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US' AB veto raises need for WTO dispute settlement reform

The WTO's system for adjudicating trade disputes between member states has come under the spotlight as a result of the recent US move to block the reappointment of a WTO Appellate Body (AB) member. *Third World Economics* considers the need to reform the workings of the system in light not only of this latest development – which drew criticism from other WTO members and trade observers – but also of several questionable dispute settlement outcomes in the past.

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WTO's first priority is restoring credibility of DSU, AB

The furore generated by the recent US rejection of a WTO Appellate Body member's reappointment has underlined the need to improve the broader functioning of the WTO's trade dispute resolution mechanism.

by Chakravarthi Raghavan

GENEVA: When member states of the WTO resume consultations at the Dispute Settlement Body (DSB) on filling vacancies in the Appellate Body (AB), they have to come to grips with a credibility problem of the WTO and its dispute settlement process, impaired by the US statements in vetoing a second AB term for Seung Wha Chang of Korea.

Hopefully, WTO members at the DSB will agree on and tackle this as being of the highest priority.

As of 1 June, there are now two vacancies in the seven-member AB. One is to replace Chang, whose reappointment at the end of his first four-year term was vetoed by the US at the DSB meeting on 23 May (see *TWE* No. 616/617). The second vacancy is for replacing Yuejiao Zhang of China, whose second and last term also ended on 31 May.

The US veto of Chang and critique directed against him (though clearly targeted at the AB as a whole, aiming to intimidate or pressure its members to toe the US line in disputes) has elicited such widespread criticism that the US stance sounds like the entire world is marching out of step but for the Exceptional Nation, USA.

If the rest of the WTO members, having made statements of trenchant criticism, believe they can hereafter continue with "business as usual", they would be committing a fatal error. The WTO's Dispute Settlement Understanding (DSU, which sets out the procedures and rules of the WTO dispute settlement system), and with it the WTO, would lose all public credibility and legitimacy, and the WTO would soon meet the fate of the League of Nations.

With the US having staked out a public stance on the issue, and after its varying explanations – first at the level of US trade officials in Washington and then at the DSB on 23 May – it is extremely unlikely that the US would reverse its stance and agree to a second term for Chang. And even if it does, it will still leave the AB's reputation in tatters, and every future ruling of the AB or of a dispute settlement panel will be suspect and tainted.

There are only two options for WTO members to restore the credibility of the DSU and AB:

(a) They could agree on and adopt by consensus a decision that for the future, any retiring member of the AB who is eligible otherwise for reappointment should be automatically reappointed, unless there are some serious questions over their health, misconduct or inability or unwillingness to continue for another term.

(b) Alternatively, they should appoint AB members for one fixed term, as Brazil and past AB members have suggested. If the six or seven years mooted by Brazil is viewed as too long, a compromise can be reached with a five-year term.

Another suggestion for option (a), posted at US trade lawyers' International Economic Law and Policy (IELP) blog, is that reappointment should be automatic unless there is a positive consensus against. Option (a) as an immediate decision, and considering and deciding on option (b) as part of the mandated DSU review process (see below), could also be considered.

When vetoing Chang's reappointment, the US pointed to AB decisions which it said engaged in rule-making, added to the obligations of WTO members and curtailed their rights instead of "clarifying" existing rules and leaving interpretations of the rules to the WTO Ministerial Conference or General Council. In this, the US is exhibiting the double standards it plays by on international questions.

So long as it benefited from such AB rulings, as in the early days of the WTO, it was praising the AB. However, once its own favourite protectionist action – the use of "zeroing" in anti-dumping investigations and taking counter-measures by levying anti-dumping duties – was found WTO-illegal, the US began crying foul.

To calculate anti-dumping duties

against a foreign product, the foreign domestic price of the product is compared with its import price adjusted for transportation and handling costs. Under the controversial practice of "zeroing", the US sets at zero any negative differences (that is, whenever the foreign domestic price is less than the import price).

This methodology, or its application in particular ways, has been repeatedly found by the AB to be in contravention of WTO rules. Unable to comply (because of powerful domestic lobbies and Congress), the US began to cry foul, and has so far failed to implement any of the rulings and DSB recommendations involving such anti-dumping measures.

DSU review

Having dealt with the immediate issue of restoring the credibility of the AB through one of the two options cited above, it is also time for the WTO to come to grips with and tackle the mandated DSU review, and complete it in a time-bound and fresh manner before the WTO's next Ministerial Conference.

This is an important long-term issue for the WTO to ensure credibility in its dispute settlement function, long proclaimed as the jewel in its crown. All the more so as the WTO's role as a negotiating forum has already been impaired by the US' unilaterally viewing itself as being no longer bound to engage in "good faith" negotiations on the Doha Work Programme – a US stance that has been supported by other developed countries.

The way the issue relating to the reappointment of AB members has come up in public (in two earlier cases, the US vetoed appointment or reappointment, but did not voice its views openly) is now forcing WTO members to come to grips with the Ministerial Decision on DSU review, adopted at Marrakesh in 1994 when the agreement establishing the WTO was signed. The decision called for a review of the DSU to be completed within four years of the entry into force of the WTO treaty (that is, by the end of 1998), and for the Ministerial Conference to take a decision "whether to continue, modify or terminate" the DSU.

This is a ministerial mandate that the WTO members have avoided or evaded so far. It was initially on the agenda of the WTO's third Ministerial Conference, held in Seattle in 1999, but that conference broke up in utter confusion and chaos, engineered by the host country, and failed to reach any decision.

In the run-up to Seattle, the developing countries, in particular a like-minded group coordinated by Egypt and its ambassador to the WTO Mounir Zahran, had consulted past GATT and Uruguay Round negotiators and sought help from one of them, former Indian ambassador to GATT Bhagirath Lal Das, to write a paper with concrete recommendations.

Das, for personal reasons, was not able to complete the task, and entrusted it to this writer. The draft was presented and discussed in 1999 at a consultation meeting of developing countries (attended by most of them at ambassador level, and with the participation of the then UNCTAD Secretary-General Rubens Ricupero, formerly Brazilian ambassador to GATT during the Uruguay Round). After the collapse of the Seattle Ministerial Conference, the draft paper was finalized and published by the Third World Network (TWN Trade & Development Series, No. 9, twn.my/title/tilting.htm).

The DSU review mandate resurfaced in paragraph 30 of the WTO's 2001 Doha Ministerial Declaration, which stipulated: "We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter."

Under paragraph 47 of the Doha Ministerial Declaration, this mandate for "improvements and clarifications" (the Marrakesh mandate language that included "terminate" was quietly dropped) of the DSU was made an independent negotiating item, outside the Doha Work Programme's single undertaking.

The DSB, meeting since then in special sessions, has been considering, off and on, small procedural changes on sequencing of "retaliatory" actions etc which would at best tinker with the DSU rules, but has not taken up or come to grips with the review in any substantial way.

It is perhaps time for the membership to take a fresh look and do so, and this does need to cover the role and extent of AB rulings, in terms of where "clarification" of the WTO rules ends and the role of "interpretation" (reserved solely for the Ministerial Conference or General Council) begins.

The AB's powers

Within this remit comes also the issue of self-assumed powers of the AB, under the concept of "collegiality" under Rule Four of its "Working Procedures", which enables the three-member AB division bench hearing an appeal to "consult" the four other members of the AB at all stages, behind the backs of the parties and third parties to the dispute/appeal. This is something alien to the principles of natural justice, and to an independent judicial process. In terms of principles of natural justice and an independent judicial process, a judge or judges adjudicating a dispute, after hearing the parties, must come to an independent conclusion, without consulting any other person or body of persons, not even the secretariat servicing the panel or appellate process providing any input or draft, and write down and deliver their own judgment.

