the 17-18 March series of WTO services meetings, the US spoke out against according special and differential treatment to "emerging developing countries" in disciplines under negotiation that will govern domestic regulation on services trade.

by D. Ravi Kanth

GENEVA: After dismantling the Doha Development Agenda trade negotiations over three months ago, the US on 17 March fired the first salvo against the provision of special and differential treatment for "emerging developing countries" such as China, India, Brazil, Indonesia and South Africa in domestic regulation of trade in services, services negotiators told the *South-North Development Monitor (SUNS)*.

The US said it wanted an assurance from emerging developing countries that they would not be negotiating for special and differential treatment in developing the disciplines on domestic regulation (DR) covering trade in services.

The US categorically demanded that members must commence work in DR on a "clean slate" by discarding the previous 2009 and 2011 draft DR texts as Washington remained opposed to those two texts, several participants familiar with the meeting said.

Effectively, the US suggested that any new disciplines in DR shall not include special and differential treatment provisions for emerging countries such as China, India, Brazil, Indonesia, South Africa and other developing countries, according to participants who were present at the meeting.

This was the first categorical statement from the US after it dismantled the DDA negotiations in Nairobi, a participant told *SUNS* after the meeting.

At a meeting of the Working Party on Domestic Regulation (WPDR), China called for improvements in DR based on convergence of views among members. China emphasized the importance of S&D provisions in any new disciplines that would be negotiated under the Article VI:4 mandate on domestic regulation.

Under Article VI:4 of the General Agreement on Trade in Services (GATS), WTO members are required to develop the necessary disciplines so that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards do not constitute unnecessary barriers to trade in services. The negotiated DR disciplines shall aim to ensure that such requirements are, inter alia:

(a) based on objective and transparent criteria, such as the competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Efforts at developing the disciplines have been scuttled since 2009 when the chair of the WPDR, Peter Govindasamy of Singapore, issued a middle-ground draft text on DR. The draft text was further amended in 2011 by the subsequent chair of the WPDR from Pakistan.

The US remained opposed to any strong DR disciplines since the Uruguay Round of negotiations.

Proposals by Australia-Canada and India

In the run-up to the WTO's tenth Ministerial Conference in Nairobi last December, Australia and Canada circulated a proposal seeking only transparency improvements in DR but not comprehensive changes in measures relating to qualification requirements and procedures, technical standards and licensing requirements that have increasingly become barriers in many industrialized countries.

The joint proposal by Australia and Canada, which was circulated on 27 November 2015, merely focused on the transparency-related disciplines "relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services where specific commitments are undertaken."

These measures, however, "do not apply to measures to the extent that they constitute limitations subject to scheduling under XVI or XVII [articles of the GATS]," Australia and Canada maintained.

The US had strongly supported the joint proposal by Australia and Canada, maintaining that the proposal was based on the past work of the WPDR. Several industrialized countries and even a few developing countries joined the US in emphasizing the importance of transparency improvements in DR.

As a counter to the limited transparency proposal by Australia and Canada, India circulated a comprehensive proposal demanding "disciplines on transparency in measures relating to temporary entry (i.e., laws, regulations and administrative guidelines and procedures governing temporary entry of natural persons)" relating to the delivery of services through movement of natural persons under Mode 4.

India's proposal, which was circulated on 3 December 2015, called on members, particularly the developed countries, to adopt and implement the following disciplines in DR:

"Each Member shall publish promptly, through printed or electronic means, measures of general application relating to all relevant visa categories and other immigration formalities which pertain to or affect the operation of their Mode 4 commitments. The information provided shall be regularly updated and shall include, inter alia:

(a) Categories of work related visas and other entry requirements;

(b) Specific work related visa and other entry requirements for each category of Mode 4 specified in the Member's Schedule of Specific Commitments;

(c) Procedures for filing the application and detailed documentation required;

(d) Normal timeframe for processing the application;

(e) Application fees;

(f) Length and validity of stay;

(g) Possibility and conditions for extensions/renewal (including availability of multiple entry visas/permits);

(h) Applicable procedures relating to reviews and/or appeals of decisions concerning applications;

(i) Rules regarding accompanying dependents;

(j) Details of relevant contact points for further information (e.g. links to relevant government web-sites which provide more detailed information on Embassies, Consulates and other issuing bodies);

(k) Any other relevant immigration laws or other formalities of general application;

(l) Any exceptions to these rules, whether applicable to all Members, or only to some pursuant to any bilateral or plurilateral arrangements; and

(m) Social security contributions, if any, as well as procedures for refund…"

India said "Members shall also provide a full description of the manner in which the scheduled limitations to market access and national treatment and any other non-scheduled conditions for the temporary entry of natural persons in such categories are administered by their authorities, including complete description of the manner in which scheduled Mode 4 categories are granted entry including, for instance, application of salary thresholds, economic needs tests/labour market tests, requirements of prior employment, qualification requirements and criteria for determination of each category of natural persons specified under their commitments."

US conditions

Against this backdrop, the WPDR meeting on 17 March was the first attempt after the WTO's Nairobi conference to test the waters.

Australia and Canada said respectively that they were withdrawing their proposal on the transparency provisions concerning DR, according to the negotiators present at the meeting.

India, however, maintained that its proposal on "services transparency in measures relating to temporary entry of natural persons (Mode 4)" would remain on the table.

India, the ACP (Africa, Caribbean and Pacific) countries and South Africa supported China's call for a developmental outcome on DR.

In response to an overwhelming demand for negotiating developmental disciplines on DR based on S&D flexibilities, the US categorically set three conditions, according to a developing-country negotiator present at the meeting:

(i) Members need an assurance from emerging developing countries that they will not be negotiating on the basis of special and differential treatment;

(ii) DR is part of a larger puzzle of future negotiations (implying that DR cannot be the immediate priority);

(iii) Members must start work on a

"clean slate" by ignoring the 2009 and the 2011 draft DR texts.

Buoyed by their success at Nairobi, the US and other industrialized countries are now creating a new playing field in which major developing countries – China, India, Brazil, Indonesia and South Africa, among others – will be treated on par with the industrialized countries, regardless of the historical and existing disparities in trade and development. *(SUNS8205)* ❐

US alone against Doha-mandated multilateral solution to rules issues

The WTO rules negotiations are hamstrung by differences between member states over how to address the outstanding issues on the agenda.

by D. Ravi Kanth

GENEVA: An overwhelming majority of members, particularly developing countries, on 22 March called for a multilateral solution to the "rules" issues under the existing Doha mandate of the Negotiating Group on Rules (NGR) at the WTO, several rules negotiators told the *South-North Development Monitor (SUNS)*.

