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Brexit – navigating the rocky road ahead

The Brexit vote has thrown up a host of challenges and uncertainties for the would-be separating parties – the UK and the EU – themselves, but also for countries outside the bloc. Untangling these complexities will require, among others, a fair amount of patient contemplation among the decision-makers involved.

● **The witches' brew of Brexit** – *p26*

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Hardening impasse on Doha Round, but no TNC meets so far

Even with the Doha Round talks at a standstill amid a lack of engagement by the US, the WTO Director-General is yet to convene a meeting of the Trade Negotiations Committee, which he chairs, to look into the deadlock.

by D. Ravi Kanth

GENEVA: Multilateral trade negotiations at the World Trade Organization (WTO) under the Doha Work Programme, more popularly known as the Doha Development Round (DDR) negotiations, seem to be at a hardening impasse in key areas, post-Nairobi Ministerial Conference, but the chair of the Trade Negotiations Committee (TNC) has yet to schedule a meeting to address the impasse, according to several trade envoys.

Though he is the chair of the TNC, WTO Director-General Roberto Azevedo is yet to schedule a TNC meeting to take stock of the impasse in the rules negotiations on fisheries subsidies and other issues, because of United States opposition to negotiating multilateral disciplines for various outstanding issues in the Doha Work Programme, several trade envoys told the *South-North Development Monitor (SUNS)*.

Since the WTO's tenth Ministerial Conference at Nairobi last December, Azevedo has not convened a proper TNC meeting, although he spoke to the WTO General Council on 24 February in his capacity as TNC chair and at an informal meeting with trade envoys on 10 February. An informal meeting of heads of delegation was also held on 9 May.

US call for new approaches

On 29 June, the US issued a strong statement at the Doha Round rules negotiating group saying Washington doesn't see any compelling set of circumstances to re-engage in the group on fisheries subsidies. It said categorically that continuing work in Doha negotiating bodies is difficult. The US emphasized the importance of adopting new approaches and suggested that there cannot be negotiations without those approaches. However, the US has not spelled out what in its view ought to be the new approaches, according to trade envoys familiar with the meeting.

The US asked members to find new paths forward for undertaking negotiations at the WTO. It suggested the need for pursuing new paths with like-minded members for arriving at robust disciplines to curb fisheries subsidies. The US showed willingness to discuss improvements in horizontal subsidies as proposed by the EU, but on the basis of new ideas.

Paragraph 31 of the Ministerial Declaration adopted at Nairobi has emphasized that "there remains a strong commitment of all Members to advance negotiations on the remaining Doha issues. This includes advancing work in all three pillars of agriculture, namely domestic support, market access and export competition, as well as non-agriculture market access, services, development, TRIPS and rules. Work on all the Ministerial Decisions adopted in Part II of this Declaration will remain an important element of our future agenda."

But the US position has created "negotiating chaos" at the rules group meeting, said a trade envoy from a major industrialized country who asked not to be quoted.

Washington's stand has upset both developed and developing countries as it would close the door to arriving at multilateral disciplines on issues such as fisheries subsidies, which have global impact, and improvements in anti-dumping provisions, which have a chilling effect on global trade, the envoy said.

"If the US is interested only in plurilateral outcomes, then the WTO's Director-General, who is also the chair for the TNC, must speak out about the role of Doha negotiating bodies dealing with agriculture, industrial goods, rules and services," the envoy said.

At a time when there is appetite for negotiating various issues in the Doha services negotiating body, including the ambitious US work programme on electronic commerce, why not pursue the outstanding issues in the Doha agriculture, industrial goods and rules talks as well, the envoy asked.

In response to the US position, the

chair of the Doha negotiating body on rules, Ambassador Wayne McCook, informed members at the 29 June meeting that he will convey the US view to the TNC, the trade envoy noted.

Clearly, all these issues would have been discussed at the meetings of the chairs of the various negotiating bodies with the Director-General. The chairs must have surely conveyed to the TNC head about the emerging developments in different negotiating bodies in which the US has adopted a consistent position that without new approaches it is not willing to discuss the outstanding issues, several trade envoys said.

The Director-General, however, has chosen to remain conspicuously silent on these developments, said an African trade envoy. He has convened an informal heads-of-delegation meeting on 25 July, followed by a meeting of the General Council on 27 July. "Instead of the informal heads-of-delegation meeting, he must convene a TNC meeting to provide his assessment on the impasse in the rules and other negotiating bodies such as Doha market access for industrial goods," the envoy said.

Azevedo has also remained silent about the crisis in the WTO's highest adjudicating body after the US blocked the reappointment of the Appellate Body member Seung Wha Chang.

Effectively, the WTO is facing multiple systemic crises in which both the negotiating arm and the adjudicating body are hollowed out because of opposition from one member – the United States – said another trade envoy.

"Everybody in town knows that the DG acts only when there is a green signal from the US," the envoy suggested.

Significantly, Azevedo participated in a meeting of trade ministers pursuing a plurilateral initiative on environmental goods in Shanghai on 10 July. But he is not prepared to convene a TNC meeting to discuss the enveloping systemic crisis in the WTO negotiating bodies because of the intransigent positions adopted by one member, the envoy pointed out.

In short, the WTO is held hostage to the US positions and Azevedo seems happy not to challenge his powerful patron, the envoy suggested. *(SUNS8280)*❐

Several South nations coalesce around Indian TFS proposal

India has floated a proposal for a WTO agreement on "trade facilitation in services" to ease cross-border flows of services.

by D. Ravi Kanth

GENEVA: Several developing and least-developed countries on 4 July coalesced around an Indian proposal for pursuing negotiations at the WTO on trade facilitation in services (TFS) to cut transaction costs associated with unnecessary regulatory and administrative burdens on cross-border movement of services, several negotiators told the *South-North Development Monitor (SUNS).*

Surprisingly, the champions of the Trade Facilitation Agreement (TFA) in goods trade – the United States, the European Union, Japan, Canada and several developing countries which were members of the Colorado group – remained silent on India's proposal for negotiating a TFS agreement along the lines of what was accomplished in the TFA for goods in 2014, an African trade negotiator told *SUNS.*

While silent on the proposed TFS, the US however said, in its non-paper on the work programme on electronic commerce, that members must consider "ensuring faster, more transparent customs procedures: The sort of provisions contained in the WTO Trade Facilitation Agreement can make very direct contributions to digital trade. Administrative and at-the-border barriers can often be a bigger problem than tariffs for exporters of digital equipment."

A large majority of developing, least-developed and many developed countries also signalled their willingness to pursue negotiations on the unfinished business of the Doha services negotiations, particularly on market access (MA) and domestic regulation (DR).

However, the US, which is leading the plurilateral negotiations on a Trade in Services Agreement (TiSA) outside the WTO, chose to remain silent on the unfinished market access and domestic regulation negotiations.

The developed countries led by the EU, the US, Canada and Japan (the erstwhile Quad countries), along with their allies in the developing world such as Mexico, Hong Kong, Singapore, Korea, Chile and Argentina, pressed for starting negotiations on electronic commerce / digital trade. The US has presented a non-paper on the e-commerce / digital trade work programme even before members have completed negotiations on the outstanding issues in the Doha services negotiations.

These conflicting demands, almost along North-South lines, over the unfinished Doha services negotiations came into full display at an informal open-ended meeting of the Doha services negotiating body at the WTO on 4 July.

The chair of the Doha services negotiations, Ambassador Gabriel Duque, sought members' views on how to continue work after the summer break in September. During the previous informal session on 3 May, said Duque, members had pressed for resuming negotiations on domestic regulation and market access.

The Colombian chair suggested that work on least-developed-country (LDC) issues also should be taken up along with digital economy and TFS. He said a balanced outcome is needed without resorting to sequencing issues in other areas.

Against this backdrop, said Duque, members must spell out their positions on different areas so as to prepare a work programme for the eleventh WTO Ministerial Conference in December 2017, according to people familiar with the development.

"Holistic outcome"

India, which was the first to take the floor, said that it is a major "demandeur of a holistic outcome on services covering both DR and MA, in keeping with the GATS mandate, Negotiating Guidelines & Procedures and all the Ministerial Decisions including the Annex C of the HKMD [Hong Kong Ministerial Declaration]."

Among other things, the HKMD in Annex C emphasized that "members shall strive to ensure a high quality of offers, particularly in sectors and modes of supply of export interest to developing countries, with special attention to be given to least-developed countries."

Significantly, the HKMD called on members to "achieve progressively higher levels of liberalization with no a

priori exclusion of any service sector or mode of supply and shall give special attention to sectors and modes of supply of export interest to developing countries. Members note the interest of developing countries, as well as other Members, in Mode 4."

India said it wants substantial and comprehensive outcomes in "Mode 1 [cross-border], Mode 4 [movement of natural persons] and disciplining of domestic regulations, including in areas such as qualification requirements and procedures [which are critical for India]."

Taking a dig at those countries which are pursuing the TiSA negotiations, India maintained that members must get "back to the full mandate of services negotiations under the CTS-SS [Special Session of the WTO Council for Trade in Services]." India called for intensifying efforts to achieve rapid progress in each of the pillars of the services negotiations, especially in areas such as market access, domestic regulation and LDC services waiver, to achieve progressively higher levels of liberalization of trade in services.

Given the "numerous border and behind-the-border barriers as well as procedural bottlenecks, which are impediments to the realization of the full potential of services trade," India said that there is a crying need for an agreement on trade facilitation in services along the lines of the TFA in goods adopted by WTO members in 2014.

The TFS agreement, India said, "should address the key issues that are pertinent to facilitating trade in services, such as transparency, streamlining procedures and eliminating bottlenecks." Further, a comprehensive TFS agreement will ensure that "the commitments that were taken in the Uruguay Round are implemented in a meaningful manner and also provide the basis for realization of benefits from improved commitments in future negotiations."