If a rules-based WTO treaty has any meaning, it entails that no instrument created by the treaty enjoys any power not provided for in the various provisions of the treaty and its annexed agreements. There is no "residual" power under which any treaty body, whether a dispute panel or the AB, can claim inherent power to do something on the basis that it is not prohibited.

In this instance, the WTO's DSU, in its Article 17, has provided for the setting up of an Appellate Body. It sets out how the body should be constituted and its members chosen, and its remit, powers and functioning. The AB has no inherent powers that cannot be found in the various provisions of Article 17.

In terms of substance, Article 17.1 says: "A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body."

Article 17.2 and 17.3 set out how the AB members are to be appointed, the duration of appointment and reappointment, and qualifications. Article 17.4 sets out who can appeal and the rights of third parties in such appeals. Article 17.5 sets out the duration and time limitations

for the work of the AB on any appeal. Article 17.6 sets out that an appeal "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." Article 17.7 provides for appropriate administrative and legal support for the AB, and Article 17.8 for expenses (travel and subsistence) for AB members to be met from the WTO budget.

Article 17.9, on the working procedures, says: "Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the [WTO] Director-General and communicated to the Members for their information." While the AB is only to consult the DSB chair, in practice the chair circulates the draft procedure to the DSB members and forwards any comments from them to the AB.

In terms of the "ordinary meaning" (public international law requires a treaty to be interpreted in accordance with the "ordinary meaning" of its terms, as codified in the Vienna Convention on the Law of Treaties), a "procedure" cannot mean "substantive". No dictionary, not even *Black's Law Dictionary*, gives such a meaning. As such, the AB cannot derive any substantive rights or duties and responsibilities other than those prescribed under Article 17.1, 17.6, 17.12 and 17.13 of the DSU. Neither can it create a substantive right for itself nor devolve substantial responsibility on the AB members or the WTO members.

Also, Article 17.12 stipulates: "The Appellate Body *shall address each of the issues raised* [emphasis added] in accordance with paragraph 6 [Article 17.6 cited above] during the appellate proceeding." The use of the mandatory "shall" here leaves no scope for the AB not to address an issue of law raised in an appeal on the ground of "judicial economy", as the US in vetoing Chang's reappointment has argued.

A comment (on Chang's reappointment and the US call for exercise of judicial economy) posted on the IELP blog points out that Article 17.12 requires the AB to address every issue raised in an appeal. This has been taken to mean claims in an appeal. "Therefore, in effect, the Appellate Body has less discretion under the DSU to exercise judicial economy by ignoring claims than panels."

As the AB has ruled on several occasions, if members wanted such exercise of "judicial economy" for whatever reason, they would have said so! *(SUNS8255)* ❐

US double standards in complaints against AB

It may have criticized the WTO Appellate Body when vetoing a second AB term for Seung Wha Chang, but the US had raised no grievance when the body issued several questionable rulings previously against developing countries, notes *Chakravarthi Raghavan*.

GENEVA: In directing its ire against the Appellate Body (AB) at the WTO's Dispute Settlement Body (DSB) meeting on 23 May, though purportedly against Prof. Seung Wha Chang of South Korea and singling him out to deny him reappointment to the AB, the US was exhibiting its double standards in the international arena.

So long as the WTO's dispute settlement panels and AB were piling obligations on developing countries and curtailing their rights, to pry open their markets to serve the mercantilist interests of its corporations, the US was all praise. But when some dispute rulings went against the US, particularly regarding its anti-dumping measures (aimed at protecting specific industries and enterprises), the US began to cry foul. This has now reached a crescendo in the US' veto of Chang and voicing its views openly and stridently, initially through its trade officials in Washington and then at the DSB.

In the early years of the WTO and the functioning of its Dispute Settlement Understanding (DSU), when most of the rulings handed down by the panels and the AB were against the developing countries (and were virtually automatically adopted under the "negative consensus" rule, through which a ruling would be adopted by the DSB unless it decides by consensus not to do so), the US was one of the main beneficiaries and cheerleaders, often when the EU and Japan too were complainants.

Several of those rulings added to the obligations of the developing countries and curtailed their rights, and were grounded on questionable reasoning and conclusions, purportedly based on public international law interpretations codified by the Vienna Convention on the Law of Treaties (VCLT).

[The US never ratified the VCLT as the US Senate did not consent to it. However, the US State Department (to whose views on international commitments the US courts, including the Supreme Court, defer), in a statement by the Secretary of State, announced that the US abided by public international law.]

Selection of AB members

The US double standards, and the WTO and its secretariat acquiescing, began even in 1995 when the initial slate of seven AB members was agreed on 29 November 1995 after a difficult process of haggling involving the WTO Director-General, the US and the EU. The process resulted not only in the seven AB members being named, but also in a US national being selected to head the WTO's legal division (and a Canadian to head the AB's legal assistance secretariat). Under the old GATT forum which preceded the WTO, the legal division had been headed by a German national. Under the WTO, Europe as a whole got one seat on the AB!

For the selection of the AB members, candidates from 23 countries were interviewed. From among them a selection was made by a small committee consisting of the then WTO Director-General Renato Ruggiero and the respective chairpersons of the DSB (Don Kenyon of Australia), Goods Council (Minoru Endo of Japan), Services Council (Crister Manhusen of Sweden) and TRIPS Council (S.W. Harbinson of Hong Kong). (In 1995, Hong Kong was still a separate customs territory under the UK.)

In the selection process, the WTO members were "consulted" and asked for views on their preferred candidates and why, on the basis of criteria agreed by the DSB. However, the US was effectively given the "privilege" of objecting/vetoing some names (a question never posed to other members), thus helping to label the successful candidates as "pro-American". Everyone involved in that process must be held responsible, but the major players were DSB chair Kenyon and Director-General Ruggiero: the two enabled the Americans to exercise such a "privilege".

After some tussle (between the US and the EU over Europe's claim for two

seats), seven names were put before the DSB and accepted by consensus. India and Switzerland, while not blocking the consensus, however said they were not joining. Switzerland said there was an imbalance, complaining that the selection committee had not followed the criteria set out and agreed upon, and had taken a "restricted view" of the European entity. India, in a statement made available by its delegation to the media, detailed how one member alone had been given the option of saying "no" to individual candidates. The EU, while joining the consensus, expressed its dissatisfaction. (For a detailed report, see Chakravarthi Raghavan, "WTO establishes Appellate Body", www.sunsonline.org/trade/process/followup/1995/11300095.htm.)

Conflicting or cumulative provisions?

The Uruguay Round (UR) agreements had been negotiated at various stages in formal and informal negotiating groups, with most of the negotiators having no clear view of the final outcome or of the institutional setup for the implementation of the agreements until the very end. This outcome, in the shape of the WTO Agreement – with annexed agreements relating to trade in goods, trade in services, trade-related aspects of intellectual property rights, trade policy review mechanism, some plurilateral agreements, and a Dispute Settlement Understanding for an integrated dispute settlement system – was negotiated within a small group of key countries (often between the US and the EU initially) and then presented to the other UR participants on a take-it-or-leave-it basis. The developing-country negotiators in Geneva and their capitals had very little time to study the final draft agreements and their implications; they never had any option to suggest changes.

The various agreements under the rubric of "trade in goods" had been negotiated disjointedly, with different negotiating groups on different issues, often with one or two delegates of developing countries having to shuffle between negotiating groups meeting at the same time. Compromises in differing language were agreed for more or less the same concepts. Some of these were such that even at the time of the official-level conclusion of the negotiations in November-December 1993, possible conflicts inter se were envisioned.

To reconcile these, two safeguards were suggested. One was to subject all the agreements to "legal scrutiny and reconciliation" before settling on a final draft. At the time of legal scrutiny, when some of the inconsistencies and impreciseness in language were raised and pointed out by some developing countries, Canada argued that reopening compromise texts arrived at after much difficulty may unravel the entire package of agreements.