The United States, however, issued a diametrically opposite message that the rules negotiations must not be resumed unless the NGR chair, Ambassador Wayne McCook of Jamaica, is sure that there is a clear signal for the way forward after his consultations with members, negotiators maintained.

At a meeting of the NGR, the differences between China, India, South Africa along with other developing countries on the one side, and the US on the other, on how to address the outstanding issues of the existing rules mandate came into the open.

McCook presented a factual report of the positions held by members at the tenth WTO Ministerial Conference in Nairobi three months ago.

"This is a transparency meeting to hear members' views on the way forward," he told *SUNS*. McCook said he waready to hold consultations with members on their respective priorities to advance the work on all issues in the rules dossier.

The "friends of the fish" group – New Zealand, Mexico, Peru, Haiti, Australia, Canada, Argentina, Costa Rica, Colombia, Paraguay and Pakistan, among others – made an aggressive pitch for commencing work on fisheries subsidies without further delay. The group wanted a clear outcome by 2017 when trade ministers congregate for the eleventh Ministerial Conference.

At Nairobi, the "friends of the fish" had made a sustained effort and issued a statement calling for prohibiting certain forms of fisheries subsidies that contribute to overfishing.

The US, a strong ally of the "friends of the fish" group, stressed the need for a credible and ambitious outcome with new approaches.

China, India and South Africa along with other developing countries called for pursuing the unfinished rules negotiations in all pillars based on the special and differential treatment architecture as enshrined in the Doha work programme.

China touched on the important issues of anti-dumping such as due restraint and investigations to highlight the importance of tackling both anti-dumping and horizontal subsidies without delay.

India called for pursuing all pillars in the rules negotiations for arriving at a balanced outcome.

Many other countries also called for continuing work in the negotiating group, as a multilateral solution on improvements in anti-dumping, horizontal subsidies, fisheries subsidies and transparency-related provisions in the regional trade agreements can be achieved only in the Doha Negotiating Group on Rules.

Brazil issued an ambiguous message that it was open to process and timing, implying that it would go with the chair's decision based on his consultations.

Japan, the coordinator of the "friends of anti-dumping" group, called for resuming work on all outstanding issues of anti-dumping.

The European Union maintained that all issues pertaining to agricultural, industrial and fisheries subsidies could only be tackled in the NGR.

Unilateral US position

In sharp contrast, the US adopted a unilateral position as to what needed to be done and what needed to be avoided at the NGR, said a participant familiar with the meeting.

To start with, the US delivered sermons to members on what happened at the Nairobi meeting when members adopted differing perspectives. It argued that members must avoid the impulse to begin the negotiations given the divergent views as expressed in the Nairobi Ministerial Declaration.

The US said while the Nairobi meeting and its ministerial declaration would give unease to some members, it also provided a "historic" opportunity by setting the ground for "new approaches" for addressing the remaining issues, according to a South American participant.

Intensifying the war-like campaign for "new approaches" in different negotiating areas of the unfinished Doha work programme, a move pointedly aimed at terminating special and differential treatment for China, India, Brazil and South Africa among others, the US said that members could not afford to adopt stale and failed approaches.

After stating the demand for "new approaches" during the discussions on the unfinished issues of agriculture and services of the Doha work programme, the US brought the issue frontally at the Doha rules negotiating body.

At the meeting, the US said "new approaches," a euphemism for graduation of China, India, Brazil and South Africa among others from availing of special and differential treatment, were central for pursuing work on subsidies, including fisheries subsidies, according to negotiators present at the meeting.

A US official said this was the first time that members had not reaffirmed the "Doha mandates" in the last 14 years, according to negotiators present at the meeting.

The US official went on to quote paragraph 30 of the Nairobi Ministerial Declaration which states: "We recognize that many Members reaffirm the Doha Development Agenda, and the Declarations and Decisions adopted at Doha and at the Ministerial Conferences held since then, and reaffirm their full commitment to conclude the DDA on that basis. Other Members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to ad-

dress the negotiations. We acknowledge the strong legal structure of this Organization."

Washington maintained that new approaches as stated in the paragraph offered an immense and historic opportunity for members to move away from the stale debate in which the rules negotiations had been enmeshed all these years, a developing-country negotiator told *SUNS*.

As regards anti-dumping, which includes the elimination of the much-condemned "zeroing" methodology that is at the heart of the US' anti-dumping measures, the US struck a familiar posture like on trade-distorting domestic support in agriculture.

The US said improvements in anti-dumping provisions must not be addressed by the NGR. Instead, the anti-dumping issues should be left to the working group on anti-dumping of the WTO's regular committee on anti-dumping, according to negotiators present at the meeting.

Like in agriculture, when the US blocked the 2008 revised draft modalities, the US also gets the distinction for time and again blocking substantial work on improving anti-dumping provisions in the Doha rules negotiations, according to past and present negotiators of the rules negotiating body.

(The US in effect wants to dump anti-dumping from the Doha-mandated negotiations and have the issue tackled in the regular committee on anti-dumping, where it could be bottled up by the US, while it gets its way on accords in Doha-mandated talks only on issues of interest to it and which will hit major developing countries like Brazil, China, India and South Africa. – *SUNS*)

While an overwhelming majority of members approved the elimination of zeroing methodology in the Doha rules negotiations, and the WTO's Appellate Body has repeatedly ruled against the methodology (in trade disputes involving the US), the US was the only country which opposed the recommendation on the zeroing issue.

Japan, which was a major ally of the US in the run-up to the Nairobi ministerial meeting, has failed to secure any relief on anti-dumping issues because of opposition from the US. It merely swallowed the US' opposition to any improvements in anti-dumping provisions, several rules negotiators maintained.

Even the EU, which was a strong partner for the US in finalizing the Nairobi Ministerial Declaration, is unable to address its core issues in anti-dumping and horizontal subsidies because of the American opposition, said a subsidies negotiator.

In crux, the rules negotiations are being held hostage to the whims and fancies of one member, the US, which wants a credible and ambitious outcome on fisheries subsidies based on new approaches but no progress in other areas of the rules dossier, according to an Asian negotiator. *(SUNS8208)* ❐

Serious concern voiced over US non-implementation of DSB rulings

US non-compliance with WTO decisions on trade disputes involving the country aroused concern at a recent meeting of the WTO's Dispute Settlement Body.

by D. Ravi Kanth

GENEVA: Several countries have reminded the United States at the World Trade Organization that Washington's continued failure to comply with and implement the WTO Dispute Settlement Body (DSB) recommendations in trade disputes remained a source of "serious" and "systemic" concern, trade diplomats told the *South-North Development Monitor (SUNS)*.