The TFS agreement will be based on strong special and differential treatment provisions as set out in the TFA, India maintained. India said it will circulate a written proposal on TFS soon, according to people familiar with the development.

China said it is looking forward to India's proposal on TFS, emphasizing that it would require urgent discussion on such a constructive proposal, said a negotiator who asked not to be quoted.

Turkey said TFS is "a great idea" and that it looked forward to India's proposal. Uganda welcomed India's proposal on TFS, while a representative for the LDCs said that their group is ready to engage on the proposal.

Several countries – Nigeria, the EU, Singapore, Japan, Hong Kong, Canada, Korea, Mexico, Chinese Taipei, Colombia, Norway, Chile, China, Australia, Turkey, South Africa, Argentina and Russia – supported India's demand for intensifying negotiations on domestic regulation.

Many countries – India, New Zealand, Singapore, Japan, Hong Kong, Canada, Korea, Mexico, Chinese Taipei, Colombia, Switzerland, Norway, China, Turkey and Thailand – pressed for intensifying market access negotiations.

E-commerce proposal

In sharp contrast to the demands for negotiations on domestic regulation and market access, the developed countries and several developing countries rallied around the US for pursuing negotiations on e-commerce / digital trade. The US had on 1 July presented a three-page non-paper for launching a work programme on e-commerce.

The US non-paper suggested several examples in the work programme that members must consider for an outcome, including:

- Prohibiting digital customs duties;
- Securing basic non-discrimination principles;
- Enabling cross-border data flows;
- Promoting a free and open Internet;
- Preventing localization barriers;
- Barring forced technology transfers;
- Protecting critical source code;
- Ensuring technology choice and authentication methods;
- Safeguarding network competition;
- Fostering innovative encryption;
- Building an adaptable framework for digital trade;
- Preserving market-driven standardization and global interoperability;
- Ensuring faster, more transparent customs procedures;
- Promoting transparency and stakeholder participation in the development of regulations; and
- Recognizing conformity assessment.

In a nutshell, the US is advancing a maximalist agenda on e-commerce / digital trade without addressing the issues of domestic regulation and market access as set out in the Doha work programme, trade negotiators told *SUNS*. *(SUNS8277)* ❐

South-North showdown on Mode 4 in services trade

Restrictions imposed by the US, the EU and Canada on the entry of service-providing workers from developing countries sparked a lively debate at a 17 June meeting of the WTO's Council for Trade in Services.

by D. Ravi Kanth

GENEVA: India, China, Turkey, Bolivia, the African Group and the least-developed countries on 17 June clashed with the United States, the European Union and Canada at the WTO over their continued regulatory barriers imposed on the movement of natural persons under Mode 4 of the General Agreement on Trade in Services (GATS), several trade diplomats told the *South-North Development Monitor (SUNS)*.

During the Uruguay Round negotiations on services, the initial deadlock on what was to be negotiated was resolved only when agreement was reached to limit the scope of the proposed accord to "trade in services" without defining "services" as such. In this regard, "trade in services", it was further agreed, was to be defined as the supply of a service: (a) from the territory of one member country into the territory of any other member (Mode 1); (b) in the territory of one member to the service consumer of any other member (Mode 2); (c) by a service supplier of one member through commercial presence in the territory of any other member (Mode 3); and (d) by a service supplier of one member through presence of a natural person of a member in the territory of any other member (Mode 4).

At the meeting of the WTO Council for Trade in Services on 17 June, the developing and least-developed countries offered a graphic account of regulatory

barriers imposed by the three trade majors – the US, the EU and Canada – in Mode 4 that effectively rendered market access meaningless.

The developing countries demanded an updated paper by the WTO secretariat on the developments in Mode 4 so as to throw light on how countries have implemented their Mode 4 commitments since the last major background note of 2009.

However, the three trade majors opposed this demand on the grounds that it would not be conducive at a time when a trade dispute is currently under the WTO dispute settlement process. The three also chose to stonewall questions on Mode 4 on the pretext that the issues raised by the developing countries involved market access, which can only be discussed at the special negotiating session of the Council for Trade in Services.

Indian paper

The sharp debate arose over the issues raised in a seven-page Indian paper on "Mode 4: Assessment of Barriers to Entry." The paper offered a detailed account by citing the Mode 4 barriers that have been mentioned by the WTO secretariat, including:

- Movement tends to be associated with a commercial establishment in the host country and contingent upon prior period of employment with the home-country company;
- There are also numerical quotas and economic needs tests (ENTs) that are frequently imposed. ENTs are conducted in the absence of clearly defined criteria and procedures are comparable in effect to the absence of any policy binding;
- Eligibility criteria for visa and work-permit-related requirements and procedures tend to have a bias towards persons who are highly skilled and educated at elevated functional levels;
- Procedures relating to visas and work permits can act as an additional impediment since they often tend to be cumbersome, costly and administratively complex and time-consuming. Rejection rates are also high, and the procedures are sometimes opaque and arbitrary. The paper cited a study which estimates that the worldwide costs of processing visa / work permit applications represent around 0.3% of the world GDP;
- Nationality and residency requirements, and non-portability of social security benefits, also act as Mode 4 barriers;
- Mode 4 trade may be seriously affected even by non-discriminatory regulatory requirements, including assessment of an applicant's credentials by taking into account only formal qualifications rather than considering skills and experience. Approval procedures may be complex and discretionary, particularly where no specified criteria exist for judging equivalence.

India provided an illustrative list of barriers in the US, UK and Canada, including some latest measures such as the recent report by the Migration Advisory Committee of the UK. India explained about the restrictive regime in Canada since 2012 which undermined predictability and impacted negatively on Indian companies. Some of the restrictive measures imposed by Canada, according to India, included a hike in visa fees, more restrictive guidelines on intra-corporate transferee (ICT) visas, mandatory customer certification, and frequent upward revisions in minimum salary. Commenting on the US measures, India said that it was raising only those issues that were outside the ongoing trade dispute with the US.

India said the increasingly complex nature of barriers to Mode 4 entry in the US, Canada and the EU included:

- subjective definitions of Mode 4 categories such as managers, executives and specialists under the ICT category;
- non-portability of social security contributions;
- discriminatory salary thresholds;
- lack of clarity in visa categories, massive increases in visa fees for certain categories of foreign professionals etc.

India maintained that these challenges / issues remained "generic" to Mode 4 access that the developing and the poorest countries invariably face in major markets. A large majority of developing and poorest countries wanted the Mode 4 issues to be addressed on a priority basis. Further, the Mode 4 regulatory barriers entailed huge costs for companies providing short-term services.

India said it remained disappointed as members could not reach consensus on issues related to Mode 4 since 2009. The WTO secretariat must update commitments undertaken by recently acceded members, including Doha offers, and more recent literature.

The US adopted a hardline stance that it will not discuss the Mode 4 issue now as it is part of the ongoing dispute with India. It also expressed its disapproval of any update by the secretariat on the issue.

The EU cast aspersions on India's real intention by arguing that while it spoke of the Mode 4 measures being generic, India also drew attention to specific measures of specific members. The EU said it was disappointed because the Indian paper raised questions about the commitment of the EU to multilateralism. The EU also said that the Indian proposal on Mode 4 involved market access, which can only be discussed at the special negotiating session.

Canada disagreed with India's illustrations on the Canadian measures, maintaining that it did not impose any barriers.

In sharp response, India told the US that the issues raised in its paper were outside the current dispute.

India reminded the EU that all issues of Mode 4 can be discussed at the regular sessions of the Council for Trade in Services as per paragraph 11 of the Nairobi Ministerial Declaration which called on members to continue work on all issues in the regular bodies.

Turkey said that Mode 4 remains the most neglected area of negotiations. It expressed concern that the commitments made in Mode 4 are few and far between, without any benefit to developing countries.

China said it agreed with India's proposal for a comprehensive examination of barriers concerning Mode 4. It said it also faced similar problems in Mode 4 in major markets. China urged the secretariat to update its background paper by including all the latest data.

Morocco, on behalf of the African Group of countries, said that barriers under Mode 4 are constantly increasing. It said that "lack of recognition of qualifications" and lengthy procedures pose hurdles for Mode 4. Morocco added that the African Group has a "systemic" interest in Mode 4 issues, suggesting that it is going to table its concerns.

The least-developed countries said they fully support the Indian proposal because it contained the problems they have raised in their collective requests.

In short, the Mode 4 showdown between India, China and other developing and least-developed countries on one side, and the US, the EU and Canada on the other, revealed the classical North-South divide on issues concerning the movement of natural persons over the past 150 years, according to trade diplomats from the developing world. *(SUNS8266)* ❐

No credible WTO answers on "investment" in "trade in services"

Several WTO member states have raised concern – and received no satisfactory response – over an apparently unilateral decision by the WTO secretariat to incorporate the contentious issue of investment in the remit of its services division.

by D. Ravi Kanth

GENEVA: The secretariat of the WTO was unable to provide a credible answer to the members of the African Group of countries and Bolivia on 17 June as to why the WTO Director-General Roberto Azevedo has decided to include work on investment in the secretariat division on trade in services without consulting member states and without a prior WTO General Council decision, several African trade diplomats told the *South-North Development Monitor (SUNS)*.

On behalf of the African Group, Morocco raised the issue of the Director-General's controversial move during the regular meeting of the WTO Council for Trade in Services on 17 June.

The African Group, said Morocco, is concerned over the "serious systemic implications" arising from Azevedo's decision to expand the trade in services division to include investment.

At the fifth Ministerial Conference of the WTO at Cancun in 2003, efforts to launch negotiations on the three controversial "Singapore issues" of investment, competition policy and government procurement were shot down due to massive opposition from the developing countries. The entire meeting collapsed, unable to reach any consensus on the draft declarations placed before it. Instead, the conference remitted all the documents before it to the WTO General Council, mandating the latter to convene and take decisions to conclude the negotiations on the Doha Work Programme.