While an important consideration, this was not such an insurmountable obstacle. With clear instructions for time-bound discussions to produce uniformity and clarity without endangering or changing substance, solutions could have been found. Nevertheless, with delegations weary after seven years of negotiations, the Canadian suggestion – that these matters could be resolved through the dispute settlement process – prevailed.

In this respect, some of the built-in safeguards were pointed to:

1. The dispute settlement process, through the panels and AB, was to "clarify" the existing provisions of the agreements in accordance with customary rules of interpretation of public international law. However, recommendations and rulings adopted by the DSB cannot add to or diminish the rights and obligations provided in the agreements (DSU, Article 3.2).

2. Under Article IX:2 of the WTO Agreement, "The Ministerial Conference and the General Council shall have the *exclusive* [emphasis added] authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X."

3. The negotiators recognized that conflicts were likely to arise from the General Agreement on Tariffs and Trade (GATT) 1994 and several multilateral agreements covering various aspects of "trade in goods", put together in Annex 1A (titled "Multilateral Trade Agreements on Trade in Goods") of the WTO Agreement. As such, Annex 1A itself has a "general interpretative note" which stipulates: "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A ..., the provision of the other agreement *shall* [emphasis added] prevail to the extent of the conflict."

While every participant which signed on to the WTO Agreement at Marrakesh in 1994 also had to sign on to all the agreements listed in Annexes 1, 2 and 3 (but not the plurilateral agreements listed in Annex 4, where adherence was to be voluntary), the WTO Agreement has no provision on the sum total of rights and obligations under the various agreements.

In terms of customary rules of interpretation of public international law, when a country is a party to several agreements, it is expected to implement all in good faith, with specific obligations in one overriding the general in another, and a subsequent agreement between the same parties on a specific subject overriding an earlier one etc.

From the outset, however, contrary to these customary rules of interpretation, the WTO's dispute settlement panels and AB, aware that their rulings would be automatically adopted by the DSB under the "negative consensus" rule, in a series of disputes raised by the US against individual developing countries (and in the banana dispute against the EU), held that the rights and obligations of the various agreements were "cumulative", even though those who negotiated, drafted and concluded the agreements did not formulate any such requirement.

The AB said that it would clarify and reconcile the various agreements such that there are no conflicts and in such a way that a WTO member state would be obliged and enabled to observe all the obligations of all the agreements.

In several of its rulings, the AB "interpreted" the accords cumulatively, increasing the obligations of developing countries and restricting their rights, in effect using the DSU and the "negative consensus" requirement for adoption of rulings to open up developing-country markets to the transnational corporations (TNCs) of the US. Some egregious examples are detailed below.

The AB bias in favour of the US, and acting against developing countries to open up their markets, began from the outset in its rulings on a series of disputes raised by the US and/or the EU.

In a dispute against Indonesia over its domestic auto production project, which involved some subsidization for

local procurement, the panel ruled that when a number of international agreements are entered into by the same parties at the same time, there has to be a presumption that there are no conflicts.

However, on a plain reading of texts, it is clear that the UR negotiators, in reaching the various WTO accords on trade in goods, did envisage conflicts, and hence inserted the overriding general interpretative note to Annex 1A.

The panel got around this by arguing that the note could apply to any conflict between the obligations of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (SCM), but not between the Agreement on Trade-Related Investment Measures (TRIMs) and the SCM Agreement. The "non-conflict" between the TRIMs and SCM Agreements was deduced by "interpreting" the TRIMs Agreement as a "full-fledged" agreement of the WTO, and the references in the TRIMs Agreement to the "provisions" of Article III of GATT 1994 (against investment measures) as a reference not to the Article as such – as would be the ordinary meaning of the term in public international law interpretations – but only to its "substantive aspects"!

The panel did not explain where it got this "qualification" to distinguish between "substantive aspects" and the Article itself. It used the AB ruling in the US-EU banana dispute (see below) to buttress this view and promote the theory of "cumulative obligations" on the same subject in different agreements.

However, if the TRIMs and SCM Agreements are separate accords, the special rights given to developing countries under the SCM Agreement (to promote industrialization through subsidies and incentives, including for the use of domestic goods in preference to imported goods) ought to have prevailed over the more general TRIMs Agreement.

In commenting on the Indonesia auto dispute in the *South-North Development Monitor (SUNS)*, trade expert and former Indian ambassador to GATT Bhagirath Lal Das pointed out that in reaching the conclusion of no conflict between the TRIMs Agreement (a general accord) and the specific SCM Agreement, the panel had taken "circuitous routes, making a subtle, but tenuous, distinction between Article III of GATT 1994 and 'the provisions' of this article." This appears totally artificial, as an article cannot be viewed as separate from its provisions. Das said: "One may be tempted to ask: what is the content of Article III of GATT 1994, devoid of its provisions contained in its various paragraphs?"

Indonesia did not appeal the panel ruling but implemented it. In this instance, it bowed to the International Monetary Fund (IMF), which required Indonesia, in return for an IMF loan to meet the country's financial crisis, to implement the ruling, end the subsidy and abandon its automobile project. The IMF thus advanced the mercantilist interests of its major shareholders, the US, the EU (France, Germany and the UK) and Japan.

[The accord with the IMF (and the picture of the flamboyant way the then IMF boss Michel Camdessus stood behind then Indonesian President Suharto as the latter signed the accord) sealed Suharto's fate, and the corrupt Suharto regime gave way to successors who did not want to pursue the projects whose beneficiaries were Suharto's sons.]

In the earlier banana dispute, the US, in pursuing the interests of its Chiquita banana TNC (which procured and exported bananas from Central and South America, but not from the US), had challenged the EU's wholesale distribution regime under the WTO's General Agreement on Trade in Services (GATS); the US had no locus standi in a dispute involving Annex 1A accords on trade in goods, since it exported no bananas.

[The US withdrew its own initial complaint and joined the Central American countries as co-complainant. Chiquita had banana plantations in Central America and exported bananas to the EU at MFN rates, as against the preferential tariff regime for bananas from African, Caribbean and Pacific (ACP) countries.]

The issue raised by the US complaint hence was over the EU's obligations under Annex 1A agreements in relation to banana imports, and the accord in Annex 1B (GATS), and whether the invocation of GATT accords (by Guatemala and others) excluded a claim by the US under GATS.

The WTO treaty itself has no provision analogous to the Annex 1A general interpretative note when it comes to possible conflicts amongst the agreements in Annexes 1A, 1B, 1C (the TRIPS Agreement) and 2 (DSU). Thus, on questions of conflict among the first three (e.g., conflict between the general and the specific), a presumption (rebuttable though) of no conflict is possible. But all Annex 1A accords are covered by the mandatory general interpretative note, which shows that the signatories envisaged possible conflicts and ways to resolve them.

At first (in the banana dispute), the panels said that the obligations under GATT, GATS and the TRIPS Agreement were "cumulative". This itself was questionable. But to import this to make GATT 1994 and the other goods agreements in Annex 1A cumulative, as in the Indonesia auto dispute, is nonsense. If the negotiators had intended it, they would have said so, as both this writer and Das pointed out at a 2000 trade seminar in Harare (see Martin Khor, "WTO dispute system tilting balance against South", *SUNS*, No. 4638, 31 March 2000).

Same wording, different interpretations

In another set of rulings, despite its own so-called "collegiate" working procedures, the AB provided two different views on the same wording in two different provisions invoked in two different, more or less contemporaneous disputes.

In the Turkey-India dispute (see Chakravarthi Raghavan, "WTO Appellate Body extending its jurisdiction", *SUNS*, No. 4537, 26 October 1999), in obiter dicta on points of law not raised in appeal by either India or Turkey, but of indirect benefit to the US in future disputes, the AB handed down a ruling contrary to its earlier views on the India balance-of-payments (BOP) case.