At a regular DSB meeting on 23 March, Mexico sought authorization for slapping trade retaliatory measures to the tune of $472.3 million on American goods because of Washington's repeated failures to comply with the DSB's recommendation in the long-drawn dispute over import and sale of tuna and tuna products from Mexico.

A day before the DSB meeting, the US objected to Mexico's request for the level of trade retaliation of $472.3 million. The arbitration on Mexico's level of retaliation will now go before the original dispute panel if it is available, or to an arbitrator appointed by the WTO's Director-General, with the arbitration exercise to be completed within 60 days.

But more importantly, the DSB's monthly agenda has invariably listed the following trade disputes in which the US has failed to implement the DSB's recommendations: (i) US anti-dumping measures on certain hot-rolled steel products from Japan; (ii) Section 110(5) of the US Copyright Act; (iii) US anti-dumping measures on certain shrimp products from Vietnam; (iv) US countervailing measures on certain hot-rolled carbon steel flat products from India; (v) US Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment).

At the 23 March DSB meeting, the EU, Japan and India, among others, told the US that WTO-inconsistent disbursements to the American domestic industry continue unabated under the Byrd Amendment.

India highlighted its "significant concerns" about the steps taken so far by the US to implement the DSB recommendations in the dispute concerning countervailing duties on Indian hot-rolled carbon steel products.

India said "even after 16 months of adoption of the Panel and Appellate Body Report and the RPT [reasonable period of time] almost coming to an end shortly, the US seems to have made no efforts to repeal or amend Section 1677(7)(G) of its domestic law as to bring it into conformity with Articles 15.1, 15.2, 15.3 and 15.5 of the [WTO] Agreement [on Subsidies and Countervailing Measures], despite the categorical finding and recommendation of the Appellate Body to this effect."

"The failure to initiate any good faith efforts in this direction, with the RPT deadline being so close now, is a cause for serious and systemic concern," India maintained.

The number of cases in which the US has not implemented the DSB recommendations stands out like an eyesore in the WTO's dispute settlement jurisprudence, several trade diplomats told *SUNS*.

The US has alleged that China has not implemented the DSB recommendations on certain restrictive measures it imposed on electronic payment services.

But Washington's serial behaviour of not providing justice in trade remedy cases and other disputes, particularly those raised by developing countries, is contributing to growing lawlessness in the enforcement of WTO rulings, several trade diplomats told *SUNS*. *(SUNS8209)* ❐

Reform policies in Greece must respect human rights, says UN expert

The economic reforms implemented in response to the Greek debt crisis have adversely affected fulfilment of human rights in the country, according to a UN rights expert.

by Kanaga Raja

GENEVA: A United Nations human rights expert has called for a review of the economic reform policies and adjustment measures agreed between Greece and its international lenders to ensure that they do not undermine the progressive realization of economic, social and cultural rights in the country.

In his report following an official visit to Greece from 30 November to 8 December 2015, Juan Pablo Bohoslavsky, the Independent Expert on the effects of foreign debt and other related international financial obligations of states, said that priority must be given to safeguarding the enjoyment of minimum essential levels of economic and social rights by all individuals in situations of vulnerability within Greece.

The rights expert also called for a comprehensive human rights impact assessment of the structural adjustment programme to be carried out in cooperation with all relevant stakeholders. Such assessment should include at a minimum an evaluation of past failures to protect economic, social and cultural rights of the Greek population and ex ante forecasts of the social and human rights impacts of particular adjustment measures.

The report by the Independent Expert addresses human rights concerns arising out of the debt crisis and the economic structural adjustment programmes implemented in Greece.

The main focus of Bohoslavsky's visit was to receive updated information on the situation in Greece, which is currently implementing a third adjustment programme, signed on 19 August 2015 between the Greek government and the European Commission on behalf of the European Stability Mechanism (ESM).

The Independent Expert's report was presented to the UN Human Rights Council at its thirty-first regular session, held from 29 February to 24 March. (The report can be found at www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.60.Add.2_AUV.docx.)

Denial of rights

The rights expert noted with concern that the obligations of the Greek government and international lenders towards rights-holders within the country continue to be sidelined, in both the design and implementation of the structural reform programmes.

He expressed regret that to date, no comprehensive ex ante human rights impact assessments of the three economic reform programmes have been carried out.

According to the Independent Expert's report, social and economic rights have been denied in a widespread manner.

More than one million persons in Greece have fallen below income levels indicating extreme poverty. In his view, these individuals are ultimately denied, in one form or another, the enjoyment of core essential minimum levels of social, economic and cultural rights that states have to protect in all circumstances. The pervasiveness of extreme poverty in Greece is far from isolated, taking into consideration that currently one out of 10 persons (or 10.4% of the population) is living under such conditions.

"The austerity measures implemented since 2010 contributed significantly to this outcome," said the rights expert.

First, it should be noted that irresponsible borrowing and lending contributed significantly to the financial crisis in Greece. Second, excessive austerity measures not only significantly deepened the economic crisis but prescribed as well cutting down social protection and public health expenditures, undermining the rights to social security and health.

"Finally, insufficient priority was given to address well-known gaps in the social security system of Greece. Instead of addressing these gaps first, drastic economic reforms with dubious prospects in terms of growth were implemented at the expense of human rights."

The Independent Expert underscored that the widespread hope that private investment could be the primary engine to growth and development might prove to be illusive, given that capacity utilization is at historically low levels; the income expectations of the majority of the citizens are extremely depressed; and there is still uncertainty about whether the recession will be overcome.

"The only way to give a positive impulse to an economy stuck in deflation and depression is by enabling the government to launch a robust investment initiative. To finance this initiative public debt should be restructured in a way that would create the policy space for the Government to launch projects to improve the situation of the poor and the unemployed."

The report said that since May 2010, the government of Greece has been implementing an economic adjustment programme as a precondition for securing financing packages from the International Monetary Fund (IMF), the European Commission and the European Central Bank (ECB), also known as the "Troika" or as the "Institutions".

On the European side, eurozone countries have established the European Financial Stability Facility (EFSF) and later the European Stability Mechanism (ESM) as vehicles through which financial support is provided. The programmes consist of stringent policy measures that entail deep public spending cuts, public sector job cuts, tax increases, the privatization of public enterprises and structural reforms, which are aimed at reducing the country's fiscal deficit.

According to the report, a new government proposal for a bailout package was endorsed by the Greek Parliament and on 12 July 2015 agreement was reached between the Greek authorities and eurozone leaders to negotiate a third Memorandum of Understanding (MoU) on the condition that the Greek Parliament adopt upfront certain "trust-building measures".