The General Council, after extensive consultations among members, convened in July 2004 and adopted the compromise July Framework agreement to put the Doha talks back on the rails. As a part of the July Framework, the Council decided to keep the three "Singapore issues" outside any work in the WTO during the Doha Round.

Paragraph 1.g of the July Framework agreement unambiguously stated: "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."

Questions posed

Against this backdrop, the African Group said emphatically at the 17 June meeting that the decision to include investment in the division on trade in services will have grave implications "on members' rights under paragraph 29 of the Nairobi Ministerial Declaration where the authority to consider the need for adjustments rests with members."

Paragraph 29 of the Nairobi Ministerial Declaration maintains: "We agree to reinvigorate the regular work of the Committees and direct the General Council to consider the need for adjustments in the structure of their subsidiary bodies in light of their relevance to the implementation and operation of the Covered Agreements."

The African Group therefore asked the WTO secretariat to provide "details as to the rationale for the change [change to include investment in the services division]", "clarification as to the mandate" for the change, and "written and evidence-based justification" for the change.

Further, the Group sought to know "why investment in particular has been included in the work of the services division" and "how will this interfere with the current work undertaken by the services division."

It asked the secretariat to explain "the budgetary implications of the proposed change" and whether the WTO's budgetary committee has given any approval for such a decision.

During the meeting, Uganda, Bolivia, Zimbabwe and South Africa, among others, grilled the secretariat on several grounds, particularly the "propriety" of the decision to include investment in the services division.

Uganda asked how the change was arrived at and what the factors were that triggered the change, according to an African trade diplomat who asked not to be quoted. Uganda also asked why, if investment is included in the services division, "poverty reduction" is not included in the same division. It said the WTO is a member-driven organization in which members' rights have to be protected first before any decision is taken.

Bolivia asked whether the Director-General had consulted members before taking this decision, and for the basis for the name change. (The division on services was renamed the Trade in Services and Investment Division.) In normal times, any change in the name of any WTO division ought to be considered by members before a decision is taken, Bolivia said, according to a South American trade diplomat who attended the meeting.

Zimbabwe sought to know the "objective and justification for the change", as any "change in the WTO has systemic implications that affect members' rights." Further, the change in the name to include investment in the services division ought to have been done in a transparent manner, it said.

Further, Zimbabwe asked how a controversial issue like investment could come into a division as members have not agreed to new issues in terms of paragraph 34 of the Nairobi Ministerial Declaration, according to an African trade diplomat.

Paragraph 34 of the Nairobi Ministerial Declaration states: "While we concur that officials should prioritize work where results have not yet been achieved, some wish to identify and discuss other issues for negotiation; others do not. Any decision to launch negotiations multilaterally on such issues would need to be agreed by all Members."

South Africa said there is no "clarity" as to why the name was changed. It asked the secretariat to explain "under which [and whose] mandate the change of name was carried out." South Africa exposed the dangers involved in clubbing investment with services, by which the WTO is giving preference to only one mode of services supply (i.e., investment) over the other three modes.

Under the WTO's General Agreement on Trade in Services (GATS), trade in services is defined in terms of four modes of supply: (i) Mode 1 involving cross-border trade (the supply of services from one member country into another member); (ii) Mode 2 covering consumption abroad (in the territory of one member by the service consumer of any other member); (iii) Mode 3 involving commercial presence or investment (by a service supplier of one member, through commercial presence, in the territory of any other member); and (iv) Mode 4 involving presence of natural persons (by a service supplier of one member, through the presence of natural persons of a member in the territory of any other member).

In response to these concerns expressed by members, the director of the services division, Abdel Hamid Mamdouh, said changing the name of the division has "created lot of excitement", according to a trade official who was present at the 17 June meeting.

Mamdouh said the name change was "an exercise of transparency and signposting just to make it clearer which division in the WTO is handling investment." He said that "after the dissolution of the trade and finance division, investment was transferred to the services division as it was best placed to fit in there", according to the official, who asked not to be quoted.

Mamdouh went on to say that "interest in investment has arisen and many members have asked for technical assistance and capacity-building on investment." The WTO services division chief argued that those members of the G20 country grouping who were in the room had already been collaborating on many issues concerning investment with the World Bank and IMF. Further, decisions taken by the Director-General were never subjected to prior consultations by members, Mamdouh suggested.

As regards budgetary implications, "if nothing changes, then there is zero impact", he added. "The services division has been shrinking, not growing," Mamdouh argued. He told the African countries that if they wished to have more information, they were welcome to meet him in his office "over coffee and chocolates."

"The response from Mamdouh was condescending to the African Group in tone and tenor," a West African trade diplomat said, suggesting that his response failed to clarify the "material" issues raised in the African Group's statement.

Chakravarthi Raghavan, Editor Emeritus of *SUNS,* adds:

After the Doha Ministerial Declaration of November 2001 which launched the Doha Round, even before any work could begin or negotiating groups set up (as the then Director-General Mike Moore sought to do), the details of the actual work to be done under the various items for negotiation, and the staff and expenditure requirements etc had first to be put up to the Budget Committee.

There were several weeks of delay due to the inability of the secretariat, purportedly as a result of baggage being misplaced by the airline, to provide the official minutes and transcript of the final open session of the Doha Ministerial Conference. The Budget Committee found itself unable to process the requests without these documents, and no decision sanctioning work could be reached. The Committee did so only after the official record was published and became available, and details of reassignment of existing staff, additional staff and resources needed with the actual work plan etc were set out.

The insistence of the Budget Committee at that time was partly due to a purported summary of the final session of the Doha conference that was posted on the WTO website. That summary said the final declaration was adopted at the open session and the Qatari chair of the Ministerial Conference read out his understanding *after* the adoption.

Under GATT practice carried over into the WTO, any explanation or declaration of the chair of a meeting before declaring as adopted the decision placed before it, in effect qualifies and conditions that decision. Any understanding or statement made after adoption, by the chair and / or members joining the consensus, has no legal implications for the decision.

That initial summary was contrary to what had actually happened in the open session, which had been webcast live and recorded by several delegations. As a result of "protests", the WTO's post on its website was corrected and changed, without any explanation being given but making clear that the chair had first read out his understanding, followed by the Indian minister making a statement that in view of the understanding just read out, India was able to join the consensus.

In this light (and ignoring the then Director-General's efforts to kickstart the negotiations in December 2001), it was only after the full minutes and official records of the Doha conference were produced that the Budget Committee clearance for staff and budgetary resources was obtained, and the General Council decisions on the Trade Negotiations Committee and its remit, negotiating bodies, their guidelines etc came on 18 February 2002.

As mentioned above, the General Council, in paragraph 1.g of its 2004 July Framework decision, modified the Doha Work Programme in the following terms: "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."

Meanwhile, paragraph 47 of the Doha Ministerial Declaration itself, in its first sentence, states that "the conduct, conclusion and entry into force of the outcome of the [Doha Work Programme] negotiations shall be treated as parts of a single undertaking".

Paragraph 45, in its third sentence, sets out (under the rubric "Organization and Management of the Work Programme") the following: "When the results of the negotiations in all areas have been established, a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results."

Since the July Framework decision of the General Council remains in force (unless specifically decided otherwise by the General Council, acting in between sessions of the Ministerial Conference, or by the Ministerial Conference), and since the Doha Work Programme has not been concluded (as per the procedure and mandate set out in paragraphs 45 and 47 of the Doha Ministerial Declaration), the question remains: under what authority or mandate have the divisions of the WTO secretariat been "doing the work they are already doing"?

This is not an issue to be settled informally between the head of the division concerned and African delegations

"over coffee and chocolates" in his room, but something to be settled and recorded in official minutes of the Council for Trade in Services and the General Council.

In conclusion, WTO members cannot allow a decision to change the name of a division to include investment as it fundamentally violates their rights and obligations. If they fail to correct this step at the General Council, then, in future, decisions will be foisted on members on the ground that they were already there in the WTO system, according to several negotiators who spoke to *SUNS*. *(SUNS8269)* ❐

Deliver on "cotton issue", WTO told

Four cotton-producing West African countries have urged a solution in the WTO to the longstanding problem of subsidies which are distorting trade in the crop.

by D. Ravi Kanth

GENEVA: The "Cotton Four" (C-4) group of countries – Benin, Burkina Faso, Chad and Mali – have reminded the United States, the European Union and other countries at the WTO to deliver on the much-delayed outcome on cotton for tackling the rising levels of domestic subsidies on cotton that are impoverishing millions of their poor farmers.

The four West African countries have reminded the majors and others to deliver on the cotton issue as part of the WTO's post-Nairobi work programme, before launching any negotiations on a multilateral sectoral initiative on electronic commerce / digital trade, several trade negotiators told the *South-North Development Monitor (SUNS)*.

At a time when the US and the EU along with their usual allies are making war-like efforts to launch negotiations on e-commerce / digital trade at the WTO, the C-4 have issued a reminder about the cotton issue, which has been under negotiation for the past 15 years, said an African trade negotiator who asked not to be quoted.

"The WTO does not serve the poor countries like us because we waited for 15 years to have commitments to reduce trade-distorting domestic subsidies for cotton provided by the US and the EU that are causing large-scale poverty and misery to our farmers," the negotiator said.

Cotton sectoral initiative

On 28 June, the negotiator said, the four West African countries presented what is called "the sectoral initiative in favour of cotton", in which they laid out their case on the domestic cotton subsidies issue that must be resolved by the eleventh WTO Ministerial Conference in December 2017.

The two-page restricted proposal on the sectoral initiative for cotton expressed grave concern at "the continuation of domestic support practices and measures that have a distorting effect on the production and marketing of cotton."

It is public knowledge that the US farm bill which was passed in 2014 has continued with billions of dollars of domestic subsidies for cotton. The EU too provides a range of subsidies, including Blue Box payments, for cotton.