The AB's obiter dicta (against which the US expressed no criticism then) opened the way for customs unions to depart from GATT obligations other than those in Article I, the MFN provision of GATT. The AB said: "... we are of the view that Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a Customs Union, this 'defence' is available only when two conditions are fulfilled. First, the party obtaining the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraph 8(a) and 5(a) of Article XXIV. And, second, the party must demonstrate that

the formation of a Customs Union would be prevented if it were not allowed to introduce the measure at issue. Again both these conditions must be met to have the benefit of Article XXIV."

In these obiter dicta, the AB obliquely sought to expand its own jurisdiction in future cases: "We wish to point out that we make no finding on the issue whether quantitative restrictions found to be inconsistent with Article XI and Article XIII of the GATT 1994 will ever be justified by Article XXIV. We find only that the quantitative restrictions at issue in the appeal in this case were not so justified. Likewise, we make no finding either on many other issues that may arise under Article XXIV. The resolution of those other issues must await another day. We do not believe it necessary to find more than we have found here to fulfil our responsibilities under the DSU in deciding this issue."

In the Turkey-India dispute, the Uruguay Round Understanding on Article XXIV (on customs unions) was involved. In the India BOP dispute, where India sought to justify its quantitative restrictions (QRs) on BOP grounds, the UR Understanding on Article XVIII:B (on BOP) was involved. The language used in paragraph 12 of the Article XXIV Understanding, and that in footnote 1 to the Article XVIII:B Understanding both seek to ensure that the right of WTO members to raise disputes under Articles XXII and XXIII "with respect to any matter arising out of" either of the Articles and Understandings is preserved.

In the case against India's QRs, where India pleaded BOP justification, and in the case against Turkey, where Turkey claimed justification under provisions on customs unions, the panels faced the issue of whether the BOP justification in the first and the customs union justification in the second were matters that could be raised before and disposed of by a panel, or whether they should be decided by the respective substantive WTO bodies where all members are represented.

In the BOP case, the AB, like the panel, interpreted the Understanding to provide jurisdiction to both the WTO's BOP Committee and the panels to hear and decide. The US blocked any conclusion of the Committee and raised a dispute, which the panel and the AB adjudicated, declaring the Indian QRs illegal.

At the stage of the DSB's adoption of the rulings (under the "negative consensus" rule), India and several other developing countries strongly objected to this interpretation, seeing it as a serious inroad into the special and differential (and more favourable) rights assured to developing countries under the WTO, GATT 1994 and its Article XVIII:B.

In the Turkey case, however, the panel took the opposite view that, arguably, the issue of compliance of a customs union with Article XXIV was for the WTO body (in this case, the Committee on Regional Trade Agreements) to decide, but that panels could go into disputes with respect to "any matters arising from the application of these provisions relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free trade areas."

The panel reports on the India BOP case and the Turkey Article XXIV case were due to be circulated to all DSB members at about the same time (in both cases, advance copies were provided to the dispute parties as per the rules). If the two reports had come out at the same time, both would have landed in the AB at the same time and the AB (functioning under self-assumed collegiality powers) would have been forced to deal with the fact of the identical language in the GATT 1994 provisions relating to both the disputes.

But the publication of the report on the Turkey dispute was delayed (by the secretariat) by a little over a month after it was ready, on the ground of time needed for translation; it thus went to the AB later.

In both cases, before the panels, India had taken the same position. But by the 'fortuitous' circumstance of the AB hearing in the BOP case taking place before the Turkey dispute appeal, the US was able to get the AB in the BOP case to rule on the simultaneous jurisdiction of the WTO legislative body and of the panels. In the Turkey dispute, though the US had been an interested third-party intervener before the panel, it did not intervene at the AB stage!

Nevertheless, the AB (which under the DSU cannot create or abridge rights and obligations of the WTO), by means of obiter dicta that more often come out of courts of record in Anglo-Saxon common law jurisdictions, "invited" future appeals in future disputes to enable it to rule on this contradiction in interpretation of the same wording in the Understandings on Article XVIII:B and Article XXIV.

The "shrimp-turtle" ruling

In the "shrimp-turtle" dispute, raised by India, Malaysia, Pakistan and Thailand against US restrictions on imports of shrimp caught using nets that may ensnare turtles (see *SUNS*, No. 4301, 14 October 1998), the AB:

1. Cleared the way for non-governmental organizations (NGOs) to file amicus curiae briefs and intervene, in effect ruling that the panel's right to "seek" information should not be read narrowly but as enabling it to make use of information it had not in fact "sought". The verb "seek", which (by any ordinary meaning of the word in any dictionary) requires an active role of the panel, is thus made to mean to "receive", even when the panel did not initiate any move on this! The US and EU NGOs cheered, little realizing that this meant rich corporations and their lawyers could also intervene – which they did, as in a subsequent steel import dispute.

2. Imported and expanded the scope of the GATT "exceptions" in Article XX by setting aside the panel ruling on this as a "serious error" of legal reasoning. The AB held that the panel did not examine the ordinary meaning of Article XX (unlike in the Indonesia auto ruling, there was no discussion here as to whether this meant the "substance" of the provisions or the entire Article) nor look at the application of the measure, but rather focused on the design of the measure and addressed "a particular situation where a Member has taken unilateral measures which, by their nature, could put the multilateral system at risk."

The panel had formulated a broad standard and test for excluded measures, and found the US shrimp ban as falling under this class because it imposed conditions for market access based on adoption by the exporting country of conservation policies prescribed by the US. The AB, however, accepted the US plea that Article XX(g) about the conservation of "exhaustible natural resources" applied not merely to mineral resources but also to living natural resources, and spoke of an "evolutionary" approach to treaty interpretation. The AB held that the treaty interpreter must interpret the treaty in the light of contemporary concerns of the community of nations about protection and conservation of the environment.

According to the AB, while Article XX of GATT 1947 (reflecting the understanding at that time on mineral and living resources) was not modified by GATT 1994 in the Uruguay Round, the WTO Agreement had "the objective of sustainable development" in its own preamble, and thus, the term "natural resource" used in Article XX(g) was not static but "by definition, evolutionary." Evolution in five years of life of the WTO and GATT 1994!

Negotiating history

Public international law interpretation, as codified in the VCLT, requires the words of a treaty to be interpreted in accordance with their "ordinary meaning", but where language is ambiguous or unclear, reference can be made to the negotiating history to arrive at a meaning. Under the Vienna Conventions on Plenipotentiary Diplomatic Conferences for negotiating treaties/agreements, while concluding a treaty, the plenipotentiaries are also authorized to draw up and approve a "negotiating history" to be part of the records of the conference. Any other "negotiating history", however drawn up, is of no value.

The Uruguay Round's concluding meeting of plenipotentiaries at Marrakesh was not presented with, nor did it approve or adopt, a negotiating history. (This was unlike at the end of the previous Tokyo Round, when the negotiating history, drawn up by the secretariat, was adopted.) At the Marrakesh plenipotentiary ministerial meeting, only formal documents and reports of the Uruguay Round were derestricted and published. Although much of those negotiations had taken place in informal meetings where informal proposals by participants and sometimes "non-papers" (those without identified authors) were tabled and considered, none of these can be found in the derestricted formal Uruguay Round documents.

Yet, WTO dispute settlement panels, purporting to exercise a need to clarify meanings of language in the WTO accords (rather than on the basis of the ordinary meaning deduced from a dictionary), have been using "negotiating history" produced by the secretariat (the legal division servicing the panels, in consultation with substantive divisions), behind the backs of parties after they had presented and argued their cases. This is a gross violation of the principles of natural justice common to all systems of law and public international law. The secretariat records resulted, in two dispute cases explained below, in some strange "negotiating history".