The third economic reform programme includes additional loans of €86 billion over the period 2015-18 and detailed adjustment and structural re-

form measures outlined in the MoU.

The deal between the eurozone states and Greece included a European Commission-funded "Jobs and Growth Plan for Greece" to support Greece over the period 2014-20 with €35 billion through various European funds. About €3.9 billion, or 11% of the entire package, is expected to be spent on active labour market and social inclusion policies, including for the Youth Employment Initiative.

The Independent Expert highlighted that on top of the economic and social crisis in Greece, another humanitarian and human rights crisis has unfolded.

Since January 2015, Greece has been witnessing an unprecedented increase in the inflow of refugees and migrants to its territory, mainly from conflict-torn countries such as Syria, Afghanistan and Iraq. According to government information, almost 950,000 refugees and migrants entered through the Greek-Turkish sea borders in 2015, while more than 66,000 arrived in January 2016.

The report said Greece made increased efforts to rescue refugees fleeing from war and crossing the Mediterranean Sea in unseaworthy boats and dinghies, including 2,500 search and rescue operations by the Hellenic Coast Guard. The Greek state has provided aid and encouraged solidarity and support by the local population.

"There have been also positive developments in relation to the Greek Government policy towards refugees and irregular migrants, including a reduction of administrative detention. However, owing to austerity and the economic crisis, the Greek State is in a difficult position to respond adequately to the refugee crisis without additional European and international aid."

"While Greece holds primary responsibility to ensure that human rights within its territory are protected, the obligation to protect, respect and fulfil human rights is also applicable to multilateral institutions, including international financial institutions, and States when deciding on conditionalities and adjustment measures attached to lending," said the rights expert. "International institutions acting on behalf of member States such as the ESM, European Commission, ECB or IMF, have, in the first instance, to ensure that their policies respect international human rights standards."

The Independent Expert was of the view that the European Commission remains bound by the full extent of European Union laws and the Charter of Fundamental Rights, and has to protect and respect human rights enumerated therein also when it acts on the basis of the treaty establishing the ESM.

"The IMF is bound to act in compliance with general international law, including human rights. As a specialized agency of the UN, the IMF is as well bound to act in accordance with the principles of the Charter of the United Nations, which refers to the realization of human rights and fundamental freedoms as one of the purposes of the Organization, to be achieved in particular through international economic and social cooperation."

Impact of excessive austerity

According to the report, by slashing public expenditure and internal demand, the first and second structural adjustment programmes deepened the Greek economic crisis significantly. The GDP dropped by about 25% during 2008-13 and growth rates have remained around 0% since 2014.

According to latest economic forecasts, a further drop in the GDP of 0.7% is expected in 2016 followed by a modest growth of 2.7% in 2017, based on the assumption that adjustment measures finally result in the desired positive economic impact.

The austerity packages of 2010 and 2012 saw unprecedented cuts in government expenditure. According to the latest available Eurostat data, general government expenditure was reduced from €128 billion to €108 billion during 2009-13, reflecting cuts of 15.7%, significantly outnumbering reductions in other eurozone countries undergoing adjustment, such as Ireland (-11.3%), Spain (-5.9%) or Portugal (-2.7%).

The Independent Expert was particularly concerned that social protection expenditure was not sheltered in any form when it was most needed for the protection of an increasing number of persons in situations of vulnerability. Instead, social protection expenditure witnessed cuts of 21.3% during 2009-13. "This contrasts [with] the overall trend in the Eurozone, which saw during the same period an increase of social protection expenditure by 8.4% (Portugal and Spain increased their social protection spending by 9.1% and 6.8% respectively)."

Limited funds that had been available to combat social exclusion, for rental and housing support and family and child benefits were reduced drastically. Spending to support sick persons and persons with disabilities also decreased disproportionately, while pension benefits – the biggest social expenditure and backbone of the social protection system of Greece – saw consecutive cuts in line with the overall reduction of government expenditure. Unemployment benefits fell by nearly one-third while at the same time the unemployed rose nearly threefold.

Analyzing the development of social protection expenditure, it can sadly be said that reductions were particularly harsh for the most marginalized who lacked any strong political lobby, said the rights expert.

Public health expenditures saw an unprecedented fall from €16.1 billion to €9.3 billion during 2009-13, or by 42.5% within five years. At the same time, demand for public healthcare services increased, as more people could not afford private healthcare anymore.

"Nobody disputes that a reform of the Greek public health care system was overdue and that cost reduction measures needed to be taken to improve its efficiency or reducing the cost of medicines. However, the excessive austerity in the public health care sector literally killed first nurse and doctor before treating the patient."

Even when trying to minimize impacts on health service delivery to rights-holders through strategic cuts, it is impossible to undertake such drastic cuts in a short period without jeopardizing the right to health in all its dimensions, which include accessibility, affordability, acceptability and quality, said the rights expert.

Education expenditure fell heavily between 2009 and 2013, with spending on secondary schools absorbing a reduction of 24.4%. It should be noted that heavy cuts were also made in the field of general public service, reflecting salary reductions and hiring freezes and other cost-saving measures.

While defence expenditure per capita remained above the eurozone average, significant cost-saving measures were also undertaken in this field along with expenditure reductions for police, fire brigades, justice, culture, religious affairs, housing and community amenities.

"The only category which saw an upward trend in Government expenditure was economic affairs, reflecting the

immense cost of recapitalization of Greek banks in 2013."

The Independent Expert said that, from a human rights point of view, the most sensitive contents of the third economic programme include pension reform, aiming at further reducing spending on pensions by 1% of GDP, and a social welfare review that shall generate further reductions of 0.5% of GDP in public social spending.

While the rights expert fully supported efforts to redirect social welfare benefits to protect the most vulnerable, he seriously questioned further cuts in social welfare spending of about €887 million per annum in the context of significantly increased poverty and social exclusion in Greece. In his view, such reductions on top of earlier cuts are incompatible with the obligation to ensure that all persons in Greece can enjoy at least core minimum essential levels of social and economic rights, and are incompatible with obligations contained in Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

He noted that the planned introduction of a Guaranteed Minimum Income (GMI) scheme, which shall essentially close large gaps in the Greek social welfare net, should already have been a priority of reform in 2011 and 2012 to counter the adverse human rights impacts of adjustment. He was, however, worried that this important reform would be implemented in "a fiscally neutral manner". This posed the risk that either the GMI scheme will not reach all in need, or individual levels of benefits could fail to serve the intended function of securing social and economic rights by moving recipients out of poverty and destitution.