For "several African cotton-producing countries", the four countries argued, "cotton plays a significant role in economic and social development, accounts for a large share of the trade balance, and occupies a strategic position in the implementation of economic and social development policies."

Cotton, for example, "accounts for almost 70% of the agricultural export earnings of these [four] countries, whereas no more than 2% of their output and 12% of their international exports are processed locally."

The C-4 maintained that the only "acquis" to date is the Ministerial Decision secured at the WTO's Hong Kong Ministerial Conference in December 2005 to address the cotton issue "ambitiously, expeditiously and specifically."

Paragraph 11 of the Hong Kong Ministerial Declaration says: "We recall the mandate given by the Members in the Decision adopted by the General Council on 1 August 2004 to address cotton ambitiously, expeditiously and specifically, within the agriculture negotiations in relation to all trade-distorting policies affecting the sector in all three pillars of market access, domestic support and export competition, as specified in the Doha text and the July 2004 Framework text."

Significantly, the Declaration mandated members to eliminate export subsidies in 2006, to provide duty-free and quota-free market access for cotton exports from the least-developed countries, and to reduce trade-distorting domestic cotton subsidies "more ambitiously."

Yet, "none of the major Ministerial meetings (Cancun, Hong Kong, Bali, Nairobi) has produced any substantial means of addressing the cotton issue," the four countries lamented.

"Consequently, millions of people are forced to live in poverty in rural areas, or to risk their lives as they leave their countries in search of better living conditions elsewhere," the C-4 countries maintained.

Lack of significant progress

Despite modest improvements on market access, export competition and the development component at the Nairobi Ministerial Conference, the C-4 countries deplored "the lack of any significant progress on domestic support, which remains the greatest source of pressure on world cotton prices."

The Nairobi outcomes on cotton have no material effect unless the major cotton subsidizers – the US and the EU – substantially reduce their trade-distorting domestic subsidies with a view to fully eliminating them.

The C-4 countries maintained that there is "still significant amount of domestic support [by these two trans-Atlantic trade subsidizers] that continues to distort international trade in cotton."

For achieving satisfactory outcomes at the eleventh Ministerial Conference next year, the C-4 countries posed three issues to WTO members to address in the coming months:

(a) How do members intend to implement the provisions set out in the Nairobi Ministerial Decision on Cotton under the three pillars of market access, domestic support and export competition?

(b) What are the measures adopted or envisaged by members that grant cotton export subsidies in order to fulfil the obligation to eliminate these subsidies?

(c) How are members that grant domestic support for their cotton sector planning to substantially reduce and eliminate such support, and what would be the timeframe envisaged?

As a first step in the negotiating process, the C-4 said, all members must pro-

vide clear answers so as to arrive at a multilateral solution. "The cotton negotiations have already taken close to 15 years, at a huge cost to the C-4 countries," the four West African countries maintained.

They drove home a strong message that "many small producers in our countries depend on this for their very survival."

And more important, "the credibility of the WTO" is at stake, the four West African countries said.

But the trans-Atlantic trade majors, particularly the US, have turned a deaf ear to the C-4 call for addressing trade-distorting domestic subsidies at this juncture.

After Brazil's then ambassador to the WTO Roberto Azevedo negotiated the controversial cotton deal with the US over four years ago, the prospects for any multilateral disciplines to reduce cotton subsidies have remained bleak.

[Brazil had raised and won a dispute in the WTO over US cotton subsidies, with the WTO's Appellate Body ruling that the US domestic subsidies resulted in subsidized exports and were thus illegal. However, Brazil failed to get the US to give effect to the ruling after the expiry of the "reasonable period of time" for implementation, and obtained the approval of the WTO Dispute Settlement Body to retaliate. After this sanction, Brazil (with Azevedo as its ambassador) negotiated with the US for compensation, and the compromise involved what was seen as the US enabling Brazil to in turn offer subsidies to its own cotton exporters! – *SUNS*]

After thus "buying off" Brazil, Washington's farm bill, said a trade negotiator familiar with the cotton issue, doesn't allow any room to reduce the current level of US cotton subsidies. Cotton, the negotiator said, will continue to be a heavily subsidized crop regardless of demands made at the WTO.

The C-4 said that it "fails to comprehend the lack of political will on the part of certain WTO members [the US and the EU] to negotiate a solution to the crucial issue of cotton."

Also, the trade majors have no time for cotton, in contrast to their push for ambitious disciplines on e-commerce / digital trade, which is "the new milking cow" for their advanced services industries in the 21st century – as against the cotton issue that has led to the immiseration of African countries since the 18th century – the negotiator commented. *(SUNS8278)* ❐

WTO members scold an isolated US over AB veto

The US has come under fire at the WTO for blocking reappointment of an Appellate Body member, a move which several countries saw as "unjustifiable" and undercutting states' trust in the WTO system.

by Kanaga Raja

GENEVA: Several members of the WTO have accused the United States of undercutting the members' trust – "a basic premise that the rules-based WTO system is built upon" – in vetoing the reappointment of Seung Wha Chang of Korea to the Appellate Body (AB).

This charge was in a joint statement made by Korea on behalf of Brazil, Canada, the European Union, Guatemala, India, Indonesia, Israel, Jamaica, Korea, Mexico, Morocco, Sri Lanka, Switzerland, Thailand and Vietnam at a 22 June meeting of the WTO's Dispute Settlement Body (DSB).

(Once again reportedly no member expressed explicit support for the US at the meeting.)

In their joint statement, the 15 WTO members said while they recognize that a member may disagree with reappointment, "we are deeply worried that the reasons provided by a member for disagreeing with the reappointment are undercutting a basic premise that the rules-based WTO system is built upon: the members' trust."

Without naming the US, the 15 members expressed "grave concerns that linking reappointment of an AB member with rulings in specific cases is tantamount to interfering with the Appellate Body's deliberations and thus risks undermining its impartiality and independence."

"Moreover, singling out one AB member for criticisms directed at the Appellate Body reports is unjustifiable; the reports are those of the 'Appellate Body' and not of an individual AB member."

These concerns were pointed out in unison by the sitting and former members of the AB, the 15 noted.

"We agree that such actions risk creating a dangerous precedent and should not be repeated."

The joint statement said dispute settlement is the central pillar of the multilateral trading system. The impartiality and independence of the AB is crucial to ensuring the proper functioning and credibility of the WTO dispute settlement mechanism and, in fact, of the entire multilateral trading system.

The 15 WTO members said they are also mindful of growing concerns over the possibility of a prolonged vacancy on the AB, and in this regard, they supported the DSB chair's efforts to find a solution in a balanced way.

"We look forward to working with all members to find a constructive path that addresses the systemic concerns raised by members, bearing in mind the critical role that dispute settlement plays in safeguarding the multilateral trading system."

"Finally, we take this opportunity to reaffirm our trust and confidence in the Appellate Body," they stressed.

Systemic problem

In a separate, somewhat more hard-hitting statement, Korea, speaking for itself, said that its concern, first and foremost, is about "a large and influential WTO member" imposing its own views on the system – and the manner in which it is doing so.

Korea said a leading member of the WTO and the dispute settlement system is expected to set an example by acting responsibly and constructively. "Creating a systemic problem that is more serious and fundamental than the one it is trying to fix is not an appropriate exercise of this important responsibility."

Referring to the four AB rulings that the US had pointed to at the DSB in May in order to justify its veto of Chang's reappointment, Korea said that "there can be, and in fact are, two sides to the story."

First, regarding dispute DS453 ("Argentina – Measures relating to trade in goods and services"), it was stated by the member that in the AB report, "more than two-thirds of the Appellate Body's analysis – 46 pages – is in the nature of obiter dicta."

Korea said that what the member neglects to mention is that Panama had actually appealed the original dispute

panel's interpretation and application of several key provisions of the General Agreement on Trade in Services (GATS), including "treatment no less favourable" – the legal matter in question analyzed in the AB report.

Article 17.6 of the WTO's Dispute Settlement Understanding directs the AB to review "issues of law covered in the panel report and legal interpretations developed by the panel". Article 17.12 requires the AB to address each of the issues raised in the appeal.

Korea said that the AB's interpretation of the GATS provisions including the "treatment no less favourable" requirement is a legal interpretation developed by the panel.

"We expect there to be members in this room who would have questioned why the AB had not addressed the matter, had the AB not done so," it said.

In fact, it said, at the DSB meeting on 9 May where the AB report was adopted, the usefulness of the AB's ruling was acknowledged by a member as follows: "[R]egarding the 'treatment no less favourable' standard to be applied under GATS Articles II:1 and XVII, we welcome the Appellate Body's clarification, at para 6.111, that the analysis should assess whether the measure at issue modifies the conditions of competition to the detriment of like services or service suppliers in question ..."

Moreover, said Korea, Article 3.2 of the Dispute Settlement Understanding makes it clear that the dispute settlement mechanism serves to "clarify the existing provisions of [the covered] agreements." Clarification of the agreements can be helpful in providing guidance to members, traders and future panels. It may, contrary to what one member implies, actually lessen the AB's workload by promoting the predictability of the agreements and lowering the desire or the need to re-litigate the same legal issues, Korea underlined.

Regarding dispute DS430 ("India – Measures concerning the importation of certain agricultural products"), it was stated that "the appellate report engaged in a lengthy abstract discussion of a provision of the SPS [Sanitary and Phytosanitary Measures] Agreement without ever tying that discussion to an issue on appeal."

According to Korea, the "abstract discussion" that is being criticized here is the AB's overview of Article 6 of the SPS Agreement. In this dispute, India specifically appealed the issue of the relationship between Articles 6.1 and 6.3 of the SPS Agreement. The AB's transgression, according to one member, is that it looked more broadly at Article 6 before turning to the specific interpretative issue raised by India.