In a ruling against Korea in a dispute raised by the US on the plurilateral Government Procurement Agreement (for an analysis of the ruling, see *SUNS*, No. 4670, 18 May 2000), a panel headed by Michael Cartland, a former Hong Kong representative to GATT/WTO, first gave an expanded interpretation of the rarely invoked "non-violation" clause in GATT Article XXIII.1.b (only eight cases till then in the 50-year history of GATT invoked this clause). The ruling spoke of impairment to the US arising out of "reasonable expectation of an entitlement" to a benefit that had accrued "pursuant to the negotiation", rather than "pursuant to a concession exchanged in the negotiations," the traditional view of public international law (codified in Article 26 of the VCLT, which incorporates the principle of pacta sunt servanda).

This finding by the Cartland panel enabled its further finding that there had been lack of "good faith" in negotiations or "treaty error" on the part of Korea, and that the DSU could be used to invalidate a part of the treaty (Government Procurement Agreement), and a DSB recommendation substituted, to enable a party to withdraw reciprocal concessions. The panel arrived at this expanded view of pacta sunt servanda by delving into the negotiating history, not of the Government Procurement Agreement but of the VCLT itself, citing the statement of the International Law Commission in transmitting the draft VCLT to the UN General Assembly, which had set up the Commission and adopted the VCLT!

Having given this obiter dicta, which opened up the scope for future complaints, the panel however ruled against the US on the ground that the US had not exercised "due care" in the negotiating process! The US did not appeal, and the panel report was adopted, in effect putting the DSB imprimatur on this expanded clarification/interpretation of "non-violation" complaints and "good faith" in negotiations, and the ability of panels to remedy "treaty error" and "lack of good faith" in negotiations by substituting their own judgment in lieu of actual scheduled commitments – a veritable "Daniel come to Judgment", to use Shakespearean language. The US did not protest such an expanded remit for dispute settlement.

Balance between judicial and political bodies

The manner in which the dispute settlement process was being invoked, and rulings handed down, elicited some criticism at that time from a former GATT law official Frieder Roessler, a German national who had headed its legal division during the Uruguay Round and into the WTO, and later headed the Geneva-based Advisory Centre on WTO Law (set up to help developing countries, in particular least developed countries, with legal assistance in disputes).

In a critique of the functioning of the WTO's dispute settlement system, particularly the way panels and the AB made use of the procedural rights in the DSU to virtually nullify the substantial rights and obligations of members under the WTO agreements, Roessler said that the competence of panels and the AB could not be determined by themselves exclusively on an interpretation of the DSU, but in the context of the complex institutional structure of the WTO and the division of decision-making among different organs, set out in the Marrakesh treaty and which reflect legitimate, negotiated policy objectives.

WTO panels, Roessler said, should respect the competence and discretionary powers of the political bodies established under the agreements, and should not reverse their determinations. And if a competent WTO body has not yet made its determination, panels should not step in and preempt that determination. The role of panels, he added, should be limited to protecting WTO members against an abusive resort to provisions governing, for example, BOP measures and regional trade agreements – against measures that fall outside the discretionary authority of the BOP Committee or the Committee on Regional Trade Agreements.

Roessler's views were put forward in a paper, "The institutional balance between the judicial and political organs of the WTO", presented at a June 2000 seminar at Harvard University (for a report on the paper, see *SUNS*, No. 4685, 16 June 2000).

The US at that time voiced no criticism of the way panels and the AB were clarifying and interpreting the WTO agreements such that it seemed to increase the obligations of developing countries to the benefit of the US and its mercantilist interests. This bias at the WTO came into play to a much greater extent in the 1996 US presidential election campaign (Bill Clinton vs Bob Dole contest), where the WTO, its DSU and loss of US sovereignty became an issue and one of the campaign slogans was "Two strikes and we are out"; the WTO and its panels and the AB seemed to be trying to ensure there was no such op-

portunity!

In a similar vein to Roessler's paper, Bhagirath Lal Das, former Indian ambassador to GATT, a trade law expert and author of several books on the WTO system and its imbalances, in a critique of the way the panels and the AB were functioning, went so far as to call for the abolition of the standing Appellate Body itself (see Bhagirath Lal Das, "The panel and appeal process at the WTO", *SUNS*, No. 4689, 19 June 2000).

In analyzing the AB views in two separate disputes (against Korea and Argentina) involving the WTO Agreement on Safeguards, heard and rulings handed down at the same time by two different division benches of the AB, Das pointed to the "extraordinary coincidence" of six paragraphs in the two AB reports having the same wording. He added: "The members of the AB divisions in these two cases were two totally different sets of members ... Each of these reports is signed by the respective sets of three members each. It is surprising how these two different sets of persons ended up writing exactly the same language in some parts of their respective reports. The AB is like a judicial body in the WTO. One has to presume that the AB in a case writes its own reports, and does not get it written by some other persons. This presumption seems to be hit by the exact convergence of the language in some parts of the two reports ..."

After Das's article came out in *SUNS*, WTO officials explained to this writer about "collegiality" under the AB's working procedures – which at that time were not made public but were available to WTO members – and that in the light of conclusions by the AB division, reports were drafted by the AB secretariat and approved by the division benches! A recent letter by six AB members to the DSB chair (written in connection with the issue of Chang's reappointment) both explains and brings to the public record how the AB division bench of three members hearing an appeal invariably consults and interacts throughout with the four other members of the AB who do not participate in the hearing, and that this is done in terms of the AB's working procedures.

Not yet in the public record then but known, as this writer had done at that time, by talking to some panel and AB members (after the rulings), it would appear that after hearing the parties and third parties in a dispute, panels, in reaching their conclusions, are "guided" by officials of the legal (and substantive) divisions of the WTO secretariat "servicing" the panel; and in most cases the secretariat also draws up a draft report.

In the case of the AB, as mentioned above, the three-member division bench interacts throughout, without the presence of the parties and third parties to the appeal, with the other members of the AB, and their reports too are drafted by the AB secretariat's legal assistance.

In any domestic jurisdiction, this is enough to make a ruling or decision (judicial, quasi-judicial or administrative) illegal and invalid. The WTO apparently is a different animal, and part of the DSU review process that should be undertaken as a priority over any other negotiations at the WTO must address these issues and ensure rulings adopted at the DSB do not add to or diminish the rights and obligations provided in the WTO agreements.

Freewheeling ways

In one US-EU dispute over countervailing duties under the Agreement on Subsidies and Countervailing Measures, the AB ruled against the US but in the process, through its freewheeling ways without any authority of the rules, managed to raise more controversies.

The US, in its notice of appeal, had not spelt out the legal grounds and panel decisions thereof, as required under the AB working procedures. When the EU asked for dismissal of the appeal on that ground, the US said there was no such requirement in the DSU. Instead of upholding its own working procedures, the AB division "requested" the US to file its grounds of appeal and accepted it even though the time for appeal had expired!

The AB also asserted its right to receive an amicus curiae brief, this time from an industry association, but then decided there was nothing in the brief! In the process, it gave NGOs superior rights over WTO members that are third parties which had not notified their intention to intervene in the appeal or those members other than third parties which can't claim any right to be heard!

On substance, the AB turned down the US arguments about when a "benefit" is conferred, but refused to provide any authoritative ruling that would end future disputes.

In the EU-Canada patent case, the panel used the "negotiating history" of the TRIPS Agreement provided in a note by the secretariat that purported to draw a history of the negotiations "on the basis" of draft legal texts in the negotiating group in the spring of 1990, a secretariat composite text, and subsequent chairman's informal text and revisions, as well as "parallel work" in the WIPO Committee of Experts on preparations for a Patent Harmonization Treaty.