The Independent Expert welcomed the fact that the adjustment programme foresees the expansion of guaranteed employment support schemes currently covering 50,000 persons to 150,000 persons by March 2016, targeting long-term unemployed, young people and disadvantaged groups. The programmes will support job creation and include as well training combined with employment. He was, however, concerned that this alone will be insufficient to reduce significantly the current number of more than 1.1 million unemployed.

The Independent Expert also welcomed the publication of a social impact assessment for the third adjustment programme by the European Commission in August 2015. However, he expressed regret that the document fails to evaluate the social impacts caused by the first and second adjustment programmes and thus fails to draw any lessons from what went wrong.

The Independent Expert further said that analyses of the sustainability of the Greek debt have a history of misdiagnosis, projecting each time higher debt-to-GDP ratios the later the assessments were published. There have also been notable differences in the projections made by the IMF and the European Commission.

"With a debt-to-GDP ratio estimated to peak at 200%, only very few economists claim that the extreme large Greek public debt is sustainable. While loans now include extremely long periods of maturity and grace periods on interest, the problem of servicing the debt will come up sooner or later."

The Independent Expert shared the view articulated also by the IMF in July 2015 that due to the severe unsustainability of the Greek public debt, further debt relief is needed. According to the IMF, Greece would likely face debt service payments in excess of 15% of GDP, which could only be controlled by annual grants to the Greek government budget, dramatic extensions of grace periods to 30 years on all European debt and/or "deep" upfront haircuts.

"A few months later, the sustainability of the debt was seen by the institutions [as being] a lesser problem, without specifying what assumptions had changed to justify such a view," he said.

In the view of the Independent Expert, it would be more beneficial to agree on debt relief earlier rather than postponing it artificially, taking into consideration evidence that economic recovery after debt crises is more robust if sufficient debt relief is granted in a timely fashion in the form of debt write-offs, compared to maturity extensions and interest rate reductions.

In the end, this should be in the interest of all parties as it increases as well the likelihood that the restructured debt can actually be repaid, he said.

Impact of reform programme on human rights

The report said since the beginning of the crisis, an estimated 230,000 small and medium-sized enterprises have shut down, contributing to more than 600,000 job losses alone. The economic adjustment programmes directly contributed to rising unemployment, by shrinking the size of the public sector by 234,847 employees between 2009 and the end of November 2015, a reduction of 26%.

Overall, about one million jobs have been lost since the beginning of the crisis, resulting in an unprecedented unemployment rate of 27.5% in 2013 which has only dropped slightly to 24.0% during the third quarter of 2015. Unemployment of women has remained 6.5% higher than men, and youth unemployment (age 15-24), at 48.8%, remains at unacceptable proportions undermining the prospects of an entire generation.

The number of persons who have never worked reached 23.6% of all unemployed, and 73.7% of all unemployed in the meantime are long-term unemployed. No significant reduction of unemployment is forecast for 2016-17.

The Independent Expert remained concerned that the reduced level of the minimum wage, as required by the second economic adjustment programme, in particular its reduction of 32% for young workers, is not sufficient to provide workers and their families with decent living and violates Article 7(a)(ii) of the International Covenant on Economic, Social and Cultural Rights.

Of particular concern to the Independent Expert were the drastic cuts in social security benefits, including restrictive entitlements implemented as part of the austerity measures. Current coverage and level of social security and social welfare benefits is inadequate to ensure a decent living for many rights-holders and is not in line with the right to social security. For example, only about 10% of all registered unemployed are actually receiving unemployment benefits.

The Independent Expert was also concerned that 3.88 million people in Greece (36.0% of the population) are at risk of poverty or social exclusion, as indicated by the 2014 Survey on Income and Living Conditions. This is the highest rate in the eurozone. Even more worrying is that 71.5% of foreign nationals from non-EU countries, aged 18-64 and living in Greece, are at risk of poverty or social exclusion.

The number of persons who are considered severely materially deprived, meaning that they cannot afford four or more items on a 9-point scale measuring deprivation, has nearly doubled, from 11.6% in 2010 to 21.5% in 2014. This rate is significantly above the eurozone average of 7.3% and is currently far above the rate in other Southern European countries that underwent adjustment policies, like Portugal (10.5%) and Spain (7.1%).

In the view of the Independent Expert, the country needs a reform of the existing system into a modern social welfare system that is just, efficient, suffi-

ciently funded and targeted to those in need, and that protects core social, economic and cultural rights in a comprehensive and non-discriminatory manner.

The Independent Expert pointed out that the current official poverty threshold of €12.63 per day or €384 per month for a single person is, in his view, already at the margins of what can be considered as a minimal threshold ensuring a life in dignity. It should be considered as a "red line" that should not be further reduced if there is no evidence that actual cost of living has fallen significantly.

He also pointed to a close link between income poverty and denial of social and economic rights. For example, only a few Greek people (3.1%) above the official poverty threshold claim that they cannot afford a meal with meat, chicken or fish (or equivalent vegetarian food) every second day. But nearly half of those below the official poverty threshold (47.5%) say so.

Greece currently has the highest rate of housing cost overburden in the European Union, which increased steeply from 18.1% (2010) to 40.7% (2014). This means that Greek people spent more of their disposable income to cover housing costs, including electricity, heating and water, than in any other European country.

Of particular concern is that 95% of all individuals below the poverty threshold currently spend more than 40% of their total disposable income on housing, leaving limited funds to them for the purchase of other essential goods and services. There is a high risk of foreclosures and further increase of homelessness as the number of households that have arrears in mortgages, paying rent or utility bills increased further during the crisis from 30.9% (2010) to 46.4% (2014).

The report said unprecedented cuts to the public health system have resulted in critical under-staffing in parts of the public health system, increase in co-payments, waiting lists and difficulties in providing effective and affordable access to the right to adequate healthcare for all. An estimated number of up to 2.5 million people have no health insurance, as public health insurance is largely linked to employment status.

Suicide rates in Greece and mental disorders have significantly increased as a consequence of the financial crisis while mental healthcare has been affected by severe cuts, the report added. *(SUNS8200)* ❐

Connecting the dots: Human rights, inequality and poverty

***Thomas Pogge* makes the case for changing the rules of the global economic order to realize the human rights of the world's poor.**

The collective net worth of the richest 1% of humankind recently broke above 50% of all the planet's private wealth. Rich people care greatly about being rich, both absolutely and in comparison with others. They understand that relative wealth brings political influence – which can be used to amass even more wealth. They succeed at using their wealth and political influence to capture an ever-growing share of global wealth and income.

At the other end of the spectrum are the world's poor. The collective net worth of humanity's poorer half is only 0.6% of the planet's private wealth – as much as is owned by the 62 richest billionaires. You saw this right: the 62 richest people now have as much wealth as the 3,700,000,000 poorest human beings.