Korea cited the AB's reasoning for doing so: "Before addressing this interpretative issue [raised by India], we seek to situate the relationship between Articles 6.1 and 6.3 within the broader scheme of Article 6. We think it useful to begin by considering the content and structure of Article 6 as a whole, and the relationship among its three paragraphs. [T]he considerations above show the existence of important common elements throughout Article 6, which reveal the inter-linkages that exist among the paragraphs of this provision."

Korea cited the argument that the US itself had presented before the panel: "Each of the 3 paragraphs under Article 6 should be read together. That is, each paragraph provides context for the other, and Article 6 must be read so that it works as a coherent whole, while the language in each of the three paragraphs is respected."

"We would let these words speak for themselves," said Korea.

"Vague criticism"

Regarding DS437 ("United States – Countervailing duty measures on certain products from China"), it was stated that the approach in the appellate report suggested that "panels and the Appellate Body are to conduct independent investigations and apply new legal standards, regardless of what either party actually argues to the panel or Appellate Body."

According to Korea, this "vague criticism" avoids mentioning that the AB in fact declined to complete the analysis with respect to many claims because it did not consider that "the participants ha[d] addressed sufficiently ... the issues that [the AB] might need to examine if [it] were to complete the legal analysis."

With respect to a limited number of other claims, the AB completed the analysis on the basis of undisputed facts and the factual findings of the panel.

The AB did seek clarification of undisputed facts at the oral hearing, "but we fail to see how this amounts to conducting 'independent investigations'", said Korea.

Regarding DS449 ("United States – Countervailing and anti-dumping measures on certain products from China"), it was claimed that the AB report "risk[ed] turning the WTO dispute settlement system into one that would substitute the judgment of WTO adjudicators for that of a member's domestic legal system as to what is lawful under that member's domestic law."

Korea said that on ascertaining the meaning of domestic law, the US is certainly entitled to its approach, which is that it should be assessed in accordance with the domestic legal system, including US constitutional principles.

On the other hand, the AB report takes the following view: "[I]n ascertaining the meaning of municipal law, a panel should undertake a holistic assessment of all relevant elements, starting with the text of the law and including, but not limited to, relevant practices of administrative agencies ... All of these assessments are subject to the circumstances of each case, including the national legal system in which the municipal law operates."

Korea believed that this approach is no less valid than the one argued by a member. The WTO agreements reveal no preference as to how the meaning of municipal law should be ascertained.

Korea failed to see how subjecting AB assessments on the meaning of municipal law "to the circumstances of each case, including the national legal system in which the municipal law operates", is tantamount to "substitut[ing] the judgment of WTO adjudicators for that of a member's domestic legal system."

Moreover, said Korea, the AB in this dispute closely followed the approach that was laid out repeatedly in previous disputes including DS213 ("US – Carbon steel"). In stark contrast to the position it says it is taking now, the US praised the AB's ruling of the issues in DS213, applauding it as a "model" decision.

"This demonstrates our point, yet again, that views on a legal matter can – and indeed do – vary across different members, and in this case even for a particular member. And it is telling that the AB decided in the end not to complete the legal analysis," said Korea.

Korea noted that it was stated at the last DSB meeting that one member was "concerned about the manner in which [an AB] member has served at oral hear-

ings, including that the questions posed spent a considerable amount of time considering issues not on appeal or not focused on the resolution of the matter between the parties."

Korea said that this attempt to place constraints on AB division members' questioning at oral hearings is deeply troubling. Division members ask questions in order to better understand the issues in their appropriate context, and to provide participants a full opportunity to make their views known. AB members must be allowed this discretion. Indeed, the AB's engagement with the issues at oral hearings is often praised by participants and third participants alike.

According to Korea, what is remarkable is not that a WTO member is taking positions on legal matters, but that it finds it acceptable to impose its views on the membership by ousting an adjudicator about whom it has developed a certain impression that the individual in question must take the fall for the AB's perceived failings.

"This approach is not only unbecoming of a leader of the multilateral trading system; it is also destabilizing," said Korea.

Unfilled vacancies

Earlier, the chair of the DSB, Ambassador Xavier Carim of South Africa, reported that there was still no agreement among members on how to fill the two vacancies in the AB.

(One vacancy was the result of the non-reappointment of Chang, whose first term of office had expired on 31 May. The other was a result of the expiry on 31 May of the second term of Yuejiao Zhang.)

According to trade officials, the chair held consultations on 8 and 9 June with 14 delegations.

Reporting on those consultations, the chair said that "we are not yet in a position to move towards filling either of the two current vacancies in the Appellate Body."

"We do not have agreement among members to take action to fill the vacancy created by the non-reappointment of one Appellate Body member [Chang]."

He said that "the consultations also revealed that the two current vacancies may need to be considered together."

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Uruguay wins dispute over its tobacco control policies

An arbitral tribunal has rejected cigarette multinational Philip Morris' challenge against tobacco control measures adopted by Uruguay, in what has been described as a landmark decision that affirms states' rights to protect public health.

by Chakravarthi Raghavan

GENEVA: The government of Uruguay has won the case in an investor-state dispute brought against it over its tobacco control policies by the tobacco company Philip Morris at the World Bank's International Centre for Settlement of Investment Disputes (ICSID).

The transnational tobacco giant had claimed violation of its trade and investor rights under an investment agreement between Uruguay and Switzerland, where the company is headquartered.

Philip Morris had challenged tobacco control regulations which Uruguay had put in place and implemented in order to comply with the country's obligations under the Framework Convention on Tobacco Control (FCTC).

The tobacco company had first presented its claim in February 2010, following implementation by Uruguay of regulations requiring health warnings to cover 80% of the main surface of tobacco packages and limiting tobacco manufacturers to one unique package per cigarette brand.

Landmark ruling

According to a fact sheet by Foley Hoag LLP, Uruguay's lawyers before the ICSID arbitral panel, the panel ruled in Uruguay's favour against the tobacco giant, and ordered Philip Morris to pay Uruguay's fees and other costs, an award in excess of $7 million.

Specifically, the fact sheet said, the tribunal rejected Philip Morris' challenge to two regulations adopted by Uruguay to protect public health against tobacco-related death and diseases, and prevent the false advertising of tobacco products.

The specific regulations upheld by the tribunal: (1) prohibited tobacco companies from marketing cigarettes in ways that falsely present some cigarettes as less harmful than others – because, in truth, no cigarettes are safe to smoke and none are less harmful than any others; and (2) required tobacco companies to use 80% of the front and back of cigarette packs for graphic warnings of the health hazards of smoking.

According to the law firm, the panel ruling is a landmark decision because it affirms the sovereign rights not only of Uruguay but of all states to adopt laws and regulations to protect public health by regulating the marketing and distribution of cigarettes and other tobacco products.

The ruling enables Uruguay (as well as other states committed to protection of public health) to take additional measures to reduce tobacco consumption, and related deaths and illnesses, by further restricting the false and misleading marketing of cigarettes and other tobacco products.

To that end, Foley Hoag LLP added, Uruguay itself will soon require all tobacco products to be sold in generic or plain packages, with even larger warnings of the harms caused by smoking, in an effort to further reduce smoking levels.

It is now inevitable, it added, that many other states, which had been awaiting this decision before adopting similar regulations, will follow Uruguay's example.

The ICSID panel ruling, the law firm said, erects a barrier to "the cynical use of international arbitration by Philip Morris and other tobacco companies to stop States from taking reasonable measures to protect public health. Not only have Philip Morris' claims against Uruguay been rejected, but the company has been ordered to pay Uruguay's legal fees.

"Its strategy of misusing the arbitration process to dissuade States from adopting meaningful regulation of tobacco marketing has failed. States need no longer fear the risks or costs of such a challenge to their sovereign rights."

Uruguay put in place these tobacco control measures under President Tabare Vazquez, an oncologist, who has direct knowledge of the death and disease that smoking causes. As a result of these tobacco control regulations and policies, smoking rates in Uruguay have been reduced from approximately 35% to approximately 23% between 2005 and 2014. Among youth, the rate has fallen to 8.2% as of 2014.

The two regulations challenged by Philip Morris were adopted in 2008 and 2009. In March 2010, Philip Morris filed its demand for arbitration with ICSID, which is part of the World Bank. Because Philip Morris International is incorporated in Switzerland, it sought arbitration under the terms of a bilateral investment treaty between Switzerland and Uruguay.

One of the regulations prevented tobacco companies from selling different versions of the same brand of cigarettes. Known as the "single presentation requirement," it stopped Philip Morris, for example, from selling Marlboro, its leading brand, normally sold in red and white packages, in gold, blue, or green and silver packages.

Uruguay considered (and proved to the ICSID tribunal) that the use of multiple variants of the same brand was intended to falsely communicate to consumers that some variants were less harmful than others, when the company knew this was untrue.

The other regulation obligated tobacco companies to increase the size of required health warning labels on the front and back of cigarette packs from 50% to 80% of the pack. Many states have adopted similar regulations, because it has been proven that larger health warnings are more effective.

Specific legal findings

Following extensive written pleadings, oral hearings on the merits of the case were held in October 2015 before an ICSID arbitral tribunal presided over by Piero Bernardini of Italy. The other arbitrators were Gary Born of the United States and James Crawford of Australia (currently a judge on the International Court of Justice in The Hague).

Uruguay's lead defense counsel were Paul Reichler, Lawrence Martin, Andrew Loewenstein and Clara Brillembourg of the Washington, DC law firm Foley Hoag LLP.

The Uruguayan government delegation at the oral hearings was led by Miguel Angel Toma, Secretary of the Presidency, accompanied by, among others, the Minister of Public Health, Jorge Basso, and Uruguay's Ambassador to the US, Carlos Gianelli.