The secretariat note admitted that these texts had not been circulated to the TRIPS negotiating group, but still used them on the ground that WIPO representatives had kept negotiators "informed" of developments! (See Chakravarthi Raghavan, "WTO panel hits stockpiling exception in Canadian Patent Act", *SUNS*, No. 4630, 21 March 2000.) At Marrakesh, all formal documents and reports were derestricted; however, the reports of various meetings of the TRIPS negotiating group were, at that juncture in 1994, available even to Uruguay Round delegates only as drafts (subject to editing and corrections from delegations); the reports were finalized and made public only in 1995 or 1996, after the WTO came into being.

While the AB has in other instances shown willingness to create law and do what it wants regarding NGO briefs, on the sequencing issue (compliance panel first before retaliation authorization request, or Article 21.6 of the DSU vs Article 22) where the Quad (the US, the EU, Canada and Japan) disagreed considerably, the AB noted lack of clarity and said it was for the WTO members to clarify through interpretation or change of rules! (See *SUNS*, No. 4812, 12 January 2001.) *(SUNS8258/8259)* ❐

WTO DG's sleight of hand on new issues

The contentious issues of investment and competition policy are back in the WTO frame following a decision by the WTO Director-General to widen the remit of two secretariat bodies to incorporate these topics.

by D. Ravi Kanth

GENEVA: Without consulting members and in an apparent violation of rules of business, the World Trade Organization (WTO) Director-General Roberto Azevedo has expanded two existing divisions of the WTO secretariat to oversee work on investment and competition policy respectively, trade negotiators familiar with the development told the *South-North Development Monitor (SUNS)*.

The controversial issues of investment, competition policy and government procurement were shot down at the WTO's fifth Ministerial Conference in Cancun in 2003 following massive opposition from the developing countries, and that entire meeting collapsed.

Subsequently, in July 2004, the WTO General Council adopted the July Framework agreement to put the Doha Round talks back on the rails, but decided to keep the three so-called "Singapore issues" outside any work at the WTO during the Round. Accordingly, the Doha Work Programme was modified in these terms in paragraph 1(g) of the July Framework: "Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: The Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round."

This decision of the General Council remains in force unless specifically decided otherwise by the Council (acting in between sessions of the Ministerial Conference) or by the Ministerial Conference.

The tenth Ministerial Conference, held in Nairobi in 2015, could reach no decision for lack of consensus, neither to end the Doha Work Programme nor on taking up any new issues.

As a result, ever since the General Council decision in July 2004, these three issues have hovered around the Centre William Rappard that houses the WTO, unable to make an entry. The developing countries have not given any "explicit" approval at the subsequent Ministerial Conference or General Council meetings. As such, for all practical purposes, the three issues remain multilaterally "untouchable" due to lack of consensus among the WTO's 164 members.

Comeback

But, in an astonishing development, Azevedo has brought back these issues through a sleight of hand, said a trade negotiator who asked not to be quoted.

In a move that raises serious systemic concerns, the WTO Director-General took decisions without any specific mandate from any of the WTO bodies to rename the secretariat divisions on services and intellectual property.

Members were "informed" in the week of 6 June that the division on services is being rechristened as the "Trade in Services and Investment Division", while the division on intellectual property will be called the "Intellectual Property, Government Procurement and Competition Division."

The new division on intellectual property, government procurement and competition, according to the WTO website, "is responsible for the WTO's work in trade-related intellectual property rights (TRIPS), government procurement and competition policy (it should be noted that substantive work in the latter area in the WTO has been on hold since 2004)."

(The division on intellectual property had already included a section on government procurement for specifically servicing "the Committee established under the [existing] plurilateral Agreement on Government Procurement and dispute settlement panels that may arise".)

The decision to include competition policy in the intellectual property division is startling since "substantive work in the … area in the WTO has been on hold since 2004." If competition policy has been on hold since 2004, did the WTO members now decide and has the WTO Budget Committee agreed that the division should monitor "developments at the international level and would be responsible for any further work in the WTO Working Group on the Interaction between Trade and Competition Policy, in the event that that body should resume its work"?

After the Doha Ministerial Conference, any additional work and the budget for it, even an expansion in activities of the WTO's information division on the Doha Work Programme agenda, had to be approved by the Budget Committee, which insisted on having the official minutes of that Conference before it in order to give its approval.

It is also legally unclear as to what is meant by saying that competition policy "has been on hold since 2004", because there was no decision to keep the work on hold. That competition policy was buried at the WTO's fifth Ministerial Conference is well known, the trade negotiator said.

In a similar vein, the decision to include work on investment along with issues of trade in services is not legally justifiable as there is no formal decision by the members to consider investment as part of services. Investment, for example, can form part of trade in goods and even intellectual property. On what basis therefore has the Director-General decided to include investment in the work on trade in services without a proper discussion involving all 164 members, a negotiator who spoke to *SUNS* asked.

The "Singapore issues"

It is common knowledge that the three areas of investment, competition policy and government procurement – along with trade facilitation – constituted the four "Singapore issues", which were introduced at the WTO's first Ministerial Conference in Singapore in 1996. In the face of combined opposition from developing countries, the four issues were brought into the Doha Work Programme in 2001 on the condition that negotiations on each of the four issues would commence only on the basis of "explicit consensus" at the WTO's fifth Ministerial Conference. The European Union, which was the principal demandeur for the four issues, tried hard

to start negotiations at Cancun but gave up in the face of developing-country opposition.

Subsequently, the four issues were dropped until the United States, the EU and other developed and some developing countries which were part of the Colorado Group brought trade facilitation back into the 2004 July Framework agreement, promising the developing and the least developed countries that their core issues in agriculture and other areas of the Doha Work Programme shall be addressed on the basis of special and differential treatment and less than full reciprocity. Effectively, the three other Singapore issues – investment, competition policy and government procurement – were obliterated from the Doha Work Programme.

In the next 11 years between 2004 and 2015 in the Doha Round negotiations, the developing countries were forced to run in circles to secure minimal results in areas such as tackling trade-distorting domestic agriculture subsidies, addressing tariff peaks and tariff escalation, improving anti-dumping rules, and securing credible market access for the movement of short-term services providers in Mode 4.

After pocketing a binding and comprehensive outcome in the form of an agreement on trade facilitation at the WTO's ninth Ministerial Conference in Bali in 2013, a handful of developed countries – the US, the EU and Japan – sought to torpedo the Doha Work Programme at the tenth Ministerial Conference in Nairobi in 2015. They were unable to get a consensus for ending the Doha Work Programme but, with some assistance from the secretariat, have been torpedoing any work on other measures post-Nairobi.

Now, the Director-General who helped these handful of developed countries in their efforts to put the Doha Work Programme to bed has quietly initiated work to bring in investment, competition policy and government procurement without multilateral consent, said a South American trade envoy.

Trade observers said that, following the example set by the US on the reappointment of a WTO Appellate Body member, the Director-General, whose current term will be ending next year, may face a similar experience. *(SUNS8260)* ❐

Cracks emerging in plurilateral TiSA talks

Differences over the proposed extent of market opening in various sectors are impeding progress in the 23-country talks to craft an accord on services trade liberalization.

by D. Ravi Kanth

GENEVA: Cracks are finally emerging in the grossly imbalanced plurilateral talks on a Trade in Services Agreement (TiSA) being pursued by 23 countries, after the European Union and several other members voiced concern about the overall quality of the latest revised offers and the exclusion of Mode 4, maritime transport and sub-federal categories among other sectors, several trade envoys told the *South-North Development Monitor (SUNS)*.

Although the trade ministers and senior officials of the TiSA countries who met on 1 June on the margins of the annual Organization for Economic Cooperation and Development (OECD) meeting in Paris put on a brave face by issuing an optimistic statement about concluding the negotiations by the end of the year, they could not conceal their growing disappointment over the poor quality of the latest revised market access offers as well as backtracking by some members of the group, in offers well below the overall GATS (WTO General Agreement on Trade in Services) floor, participants maintained.