It's not that the rich hate the poor. They may even wish the poor were better off. But the rich care more about their own share of wealth and income. And as their share increases, the other shares must shrink – especially that of the poorest. During 1988-2008, the average income among the richest 1% increased by 66%, while the global average income increased by only 24.34%.

This is actually okay, the rich tell us: while the poor may be losing in relative terms, they are gaining in absolute terms thanks to global economic growth. The Millennium Development Goals have spread word of this progress, and their recent successors, the Sustainable Development Goals, continue to reinforce the message: the poor are becoming better off. Wherever anyone may draw the international poverty line, the proportion of humanity living below it is shrinking.

This information is less comforting once we attend to what those in the poorer half can actually afford with their tiny incomes of $4-$20 per person per week. Most of them suffer at least one severe deprivation such as lack of adequate nutrition, safe drinking water, adequate housing, electricity, adequate sanitation, literacy, schooling or access to essential medicines. Each year, some 18 million people die prematurely from poverty-related causes, such as malnutrition, diarrhoea, childbirth complications, childhood diseases, pneumonia, tuberculosis, malaria, HIV/AIDS – conditions that hardly cause any premature deaths in affluent countries.

This global disaster engages human rights, for instance Article 25 of the Universal Declaration of Human Rights: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."

Where rights are at stake, immediate action is required. Those who continue to uphold the existing, highly skewed international economic and financial order delay the realization of human rights by many decades, thereby becoming responsible for hundreds of millions of poverty-related deaths in the meantime. If a more poverty-avoiding global order is possible, we must implement it as fast as we possibly can.

Global institutional reforms

We can rapidly realize the human rights of the world's poor through global institutional reforms if these reforms reduce inequality – if they reverse the relentless rise in the share in global wealth and income going to the richest 1%. Think about it. It would take 2.4% of global private wealth to multiply the net worth of the poorer half by 5, namely from 0.6% to 3%. If this shift came entirely at the expense of the richest 1%, their share would decline from 50.4% to 48% of global private wealth. Would they not still have enough?

What sort of institutional reforms would rapidly improve the situation of the world's poor? After decades of forcing free trade upon the world, the affluent states should finally be required to abolish their protectionist barriers that impede exports from poor countries: subsidies, tariffs and "anti-dumping" duties. At the very least, they should have to compensate poor countries for the economic losses these barriers cause them.

Similarly, those who produce disproportionally large amounts of greenhouse gas emissions should be required to compensate the world's poor, who emit very little and are much more vulnerable to the effects of climate change. The needed funds should be raised by putting a price on emissions, with the additional benefit of slowing the increase of greenhouse gases in our atmosphere.

Rich corporations and individuals should finally be made to pay their fair share of taxes. There is an elaborate infrastructure of tax havens, secrecy jurisdictions, letterbox companies and sham trusts, with clever lawyers, bankers, accountants and lobbyists, all working hard to hide wealth and profits and to create and exploit loopholes. This shady network drains poor countries of capital and slashes their governments' tax revenues. It also facilitates arms and drug trading, human trafficking, money laundering and terrorism. Reforms are underway, but they are driven by the interests of the affluent states and do not yet consider the poorer populations whose losses are much larger.

We should recognize the world's poor as entitled to a share of our planet's natural resource wealth. There is no good reason why a small minority of humanity should be accepted as owning these resources and as entitled to charge everyone else for access. It is especially pernicious to treat unelected rulers – dictators and juntas – as entitled to sell the natural resources of "their" country or to use them as collateral for loans that the population will then be required to repay. Such loans and resource purchases unjustly impoverish the country and strengthen its illegitimate rulers, thereby perpetuating the tyranny.

Poor people should not be excluded from medicines, seeds and other important innovations by high patent-protected markups. It makes sense to reward innovators so as to incentivize the innovations we need. But we must find a way of doing so that does not exclude the poor. The Health Impact Fund is one feasible such way.

It is a modest but most stringent requirement that we rise together to change the rules of our global order so that they no longer violate the human rights of half the human population. Together we can do this and build a much more beautiful world. ❐

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A critique of investment treaties

Gus Van Harten **counters the justifications put forward in support of investment treaties and explains how the treaty regime effectively privileges powerful private corporations at the expense of states and the public interest.**

The treaty-based investment law regime is based on the most powerful system of international adjudication in modern history. In essence, the regime reallocates power from states to transnational companies and from domestic courts to a private arbitration industry based in Washington, New York, London, Paris, The Hague and Stockholm.

It remains a recent development in international adjudication, having been put into widespread use only from the mid-1990s. Further, the arbitrators have wielded their power assertively through both expansive legal interpretations and the economic size of their awards. Not coincidentally, there is growing apprehension about the regime and pressure for reform.

The aim of this article is to canvass debate about the regime and identify elements of investment treaties and investment treaty arbitration that give cause for concern. The discussion is presented as a series of responses to justifications often advanced for the system in academic or trade literature or in public commentary. The purpose is not to provide comprehensive answers to the questions raised but rather to explain why prominent justifications for the regime are groundless or, at least, open to serious doubt.

Justification: Investment treaties are a means to encourage foreign investment

A common argument in support of investment treaties is that they are a way for states to encourage foreign investment flows into their territory (especially from the other state party to the treaty). Thus, we might say that Ecuador, wishing to encourage investment from the US, could conclude an investment treaty with the US in order to signal its commitment to protect US investors, thus encouraging them to invest in Ecuador rather than another country. The logic here appears almost self-evident. However, there are a number of difficulties with this justification, arising from the text of investment treaties and from the empirical evidence.

First, many of the treaties take a liberal approach to forum-shopping. That is, they allow owners of foreign assets to pick and choose among nationalities at their convenience for the purpose of bringing investment treaty claims against countries in which they own assets. An investor may acquire the nationality of a state party to an investment treaty, thus gaining access to the treaty's arbitration mechanism, merely by setting up a holding company in that state. A domestic business may make itself foreign so as to bring a claim against its own country simply by creating a holding company in a state that is party to a bilateral investment treaty (BIT) with the home country.

If the aim of investment treaties is to encourage foreign investment between the states that are party to the treaty – and not to extend special legal rights and privileges to an international class of corporate owners of assets – then the expansive approach to forum-shopping enabled by the broad language in many of the treaties – and, in turn, by the permissive judgments of the arbitrators – makes little sense. It undermines the framework for characterizing in legal terms the capital movements on which the inter-state bargains leading to an investment treaty would be based if the purpose indeed was to encourage bilateral investment flows.