In specific legal findings, the ICSID panel ruled:

- Uruguay did not violate any of its obligations under the Switzerland / Uruguay bilateral investment treaty, or deny Philip Morris any of the protections provided by that treaty.
- Uruguay's regulatory measures did not "expropriate" Philip Morris' property. They were bona fide exercises of Uruguay's sovereign police power to protect public health, developed by highly trained tobacco control experts and physicians in the Ministry of Public Health with the support of experts from civil society.
- The measures did not deny Philip Morris "fair and equitable treatment" because they were not arbitrary; instead, they were reasonable measures strongly supported by the scientific literature and had received broad support from the global tobacco control community.
- The measures did not "unreasonably and discriminatorily" deny Philip Morris the use and enjoyment of its trademark rights, because they were enacted in the interests of legitimate policy concerns and were not motivated by an intention to deprive Philip Morris of the value of its investment.
- Uruguay's courts did not "deny justice" to Philip Morris. Instead, the tribunal found that Philip Morris had received due process and fair treatment from the Uruguayan courts when it challenged the regulations before those courts.

[A post on the International Economic Law and Policy Blog (worldtradelaw.typepad.com) said the ruling was a two-to-one ruling, with one panellist dissenting. The full text of the ruling is available at www.tobaccofreekids.org / content / press_office / 2016 / 2016_07_08_uruguay.pdf.]

The ICSID panel decision has come just as tobacco plain packaging measures by Australia have been challenged at the World Trade Organization (in disputes raised by Cuba, the Dominican Republic, Honduras and Indonesia). There are also pending investor-state dispute settlement / arbitration processes raised under a bilateral investment treaty between Australia and Hong Kong-China.

What effect the present ruling will have on the WTO proceedings or on the separate investor-state dispute process remains to be seen. It is also uncertain whether it will have a bearing on wider international concerns raised over plurilateral trade and investment treaties with investor-state dispute provisions, such as the Trans-Pacific Partnership (which is pending acceptance in the US Congress) and the Transatlantic Trade and Investment Partnership (under negotiation between the US and the EU). *(SUNS8280)* ❐

(continued from page 11)

The chair urged members to intensify the discussions so that a decision can be taken by the next DSB meeting on 21 July.

He noted that in his consultations, he had asked members not only how the two vacancies can be filled but also what needs to be changed to avoid this situation in the future. On the latter question, he said that consultations showed that a separate session should be held to look into what changes are needed and how reappointments are reviewed.

Later, in reporting on the workload of the DSB, the chair noted that there will likely be a waiting period for resolving appeals because there is already a shortage of staff in the AB secretariat and there is a growing number of appeals coming in. "The two vacancies on the Appellate Body are likely to exacerbate this situation," he warned.

According to trade officials, several members, including Peru, China, Chile, New Zealand, Chinese Taipei, Australia, Norway, Japan and Canada, called for a pragmatic and flexible approach in order to quickly fill the vacancies.

Peru said that the responsibility is on all members to ensure the smooth functioning of the system. Pragmatism and flexibility should be shown, it said.

Morocco, on behalf of the African Group, said that this issue undermines integrity and rule of law of the dispute settlement system.

The Dominican Republic expressed support for Korea, while Oman said that it is high time to prevent such situations from recurring.

China said that it shares the views and concerns of many WTO members. The AB plays a fundamental role in the WTO dispute settlement mechanism, which is an important and central pillar of the multilateral trading system. In order to enhance the security and predictability of the rules of international trade embodied in the WTO agreements, it is critical to safeguard the independence and impartiality of AB members.

Linking the reappointment of an AB member to the rulings in specific cases could have serious consequences on the independence and impartiality of AB members and on the WTO members' trust and confidence in the AB, said China. It invited WTO members to carefully consider the systemic impact of this matter, and urged them to maintain the efficiency, impartiality, stability and predictability of the system.

Noting the increasing concerns over the AB vacancies and its workload, China urged WTO members to appropriately resolve the situation as soon as possible in order to safeguard the smooth operation of the AB and the WTO dispute settlement mechanism.

According to trade officials, the US said that its position is clear and will not change. For several years, it had already raised its systematic concerns with members and it will work with the DSB for a consensus to fill the current vacancies, the US maintained. *(SUNS8269)* ❐

Celebrating 30 years of the Right to Development Declaration

The UN Human Rights Council commemorated the 30th anniversary of the adoption of the Declaration on the Right to Development with a panel discussion celebrating the milestone document which "broke new ground in the struggle for greater freedom, equality and justice".

by Kanaga Raja

GENEVA: The UN Human Rights Council on 15 June commemorated the 30th anniversary of the adoption of the UN Declaration on the Right to Development.

To mark this occasion, a panel discussion on the promotion and protection of the right to development was held during the thirty-second session of the Council.

The panellists included Ambassador Amr Ramadan of Egypt (the moderator); Flavia Piovesan, Secretary for Human Rights in the Ministry of Justice of Brazil; Ambassador Wayne McCook of Jamaica; Mihir Kanade, Head of the Department of International Law and Human Rights and Director of the Human Rights Centre at the UN-mandated University for Peace in San Jose, Costa Rica; and Martin Khor, Executive Director of the South Centre.

Empowerment for development

An opening statement was made by Zeid Ra'ad Al Hussein, the UN High Commissioner for Human Rights, following a video presentation marking the 30th anniversary of the Declaration. The High Commissioner said: "We are here to celebrate the Declaration on the Right to Development, which thirty years ago broke new ground in the struggle for greater freedom, equality and justice."

It acclaimed long-lost freedoms and independence, and reasserted equality for all nations and peoples – including their right to self-determination and their right to sovereignty over natural resources, said Zeid.

But the Declaration's central focus was on the human person. Placing individuals at the heart of the development process, it called for every member of society to be empowered to participate fully and freely in vital decisions.

The High Commissioner said the Declaration demanded equal opportunities and the equitable distribution of economic resources, including for people traditionally marginalized, disempowered and excluded from development, such as women, minorities, indigenous peoples, migrants, older persons, persons with disabilities and the poor.

Bridging human rights with international relations, and building on the intrinsic interactions of human rights and development with peace and security, the Declaration demanded better governance of the international economic framework and redefined development as far deeper, broader and more complex than the narrow growth and profit focus of previous decades.

"The wisdom of this multidimensional approach has stood the test of time. Today, the local and the global have become ever more connected, and from communication technology to climate change, global supply and value chains to access to medicines, the right to development is manifestly relevant," said Zeid.

Amid today's slow global economic growth and low commodity prices, this 30th anniversary, the High Commissioner said, should remind the international community of development's true purpose: to improve the well-being of all members of society. True development generates greater social justice, not deeper exploitation; and it reduces the towering inequalities which confiscate the fundamental rights of those who are marginalized and poor.

The High Commissioner noted that some progress has been made in global efforts towards realizing the vision of the Declaration. But that progress has been uneven, particularly for people in Africa, least-developed countries, landlocked developing countries, small island developing states and most other developing countries, as well as for disadvantaged people in both the Global North and South.

"Insufficiently regulated globalization, persistent poverty and rising inequalities continue to rob people of their rights, and they fuel multiple crises and conflicts. That violence in turn destroys hard-won development progress, and kills and displaces people wantonly, in a terrible downward spiral of avoidable suffering."

In contrast, the High Commissioner said, the 2030 Agenda for Sustainable Development, the Addis Ababa Action Agenda on Financing for Development and the Paris Climate Agreement set forth detailed and realistic programmes that build on each other with the potential to transform the realization of human rights for millions of people.

"The 2030 Agenda, which promises to end extreme poverty within our generation, promotes an integrated vision of development with responsibilities that are shared by both the global North and South. This vision is clearly born of the Declaration on the right to development, which offers much-needed prevention, since it promises solutions for root causes, including structural challenges, at all levels."

Most evidently, said the High Commissioner, the right to development forcefully calls for individuals to be free to participate in vital decisions.

"At the international level, it addresses multiple challenges which originate in our failure to adequately regulate globalization." The engines of globalization – among them, trade, investment, finance and intellectual property – must be made compatible with the human rights obligations of states. Global development cannot mean that people are denied access to essential medicines, that small farmers are denied fair earnings, or that already impoverished people are further burdened with unsustainable national debt.

Thus, the 2030 Agenda addresses many of these systemic obstructions that disadvantage the poor – among them, distorted trade frameworks and weak international governance over powerful transnational actors, including the vectors of financial speculation. The High Commissioner said it promises better regulation of global financial markets, and an enhanced voice for developing countries in international economic and financial institutions. "It commits all states to cooperate in fostering international development and endorses the principle of special and differential treatment for developing countries, in particular least developed countries."

Zeid underscored that the 2030

Agenda is "a child of the right to development". As such, it must not be stunted by indifferent action, malnourished by failed commitments or denied safe passage to its fullest realization.

"But the right to development extends even beyond the massive global agenda of the Sustainable Development Goals. It offers a framework in which to address gaps and failures in responsibility, accountability and regulation in both national and global governance."

He emphasized that trade and investment policies and agreements can have profound implications on the realization of human rights, with potential adverse impacts in relation to food, water and sanitation, health, indigenous persons, equity and democratic decision-making. Both within the multilateral context and increasingly in bilateral and regional free trade agreements, "we are also seeing similar regulations relating to services, intellectual property, investment and trade-plus issues. Recently, sprawling modern pacts known as mega-regionals have begun changing the landscapes of trade and investment in quite unprecedented ways."

The High Commissioner underlined that the right to development guides the international community, and individual states, to ensure human rights in this context.

"The 30th anniversary of the Declaration on the right to development must renew in us the spirit of multilateral action for the common good – which is our only hope for survival on this small and fragile planet that we share," he concluded.

Inalienable right

The moderator of the panel discussion, Ambassador Ramadan of Egypt, said "we celebrate the 30th anniversary of the Declaration on the Right to Development as an inalienable and independent human right which encompasses a diverse myriad of economic, social, cultural, and political rights."