The EU came out into the open at the Paris meeting by suggesting that the level of "ambition" in the revised offers is lacking. "The recent revised offers and the work done so far represent real improvement, but we certainly need more ambition," EU Trade Commissioner Cecilia Malmstrom said. "The EU is ready to go an additional mile but everyone needs to join if we want to achieve an agreement able to shape the global economy of the 21st century."

The US, according to one source, has not included an offer on Mode 4 (delivery through movement of natural persons) and maritime transport services while raising the ante on financial services, telecom services, e-commerce and localization (local content requirements in services, particularly servers and other requirements in e-commerce). The US is also not ready to table and commit its sub-federal sectors in the overall market access demands.

However, Washington pressed the other members to start negotiating about new services which are not yet fully implemented by several TiSA member countries, the source said.

The US is also not prepared to accept any reservations/exceptions in the national treatment provisions for new services and other areas in which the TiSA members are following the "negative list" criteria for the agreed sectors, according to the source.

While Uruguay and Paraguay have withdrawn from the TiSA talks, Mauritius, which has become a tax haven for alleged dubious/illegal trusts and companies, has circulated its latest offer. Chinese Taipei did not table its latest offer because of its recent elections.

[Former trade negotiators and trade experts suggest a plurilateral accord like TiSA will be contrary to the WTO and cannot be lodged as a plurilateral agreement in the WTO's annex, nor would it qualify as a "services integration agreement" among participants under Article V of GATS. See C. Raghavan (2014), "The Plurilateral Services Game at the WTO", in *The Third World in the Third Millennium CE, Vol. 2: The WTO – Towards Multilateral Trade or Global Corporatism?*, Penang: Third World Network, pp. 367-70.]

Differences

At the end of the 18th round of the TiSA talks on 2 June at the EU mission in Geneva, differences among the participants were writ large on several aspects of the negotiations.

During the eight days of negotiations that began on 26 May, the TiSA members discussed revised market access offers in areas such as short-term services providers under Mode 4, telecoms, financial services, transport (air, maritime and road), energy, environment and delivery services. They also discussed textual provisions and annexes on Mode 4, transport sectors, telecoms, financial services, localization and e-commerce. Besides, there was an

inconclusive discussion on the institutional architecture for TiSA.

There were concerns on seven grounds following the latest round of talks.

To start with, there are grave doubts whether the revised offers submitted by 22 countries are above the "GATS floor" which is what was envisaged when the negotiations were launched in early 2012.

The question over the GATS floor came up because some members have backtracked in their latest market access offers in areas such as Mode 4, including the US, according to a participant familiar with the technical level of discussions.

While the GATS floor was selectively crossed by the US and other major industrialized countries, it was left hanging when it came to services that are not overly capital-intensive, such as in Mode 4. Besides, the overall level of ambition in transport services involving maritime, road and air is well below other areas because of opposition from the US, according to another participant.

Second, offers in sectors such as maritime, road and air transport are unlikely to match the high level of ambition being pressed by the US and the EU in areas of their interest. While the two trans-Atlantic giants are beating the drums for ambitious, high-quality offers in financial services, telecommunications, environmental services, professional services, e-commerce and localization requirements, they are not forthcoming on demands raised by the developing-country members of TiSA, said an Asian participant.

Third, the TiSA participants are unclear how to raise the bar in terms of ambition with the demands being raised for matching with their best FTA (free trade agreement) commitments in different areas. Several participants told *SUNS* that it is difficult to match with the best FTA commitments because those commitments were made in the context of give-and-take between the signatories of those agreements.

Fourth, the TiSA participants are stuck because of the raging debate on "policy space" as some major developed countries including the US and the EU are not prepared to open some sectors on the pretext of policy space, participants said.

Fifth, there is growing concern, even among some developed countries such as the EU, over poor quality as well as lack of offers on contractual services providers and independent services providers in Mode 4, participants maintained. The US did not even place an offer in Mode 4, which caused concern among several members, according to the participants.

Sixth, the US wants to introduce new services and wants the remaining TiSA participants not to place any national treatment reservations or exceptions. Several members – the EU, Korea, Switzerland and Norway – remain opposed to the US demands on new services.

Seventh, the US is not willing to place sub-federal areas in the TiSA market access offers. The US is joined by Australia in excluding any coverage of sub-federal areas in TiSA.

Asymmetries

In short, the latest round of negotiations has revealed that a comprehensive and ambitious agreement covering all areas in a "symmetrical" framework is out of the question and far-fetched, participants said.

There will be pronounced asymmetries in the levels of ambition in different services sectors, and barriers, according to several members familiar with the negotiations.

The US, the EU and Switzerland, among others, want a high level of ambition in areas such as banking and insurance, telecommunications, distribution and retail services, and e-commerce.

More crucially, the US remains indifferent to any opening in maritime services as demanded by Norway along with several TiSA members which include both developed and developing countries.

The US and the EU are not willing to support any liberalization of road transport services as demanded by Turkey and Mexico.

The US continues to turn a deaf ear to air transport services as demanded by several members such as Australia and Switzerland.

Against this backdrop, the TiSA ministers have agreed to place their second revised offers in October that will suggest whether an agreement is possible.

The exclusion of China from the TiSA negotiations is also having an adverse impact on the plurilateral negotiations on environmental goods, participants said. China has now called for negotiating a multilateral agreement on trade in services at the WTO and outside TiSA, according to a participant who was present in Paris.

In crux, the US-led TiSA talks might not be concluded by the end of the year because of too many imponderables that cannot be resolved in a US presidential election year, participants maintained. *(SUNS8255)* ❐

Western nations, blaming cash crunch, pull out of UNIDO

Developed countries have been withdrawing from the UN agency charged with promoting industrialization, sparking fears that this could undermine the global sustainable development effort.

by Thalif Deen

NEW YORK: The 134-member Group of 77, the largest single coalition of developing countries, has expressed serious concern over the "unprecedented" withdrawal of nine member states from the Vienna-based United Nations Industrial Development Organization (UNIDO).

The nine – all members of the European Union (EU) and/or the Organization for Economic Cooperation and Development (OECD) – are the UK, France, Portugal, Belgium, Lithuania, Canada, Australia, New Zealand and the United States.

The withdrawals, which began in 1993, have continued through 2016, with two additional countries, Denmark and Greece, planning to quit in January 2017. Withdrawal by the Netherlands is awaiting approval by the two chambers in the Dutch Parliament.

If approved, a total of 12 countries would have pulled out of UNIDO by early next year.

The apparent reasons for the withdrawals are mostly financial: cuts in development aid in the respective national budgets of member states, as indicated to UNIDO.

Ambassador Simon Madjumo

Maruta of Namibia, the chairman of the G77 in Vienna, pointedly says: "The Group firmly believes that any efforts to change the architecture of the United Nations system should be undertaken through consultative processes, within a broad framework of international solidarity and consensus, rather than to pursue this goal through budgetary approaches."

Asked for his comments, UN Deputy Spokesperson Farhan Haq told Inter Press Service (IPS): "We have no immediate comments, although, of course, we encourage support for UNIDO."

Industrial development mandate

Currently, UNIDO has 170 member states, described as "sizeable", and mostly from the developing world, compared with 193 at the United Nations.

According to UNIDO, its mission is to promote and accelerate inclusive and sustainable industrial development (ISID) in developing countries and economies in transition.

The G77, which also includes China, has argued that withdrawals undermine the international character and credibility of UNIDO, which was created in 1966 and converted to a specialized agency in 1985.

A second implication is a budgetary one: the reduction of core resources to UNIDO affects its capacity to deliver services to beneficiary countries.

However, the most serious implication is that it is creating a "domino effect", with one Western nation following another in quitting the organization.

In October 2011, the US cut off funding for the UN Educational, Scientific and Cultural Organization (UNESCO) when Palestine was accepted as a full-fledged member of the Paris-based agency.