Second, few if any investment treaties impose enforceable obligations on home states of investors, which are primarily the major capital exporters in North America and Western Europe, in order to encourage or facilitate outward investment by, for instance, liberalizing their own regulatory regimes or enhancing their programmes for investment insurance. This is anomalous if the purpose of an investment treaty is indeed to encourage capital flows between the state parties.

Home states might, for instance, commit to subsidizing regulatory risk insurance for investments covered by the treaty and use that insurance to supplement the compensatory regime of the treaty in situations where an investor suffered losses due to general regulatory activity by the host state. On this basis, the regulatory risks inherent in all business decision-making in the face of changing social, economic and environmental conditions would be shared between host and home states.

Instead, the treaties typically establish the subrogation rights of political risk insurance or guarantee programmes in order to allow the home country to step into the shoes of the investor in advancing a claim against the host country. Thus, the purpose appears to be more about protecting the economic position of the major capital-exporting states than it is about encouraging investment flows.

Third, the empirical research is mixed on whether the treaties actually do encourage investment or affect investment flows in a significant way beyond isolated cases. Different studies have found and failed to find connections between the treaties and investment flows. This mixed evidentiary record demonstrates in part the limitations of quantitative legal research but also that there is at best conflicting evidence that investment treaties actually encourage foreign investment and, in turn, that any signalling effect of the treaties has an actual effect on investor decision-making about where to commit capital.

As such, and in light of the major fiscal risks assumed by states under the treaties, it is dubious to assert today that the treaties are a vehicle to encourage actual investments. Also, it is clear that in the 1990s – when so many of the treaties were concluded – there was no empirical evidence that the treaties served this stated purpose. Most states committed themselves to what are arguably the most financially risk-laden international obligations in the world today without any credible empirical basis for the belief that the treaties would achieve their stated purpose.

Justification: Investment treaties respond to the bias and unreliability of domestic courts

It is often pointed out by advocates for investment treaty

arbitration – which is the centrepiece of the investment treaty regime – that domestic remedies in developing and transition states (and even in developed states) are inadequate because they take much too long, are biased, are corrupt or are otherwise unreliable. In its more aggressive form, this argument mutates into a rejection of courts in general because the judicial process entails too careful and time-consuming a consideration of disputes, and too many opportunities for appeal, to permit the necessary speed and clarity in business decision-making. More commonly, the justification is framed not as a condemnation of all courts as biased against foreign investors but rather reflecting the view that the courts of some countries are unreliable and, on this point at least, there can be little doubt.

Presumably, as a matter of principle, states should work to address this problem for all investors, domestic or foreign, and indeed for all citizens. Accepting this, those promoting investment treaties as a response to the weaknesses of domestic legal systems might also be expected to champion provisions in investment treaties that sought to address the unreliability of courts for investors and non-investors alike. The treaties could, for example, allow citizens with a grievance against a foreign investor – due to pollution or human rights abuses it has allegedly caused – to bring an international claim against the investor where the domestic legal system did not offer an expeditious and fair process.

Likewise, in the absence of broader access by non-investors to the process of international adjudication of investment disputes, it might be acknowledged that investment arbitration itself appears unfair. This is because fairness calls for all parties that are affected by the resolution of a dispute to be given standing in the adjudicative process and because, in investment treaty arbitration, only one class of private interests – the investor – has that right to be heard. Others affected by the conduct of the state or investor are barred from party status and thus from the right to introduce evidence, make submissions and otherwise participate fully in the process. If domestic remedies are unreliable, then why allow only investors to take part in the international adjudicative process?

Thus, the response of the treaties to this rationale for the system is under-inclusive. It extends the benefits of international arbitration to a narrow class of private actors, giving foreign investors the unique opportunity to resort to domestic or international options (or both) as they prefer. Of course, not all foreign investors are well positioned by the system to bring a claim against a state that has abused them in some way. The cost of access precludes many foreign investors ever from bringing a claim.

On the other hand, there is a class of large companies with substantial wealth wrapped up abroad that can use the system in a range of ways. Most problematically, when one considers the lack of access by other private actors to the process, large companies are uniquely positioned to use the system to attack general government measures aimed at advancing a development strategy, stabilizing the financial system, promoting human rights, protecting public health and the environment, and so on.

This raises a second difficulty with the present justification in light of the system's design. The treaties are over-inclusive because they do not account for situations in which domestic courts do offer justice to a foreign investor. By removing the duty to exhaust local remedies unconditionally, many investment treaties allow investors to turn their back entirely on domestic law or, indeed, to play the system by bringing multiple claims under the treaty (or multiple treaties) and in domestic courts. The investor has the sole discretion, unlike in other treaty regimes that allow individual claims, to decide on the reliability and suitability of the alternative remedies. Combined with the permissive approach to forum-shopping endorsed by most arbitration tribunals, this facilitates remarkable manoeuvring by lawyers to maximize the pressure on host governments and enhance the prospect of public compensation for their clients. It likewise gives immense power to a class of large foreign investors that is unavailable to other investors and, of course, to citizens and communities in general.

Based on this justification for the system, one would expect to see a rational connection between the treaty provisions and the purported rationale. If the concern was that domestic court systems in some countries are unreliable, then the duty to exhaust local remedies should be removed only in such circumstances. At least the treaties should allow a state to demonstrate that its legal system does offer justice to a foreign investor as a basis for limiting a tribunal's jurisdiction over the claim. Likewise, the question of the reliability of the host country's courts should be decided by an independent adjudicator and not by the foreign investor or the state.

Yet we do not see such provisions in the treaties. Instead, the duty to exhaust local remedies is removed unconditionally, even for countries that have mature and advanced systems of justice; systems that far surpass investment arbitration for their institutionalized fairness, openness and independence. The treaties also remove the duty to exhaust local remedies in the case of developing and transition states that offer high standards of access to justice or that have made major strides in this direction. Thus, the treaties do not leave space for recognition and acknowledgement of variations in the quality of domestic legal systems.

Justification: Investment arbitration ensures fairness and the rule of law in the resolution of investment disputes

A further common justification for investment treaty arbitration is connected to the criticism of domestic legal systems that is implicit in the unconditional removal of the duty to exhaust local remedies. It is claimed that investment treaties replace domestic law and courts with a fair, independent and neutral process of adjudication to resolve investor-state disputes and that the system therefore advances the rule of law.

This is a dubious claim if we assume that the rule of law rests, at minimum, on high standards of procedural fairness – and, as such, institutional safeguards of independence – especially at the final level of adjudicative decision-making. The problem is that, on close scrutiny, the system of investment treaty arbitration falls well short of this requirement of the rule of law.