However, the progress achieved thus far in the realization of the right to development has been uneven, as is demonstrated in Africa, the Middle East, the least-developed countries, land-locked developing countries and small island developing states.

He noted that the past year has witnessed the adoption of three important instruments that pave the way for realizing the vision once embodied in the Declaration on the Right to Development, namely, the 2030 Agenda for Sustainable Development, the Addis Ababa Action Agenda on Financing for Development, and the Paris climate change agreement.

Ramadan said that the 2030 Agenda for Sustainable Development constitutes an important vehicle for the realization of the right to development.

He posed the following six questions aimed at guiding the debate:

(1) What is the anticipated role of the UN system, in particular human rights mechanisms, in the implementation and realization of the right to development?

(2) What is the expected contribution on the part of the UN system in overcoming the existing challenges to the realization of the right to development as an independent and distinct right?

(3) What role can international cooperation play in the realization of the objectives enshrined in the Declaration on the Right to Development?

(4) How do you perceive the contribution of the implementation of the 2030 Agenda in the implementation of the Declaration on the Right to Development with a view to achieving inclusive, equitable and sustainable development for all?

(5) How can the right to development be operationalized to create an environment conducive to achieving the Sustainable Development Goals, in particular Goal 17 on strengthening the means of implementation and revitalizing the global partnership for sustainable development?

(6) What ways and means can be pursued to integrate, claim and build capacity on the right to development among all stakeholders?

Global issues

In his statement at the panel discussion, Martin Khor, Executive Director of the South Centre, highlighted some of the current global issues that are important in implementing the Declaration on the Right to Development.

According to Khor, the right to development has had great resonance among people all over the world, including in developing and poor countries. Even the term itself, "the right to development", carries a great sense and weight of meaning and of hope.

It is fitting to recall some of the important elements of this right to development, Khor said. It is human- and people-centred. It is a human right, where every human person and all peoples are entitled to participate in, contribute to and enjoy development in which all rights and freedoms can be fully realized (Article 1.1 of the Declaration). The human person is the central subject of development and should be the active participant and beneficiary of development (Article 2.1).

Citing Article 2.3, Khor said the Declaration gives responsibility to each state to get its act together to take measures to get its people's right to development fulfilled. But it also places great importance on the international arena, giving a responsibility to all countries to cooperate internationally and especially to assist the developing countries (Articles 3.3, 4.1 and 4.2).

Thus, it recognizes that international relations and rules have important roles. And it implicitly recognizes that there are imbalances and inequities in the existing international order that hinder countries from implementing the right to development. Therefore, it calls for a new international order, Khor said, citing Article 3.3 of the Declaration.

Khor said the right to development is also practical. The Declaration recognizes that there are international- and national-level obstacles to the realization of the right to development, and encourages all parties and stakeholders to identify these obstacles and to act to remove them. The international obstacles obviously require international cooperation to address them.

On the 30th anniversary of the Declaration, Khor said, it is useful to make use of the practical relevance of the right to development by elaborating on some of the key global issues of the present time and how they affect the right to development.

Khor highlighted five such issues, the first being the global economy in crisis. The economic sluggishness in developed countries has had adverse impact on developing economies. With commodity prices down, many commodity-dependent developing countries are facing reduced export earnings.

Many countries have had to endure great fluctuations in the inflow and out-

flow of funds, due to absence of controls over speculative capital flows. Exchange rates are fluctuating due to lack of a global mechanism to stabilize currencies.

Growth rates have fallen in Africa and elsewhere, and some countries are on the brink of another debt crisis. There is no international sovereign debt restructuring mechanism, and countries that undertake their own debt workout may well become victims of vulture funds.

All these become challenges for maintaining development and are obstacles to the right to development which need addressing, Khor said.

The second global issue relates to the challenges of implementing appropriate development strategies. Khor said developing countries that aspire to achieve sustained economic growth and sustainable economic development face many challenges in formulating and implementing policies that work. There are challenges in getting policies right in agricultural production, ensuring adequate livelihoods and incomes for small farmers, and national food security.

Countries that aim to industrialize face the challenges of climbing the ladder from starting viable low-cost industries to establishing labour-intensive industries to higher-technology industries and overcoming the middle-income trap.

Then there are the challenges in building a range of services, including providing social services like health, education and water supply, electricity and transport, and developing financial services and commerce.

These sectoral policies and the overall development policy have become even more difficult to formulate and implement due to the trend of liberalization and the dangers of premature liberalization as a result of loan conditionalities and recently due to trade and investment agreements which also constrain policy space.

In particular, said Khor, investment agreements that provide for the investor-state dispute settlement system enable foreign investors to take advantage of imbalanced provisions and great shortcomings in the arbitration system that not only impose high costs on countries but also bring about a chill or constraint on countries' policymaking ability. There is an increasing legitimacy problem for the investment rules regime.

Third, climate change has become an existential problem for the human race. Khor said that climate change is an outstanding or even an ultimate example of an environmental constraint to development and the right to development.

In 2014 the 5th Assessment Report by the Intergovernmental Panel on Climate Change gave the sobering figure that there is atmospheric space to absorb greenhouse gases of only another 1,000 billion tonnes for a reasonable chance of avoiding global warming of 2°C. Anything above that would be a devastating disaster. Global emissions are running at 50 billion tonnes a year, and within two decades the atmospheric space would be filled up.

"If the aim is to keep warming to 1.5°C, we have little more than a decade left. Therefore, there is an imperative to cut global emissions as sharply and quickly as possible."

In seeking a solution, one key question is: which country and which groups within countries should cut emissions and by how much? The danger, said Khor, is that the burden will mainly be passed on to developing and poorer countries and to the poor and vulnerable in each country. A global agreement and national agreements to tackle climate change have to be environmentally ambitious, socially fair and economically viable.

The December 2015 Paris Agreement on climate change succeeded in showing the ability to reach a multilateral deal on an issue that threatens human survival. But it is not ambitious enough to save humanity, and it also does not demonstrate that the promised transfers of finance and technology to developing countries will take place. The celebration of reaching an agreement has to give way to the sobering challenge of doing much more within a few years. The question is how the objective urgency of the situation can be met by measures that are equitable and economically feasible.

Fourthly, Khor said another possible but less known existential issue is antibiotic resistance or more broadly antimicrobial resistance, which brings dangers of a post-antibiotic age. Many diseases are becoming increasingly difficult to treat because bacteria have become more and more resistant to antimicrobials. Some strains of bacteria are now resistant to multiple antibiotics and a few have become pan-resistant – resistant to all antibiotics.

There is also the special danger in the discovery of two genes (MCR-1 and NDM-1) with the frightening ability to easily spread resistance from one type of bacterium to other species of bacteria. MCR-1 has been found to be resistant to colistin, a very powerful antibiotic usually used only as a last resort. NDM-1 is another gene with the ability to jump across different bacteria species, making them highly resistant to all but two known drugs. In 2010, only two types of bacteria were found to be hosting the NDM-1 gene, but within a few years, NDM-1 had been found in more than 20 different species of bacteria.

Khor said that actions needed include better surveillance; measures to drastically reduce the overuse and wrong use of antibiotics including control over unethical marketing of drugs, control of the use of antibiotics in livestock and public education; and discovery of new antibiotics.

Attaining the SDGs

Fifthly, Khor highlighted the challenges of meeting the Sustainable Development Goals (SDGs). Fulfilling the SDGs would go a long way to realizing the right to development. The SDGs include some very ambitious and idealistic goals and targets. Yet there are obstacles for many countries and people to fulfil these.

Citing Goal 3, which is "to ensure healthy lives and promote well-being for all at all ages", Khor said that one of the targets under this goal is to achieve universal health coverage, where no one should be denied treatment because they cannot afford it. The financing of healthcare is thus a major challenge, he said. It becomes more of an obstacle when treatment is unnecessarily expensive.

One problem is when medicines are priced very high and out of reach of the poor or even the middle class, he said. The treatment for HIV/AIDS became more widespread and affordable only when generic medicines were made more and more available at increasingly lower prices, for example, $60 per patient per year as compared to the original prices of $10,000-15,000, and millions of lives have been saved.

A similar situation has arisen for Hepatitis C patients: the original price of

a new drug with a nearly 100% cure rate is $84,000 in the US and 56,000 in Europe for a 12-week course of treatment, whereas generics can be produced and sold for less than $1,000 (in some cases around $600) in a number of developing countries.

Similar price comparisons can be made for drugs to treat cancer and other diseases and for the new category of drugs known as biologics, many of which are priced at above $100,000 in the US.

Khor asserted that the issue of patents, over-pricing of original drugs, and the need to make generic drugs more available is relevant to the fulfilment of the SDGs, to universal health coverage, and to the realization of the right to development and the right to health.

According to Khor, obtaining adequate means of implementation for the SDGs entails international cooperation in at least three areas: (1) the provision of finance and technology to developing countries, including to assist them to fulfil the SDGs; (2) establishing appropriate international rules in trade, finance, investment, intellectual property and technology; (3) when formulating their domestic policies, policymakers in developed countries should be sensitive to and take account of the interests and needs of people in developing countries.

Operationalizing the right to development

In his statement, Mihir Kanade of the University for Peace said that if the SDGs are to be realistically implemented as envisioned by the 2030 Agenda, then operationalizing the right to development is indeed indispensable and the only way forward. He highlighted six specific points as to what operationalizing the right to development for implementation of the SDGs would entail.

Firstly, this requires focusing not only on the outcomes which must result from the implementation of the 2030 Agenda, but equally on the processes by which those outcomes must be achieved. This includes, of course, participation of all stakeholders, as well as respecting the policy space of states and their people in determining and implementing their own development priorities.

Secondly, operationalizing the right to development means that development, in order to be sustainable, must not be seen as a charity, privilege or generosity, but as a right of human beings everywhere, who are the central subjects of development and should be the active participants and beneficiaries of the right to development.