The G77 says although it respects the sovereign right of every member state to decide upon its membership of international organizations, it believes that every effort should be made to prevent such decisions from undermining the concept of international solidarity and jeopardizing the existence of multilateral organizations that make a critical contribution to the achievement of the development objectives of the members of the Group.

(continued on page 16)

Is good governance key to eliminating poverty?

The link between "good governance" on the one side and economic growth and poverty reduction on the other is not as clear-cut as is often claimed, write *Jomo Kwame Sundaram* and *Anis Chowdhury*.

For over a decade, much of the international development community, led by the Organization for Economic Cooperation and Development (OECD) and the World Bank, promoted "good governance" as a prerequisite for economic development and poverty eradication.

Lack of good governance became the explanation for the failure of structural adjustment programmes (SAPs) to deliver economic growth and poverty reduction. It was presumed that SAPs were good for growth and the poor. But the disappointing results of SAPs had to be explained away, and blaming poor or bad governance provided a convenient explanation which did not challenge the economic rationale for the SAPs. Bad governance was also convenient for blaming or excusing poor aid effectiveness.

Measuring good governance

The World Bank started ranking countries against well over 100 good governance indicators. A composite good governance index was introduced based on perceptions of: (a) voice and accountability, (b) political stability and absence of violence, (c) government effectiveness, (d) regulatory quality, (e) rule of law, and (f) control of corruption.

Aid was increasingly allocated according to countries' good governance rankings, ostensibly to improve aid effectiveness. The index has also been used by the donor community to "name and shame" countries that failed to live up to the standards associated with it and other related indices, e.g., the Corruption Perceptions Index published annually by Transparency International and which serves as the basis for the influential annual Global Corruption Report.

Critics have, however, pointed out flaws in the World Bank and donor community's good governance index and agenda. They range from methodological weaknesses to poor evidence linking good governance to economic development and poverty reduction.

Good governance indicators are riddled with systematic biases due to changing definitions, selection problems, perception biases, survey design and aggregation problems.

The World Bank's good governance indicators are ahistorical while its definitions are controversial.

Claiming to be "context-neutral", they do not take into account country-specific challenges and conditions, which can be very different – not only among developing countries but also among developed countries, and between the two.

It is true that most developed (or high-income) countries have stronger institutions or good governance, while most poor (or low-income) countries do not. But it would be wrong to conclude that this observed correlation between good governance and high income means that higher incomes are due to better governance. Also, a currently high income level does not necessarily imply currently rapid economic growth.

Historically, high-income countries improved their governance and strengthened their institutions as they developed. After all, institution building needs money. Poor institutions in poor countries reflect, rather than cause, their poverty.

Thus, analytical conclusions on the relationship between good governance and growth are, at best, partial and hence misleading. The indicators measure initial conditions and the ostensible effects of governance reforms, rather than the direct consequences of governance reforms on growth and poverty rates.

Additionally, methodological and measurement biases often overestimate the impact of governance and institutions on growth.

Methodologically, most cross-country econometric studies suffer from selection bias, as African countries – where institutions are generally weak and growth performance was poor, especially in the 1980s and 1990s – are typically over-represented.

Secondly, most cross-country empirical studies use some measures of institutional or governance quality together with other variables, such as investment, which are more likely to directly affect growth. Such empirical exercises can overestimate the impact of institutions on growth if institutional or governance quality also affects the efficiency of investment. After all, it is difficult to disentangle the direct effects on growth of institutional quality variables from their indirect effects through their impacts on investment.

Fuzzy analysis

There is also a lack of consensus in the literature on definitions of institutions, how they change, and their likely influence on economic outcomes.

Thus, a wide range of indicators – including institutional quality (e.g., enforcement of property rights), political instability (e.g., riots, coups, civil conflicts, wars), characteristics of political regimes (e.g., elections, constitutions, executive powers), "social capital" (e.g., civic activity, organization) and social characteristics (e.g., income, ethnic, religious, cultural and historical differences) – are used in empirical work, although each has a potentially different impact channel on growth.

Moreover, many institutional indices used in empirical work are ordinal indices, which rank countries and simply associate a number with a ranking without specifying the degree of difference among countries ranked. For example, it does not necessarily mean that the quality of institutions of a country ranked 2nd is twice as good as that of a country ranked 4th. To be used correctly, such an index needs to be transformed into a cardinal index, in which the degree of difference matters. There is also no reason to assume that such transformation from an ordinal to a cardinal index will be one-for-one or linear.

The empirical evidence conclusively indicates that countries only improve governance with development, while good governance is not a necessary precondition for development.

All developing countries do poorly on good governance indicators compared to developed countries. Yet, some developing countries perform much better than others in terms of economic development without any empirical impact on good governance indicators.

This implies the need to identify the key governance capabilities that help developing countries accelerate eco-

nomic development, and thus to work to improve governance on a sustainable basis.

In recent years, Bangladesh, China, Ethiopia and Vietnam have all been growing rapidly despite their poor governance indicators. Such experiences suggest that good governance, as conventionally defined, is hardly ever a prerequisite for getting growth and development going.

Poor countries face a multitude of constraints, and effective growth acceleration interventions should address the most binding of them. Poor governance may well be the binding constraint in some situations, but certainly not in countries growing rapidly despite poor governance.

Thus, as a rule, broad good governance reform is neither necessary nor sufficient for growth.

Finally, the link between growth and poverty reduction may also be more complex than presumed, depending on the distributional consequences of the growth process.

One foundation of the good governance agenda is "norms of limited government that protect private property from predation by the state". In fact, strengthened property rights have often reduced tax revenues, impeded agrarian reforms and exacerbated inequality. Such good governance reforms may thus deepen poverty, increasing resentment and popular discontent – that may negatively impact on growth itself.

The good governance agenda is particularly demanding on poor countries. In some cases, it may not be possible to make much progress on one dimension without prior or simultaneous progress on others. And if certain institutional and policy reforms matter more for development, these should probably receive priority. Selectively concentrating resources would then be better than spreading limited resources thinly across a whole range of ostensible good governance reforms, as some international development agencies tended to do.

Poverty exists in a broad range of circumstances and has many causes. Poverty may be due to inclusion or exclusion. Attacking poverty's systemic, structural or root causes requires political commitment and state capacity to accelerate equitable and sustainable economic development. *(IPS)* ❐

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These objectives include the implementation of the 2030 Agenda for Sustainable Development and the UN's Sustainable Development Goals (SDGs), where industrialization plays a key role.

The UN's new development agenda, with a targeted date of 2030 for full implementation, was adopted by world leaders last September. Among the 17 SDGs, SDG 9 seeks to "build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation."

Currently, UNIDO is the only UN specialized agency mandated to promote industrial development, as reaffirmed in the Lima Declaration adopted at a meeting in the Peruvian capital in December 2013.

During a meeting of the G77 in New York in June, several members of the Group were of the view that this continuing trend of weakening international institutions serving development should be seriously addressed at the higher political level. As a consequence, the Group requested the G77 chair, Ambassador Virachai Plasai of Thailand, to proceed as follows:

Firstly, to have a letter of the Chair of the Group of 77 sent to the Permanent Mission of the Netherlands as well as to other countries such as Denmark and Greece – whose withdrawals from UNIDO membership are impending – requesting those countries' reconsideration on maintaining their membership in the organization.

Secondly, to request UNIDO Director-General Li Yong of China, at the earliest opportunity, to brief the Group's members and also to jointly explore the best course of action in this regard.

Thirdly, realizing the significance of this issue to developing countries, especially to the achievement of SDG 9, the G77 chair has been requested to pursue this issue at the 71st session of the UN General Assembly this September.

This may lead to a resolution, under an existing or new agenda item, aimed at "promoting solidarity among all UN specialized agencies while highlighting intergovernmental commitment to a global partnership for sustainable development stipulated in 2030 Agenda for Sustainable Development." *(IPS)* ❐