The problem is specific to investment treaty arbitration because it is a form of (formally non-reciprocal) public law adjudication and because investment treaty arbitrators lack institutional safeguards of their independence, especially security of tenure. This would not be a major issue if the matters

decided by the arbitrators were minor concerns or subject to thorough re-examination by an independent court. On the contrary, investment treaty arbitrators often resolve finally fundamental matters of public law without the prospect of close scrutiny by independent judges, whether domestic or international. As a result, longstanding safeguards of judicial independence in domestic legal systems have been jettisoned in the unique context where foreign investors can bring international claims against states and, by extension, the populations represented by states.

To elaborate, security of tenure is one of the core safeguards of adjudicative independence in public law. By removing it, as investment treaties do, states have returned to a model of adjudicative decision-making that is directly dependent on the discretion of executive officials in powerful governments and, remarkably, in international business organizations and the arbitration industry. This is an odd way to promote the rule of law if that is an aim of the investment treaty system.

Combined with other institutional safeguards of judicial independence – including the state's provision of a set salary for the judge, bars on outside remuneration, and an objective means to allocate judges to cases – security of tenure insulates the judge from the appearance of inappropriate pressure on her decision-making and, by extension, allows the courts to provide a foundation for the rule of law. Without secure tenure for the judge who decides public law, one must ask, where does the judge's career interest lie?

In the case of investment treaty arbitration, the first problem is that the system is a one-way process of public law claims in which only one class of parties (investors) triggers use of the system by bringing claims, and only the other class (states) is liable to pay awards for violating the treaty. Unlike in other situations where arbitration is used, the ability to bring claims is non-reciprocal. Thus, arbitrators – especially those whose careers are intertwined with the interests of the arbitration industry – are reasonably seen to have an interest in encouraging claims and arbitrator appointments by interpreting the law in favour of prospective claimants. However, presented as judicial concerns, investment treaty arbitration is also a private business and usually a career path for those employed to adjudicate the disputes.

Thus, the industry is made up of cross-connected players who affiliate around prominent centres of arbitration such as the International Chamber of Commerce in Paris. Arbitrators often name each other for appointments and may exclude those who are not accepted within the industry's networks. As Dezalay and Garth pointed out in their classic study, *Dealing in Virtue*,[1] the arbitrators are typically technocrats, intent on promoting the arbitration industry in competition with its alternatives (in the present context, domestic courts and international diplomacy). Unlike judges, the arbitrators can earn income from activities beyond their adjudicative role. Prominent figures in the industry often sit as arbitrators while advising and representing claimants or respondents and while promoting arbitration clauses in investment contracts, treaties or arbitration rules.

This provides a basis for reasonable suspicion of bias in the investment treaty system. It raises precisely the sorts of concerns that institutional safeguards of independence dispel by removing judges from the adjudicative marketplace and positioning them instead in a public institution. Arbitrators will no doubt vary in their level of commitment to values of fairness in adjudication and in their sensitivity to the outside economic or political powers at play. Yet it must be obvious to anyone working in the industry, as it is to the informed outsider, that investment arbitration does not thrive unless international businesses consider it worthwhile to bring claims and unless powerful states also see benefits in the system. Because this creates a credible prospect of bias in the system, and because the issues at stake involve matters of public law, the institution of investment treaty arbitration is inconsistent with the rule of law.

A second issue arising from the lack of institutional safeguards of independence in investment treaty arbitration is the role of the organizations designated as appointing authorities under investment treaties. These organizations – of which the International Centre for Settlement of Investment Disputes (ICSID) is the most prominent – exercise major powers within the system. They appoint the presiding arbitrator in the absence of agreement by the disputing parties or where a party (usually the state) has declined to appoint its own arbitrator. They often play an active role in directing negotiations between the disputing parties about who to appoint by proposing a list of prospective arbitrators that the appointing authority would be inclined to select. If a party claims a conflict of interest on the part of an arbitrator, the claim is usually resolved by the appointing authority. Finally, an appointing authority may exercise key supervisory powers over the arbitration rules and awards issued in particular cases. At ICSID, awards are subject to annulment proceedings before three arbitrators, all appointed by default by the President of the World Bank.

The key problem here is that executive officials have discretionary power over major aspects of the adjudicative process. The institutional safeguards of judicial independence that would otherwise address concerns arising from this executive control of the process (i.e., safeguards such as an objective method of assignment of judges to cases and the resolution of conflict-of-interest claims against a judge by an independent judicial process) are absent. In turn, one may ask, for example, whether the appointing authority is sufficiently impartial and independent and whether its power structure reflects a balance between the interests of capital-exporting and capital-importing countries.

As it stands, virtually all organizations acting as appointing authorities under the treaties have a marked slant in favour of the major Western capital-exporting states and international business. This supports a perception that the interests of a powerful state or a multinational firm, where implicated by the relevant dispute, can influence the appointing authority in the exercising of its powers. Put differently, it creates a perception of bias within the system that favours the position of prospective claimants, powerful states and private interests in the arbitration industry.

With this design, investment treaty arbitration appears to contradict basic norms of procedural fairness and judicial independence. If the aim was to advance these values, a more obvious choice would be the use of an international body that incorporated safeguards of judicial independence for the resolution of investor-state disputes. In the absence of any serious consideration of this option by the major states, and considering the defensive reaction of many in the arbitration industry

to the idea, one must question this justification for the system.

Conclusion

In the history of investment treaties, developing and transition states were presented with take-it-or-leave-it offers from major capital exporters to conclude investment treaties that, it was said, would attract foreign investment in exchange for commitments by the capital-importing countries not to expropriate or discriminate against foreign investors. There is now much evidence that the promised benefits did not materialize whereas the obligations of host states have amounted to wide-ranging constraints on general regulations adopted in good faith and on a non-discriminatory basis. Many states have faced the difficult challenge of unexpected waves of claims against them on matters of economic policy, financial stability, and environmental and health regulation.

One avenue for reform of the regime lies in the renegotiation or abrogation of investment treaties. This is the best option for extrication from the regime but also has limitations due to the 10- to 20-year survival clauses in the treaties. Another option for reform is to focus on the institutional mechanisms and, specifically, the establishment of alternative forums and processes for the resolution of investment disputes. It would be beneficial to their perceived neutrality if such alternatives were based outside the conventional arbitration centres of Western Europe and North America and if they surpassed the current system in terms of their fairness, openness and independence. Yet the most pressing priority is for states and the public to become more familiar both with the uncertain but potentially crippling public liabilities created by the system and with the perverse shift in bargaining power to the most powerful private economic actors on the planet at the expense of the institutions and processes that represent everyone else. ❐

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Endnote

1. Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, University of Chicago Press, 1996.