Thirdly, Kanade said, understanding that development is not a charity, privilege or generosity also means clearly acknowledging that all states are duty-bearers with respect to the right to development. He said this duty extends not only internally towards their own citizens but also beyond the states' borders, and permeates through international decision-making at international organizations, including the UN, World Bank, IMF and the WTO.

Thus, for instance, states would clearly be failing in their obligations if they create international conditions unfavourable to the realization of the right to development through the lending policies they support at the IMF or World Bank, or through WTO rules. In fact, WTO rules are explicitly required, by the very terms of the Marrakesh Agreement Establishing the WTO, to be framed with the objective of promoting sustainable development, he said.

Fourthly, operationalizing the right to development means insisting on a comprehensive, multidimensional and holistic approach to development as a human right.

Fifthly, operationalizing the right to development means going beyond a human rights-based approach to development.

Finally, said Kanade, operationalizing the right to development for the implementation of the SDGs means ensuring that the indicators for the SDGs and the targets are compatible with the objective of making the right to development a reality for everyone. This includes ensuring that there are clear, quantifiable indicators for both national and international action, with appropriate benchmarks for each of the SDGs, most importantly for Goal 17.

Legitimate rights

Ambassador Wayne McCook of Jamaica, who is also the chairman of the developing-country G77 and China grouping, began his presentation by quoting Bob Marley who had said, "Them belly full but we hungry, a hungry mob is an angry mob."

McCook spoke on the legitimacy and rights enshrined in the Declaration on the Right to Development and the consequences for the global development agenda. He posed the following questions: "As human beings, to what are we entitled? With what do we survive and through what can we be free to live in dignity as individuals and in community? Should the rights we agree be limited to the ability to breathe, to speak, to listen and to move freely or is there more? Should we collectively agree that all human beings have a right to more than survival or simply to being alive?"

"Yes, we have," he said. "We have agreed a body of globally accepted rights encompassing civil, political, economic, social and cultural rights and instruments that lay a foundation on which we base our promotion and protection of fundamental human rights."

"We have agreed a right to development," he stressed. "Having agreed these rights we cannot simply assume that the task is done ... We must commit to taking the steps without which these cannot be secured and it is for these reasons that we have recognized that the right to development must be promoted and protected by all."

In this context, he said, the elaboration of a holistic approach to sustainable development aligns with the fundamental goals of the right to development.

Flavia Piovesan from the Brazilian Ministry of Justice posed two questions: How to understand the conceptual basis and the legal framework of the right to development? What are the central attributes – the central components – of the right to development from a human rights approach?

Thirty years ago, she said, the UN adopted the Declaration on the Right to Development establishing the framework that provides individuals and peoples both domestically and globally the right to an equitable, sustainable and participatory development in accordance with the full range of human rights and fundamental freedoms.

The incorporation of the human rights-based approach to development is among the greatest achievements of the Declaration. Since then, this approach has guided the integration of norms, standards and principles of the international human rights system into the plans, policies and process of development, including the 2030 Agenda and the SDGs, she added. *(SUNS8264)* ❐

Austerity policies undermining rights within the EU

A UN rights expert has decried the impacts of austerity policies undertaken in the EU in response to the financial crisis, saying that these measures have undermined economic, social and labour rights within the bloc.

by Kanaga Raja

GENEVA: Recent austerity policies are undermining economic, social and labour rights within the European Union and are hitting the most vulnerable, the United Nations Independent Expert on the effects of foreign debt and human rights, Juan Pablo Bohoslavsky, has said.

This conclusion was highlighted in an end-of-mission statement following his recent official visit to EU institutions to assess the response of these institutions and of EU member states to the sovereign debt and financial crisis from a human rights perspective.

The rights expert undertook the official visit to Brussels from 30 May to 3 June, and his findings and recommendations will be detailed in his full report to the UN Human Rights Council in March next year.

Adverse effects of austerity

In his end-of-mission statement released after his visit, Bohoslavsky (who is from Argentina) said he is deeply concerned about a paradigmatic shift that is undermining the previously balanced approach of ensuring economic stability, equality and social cohesion, in favour of a disproportionate focus on budgetary stability.

"Austerity policies have unfortunately all too often gone hand in hand with an undermining of economic, social and labour rights within the European Union hitting the most vulnerable. In parallel, inequalities in income and wealth have increased within Europe. In addition to these outcomes, austerity measures do not appear to have led to full financial and fiscal stability in all countries."

The rights expert noted that in response to the crisis, many EU states resorted to austerity measures to address excessive public deficits and unsustainable public debt. After the global financial crisis unfolded, 25 of the 28 EU member states were at some stage put under the Excessive Deficit Procedure of the EU, which kicks in when a state has a public deficit above 3% of GDP or is unable to bring its debt-to-GDP ratio below 60%.

In addition, Cyprus, Greece, Hungary, Ireland, Latvia, Portugal, Romania and Spain were experiencing serious difficulties in relation to their financial stability and had to implement economic adjustment programmes as a condition for receiving stand-by support or loans from European institutions and the International Monetary Fund (IMF).

According to the Independent Expert, there are currently about 21.4 million unemployed in the EU, 4.7 million more than in 2008, before the global financial crisis spread. More worryingly, nearly every second unemployed has been without a job for more than 12 months and long-term unemployment has remained high in countries that underwent adjustment programmes (for instance: Greece 72.1%, Portugal 57.4%, Ireland 56.2% of all unemployed persons).

The percentage of persons in the EU who report unmet medical needs and say seeing a doctor is too expensive for them, has also increased after 2009.

"Disappointingly, in one of the most affluent regions of the world, poverty has been on the rise," said the rights expert. About 121 million people in the EU-27 are at risk of poverty or social exclusion, 4.7 million more than in 2008, and their number has in particular increased in Greece, Italy and Spain. Children and women in Europe are more at risk of poverty and social exclusion (27.8% and 25.2% respectively) than the total population (24.4%).

"In this context, it will be difficult to reach the target the European Union has set for itself, to reduce the number of people at risk of poverty and social exclusion by 20 million people by 2020," he said.

"It is paradoxical that when social protection was most needed, social spending was often reduced. In some countries, in an effort to ensure the repayment of public debt, public health and social protection expenditures were excessively slashed," he added.

According to the rights expert, the core question here is why this type of expenditure was particularly targeted by conditionalities. "These cuts were often made in public health and social protections systems that already were deficient to ensure that those most in need would receive treatment or benefits."

The case of Greece

In Greece, which Bohoslavsky visited in December 2015, the overall social protection budget stood in 2009 at 44.2 billion. In 2014, only 35.7 billion was spent, a cut of 19.3%, while at the same time the number of persons unemployed or living in material deprivation dramatically increased. Public health expenditures in Greece were reduced from 16.1 billion (2009) to 8.3 billion (2014), an unprecedented decrease of 48.6%. Poor patients are now relying on solidarity clinics run by volunteers to receive essential medical services.

"There is a widespread belief that billions of taxpayer money has been used or provided in the form of guarantees to rescue Greece from defaulting." According to the rights expert, the amounts were indeed large, but in reality the financial assistance provided through European financial institutions returned to a very large degree to international lenders, who had provided Greece until 2009 with loans without fully following due diligence standards in order to check whether the country would be able to pay back its debt.

In total, 215.9 billion was disbursed under the first and second adjustment programmes from 2010-14. However, a recent study published by the European School of Management and Technology in Berlin suggests that only a very small fraction – 9.7 billion or less than 5% – ended up in the public budget of Greece; 64% of the disbursed loans was just used to pay back the existing debt and interest, 37.3 billion or 17% was used to recapitalize Greek banks, while 29.7 billion or 14% of the amount was used to provide incentives for investors to engage in the Private Sector Involvement (PSI) in March 2012, a haircut of the Greek debt. Through the PSI, private debt was converted to a large degree into public debt.

Looking at these figures from a human rights perspective, the rights expert said he was inclined to ask: Who has been given priority? Who has mainly benefited from the financial support? While bailing out banks and stabilizing the financial system, was enough done to reduce poverty and unemployment in Greece, Spain, Portugal and elsewhere? Were economic and social rights given

the needed priority to ensure that everybody within the EU can live in dignity?

"Poverty levels and the increase of inequality experienced in those countries make me feel that this is not the case," he said.

In his view, Greece's debt, currently estimated at around 180% of GDP, is highly unsustainable. The IMF recently published a scenario that Greece's debt-to-GDP ratio will further increase to about 250% by 2060 if no frontloaded debt relief is provided.

Debt relief is currently under discussion in the form of maturity extensions, payment deferrals and lower fixed interest rates. However, in the view of the Independent Expert, this would be "too little, too late", especially for the thousands of people who have suffered in the last years. Postponed debt relief will not restore confidence in the Greek economy nor promote much-needed investment.

Bohoslavsky was similarly worried about the short- and long-term human rights impacts of the latest austerity package passed under pressure from international lenders by the Greek Parliament on 20 May, which includes further cuts to pensions to the tune of 3.6 billion and an increase of the value added tax (VAT) to 24%, which hits poorer people more forcefully than the more affluent.

The package includes across-the-board spending cuts should Greece fail to reach agreed primary surpluses in the future, surpluses that have been considered unrealistic for Greece by the IMF due to its very high structural unemployment. "Such across-the-board spending cuts are unlikely assessed in relation to their social or human rights impact. They would repeat past mistakes, further undermine the Greek economy and deepen the economic and social rights crisis within Greece," the rights expert underlined.

Human rights obligations

"My point is that obligations under human rights law should be a legitimate and necessary constraint when designing and implementing macroeconomic policies ... My point here is to stress that irrespective of the macroeconomic policy chosen, there is a need to ensure that human rights are fully respected and that nobody is left behind," Bohoslavsky said.

While EU member states are primarily responsible for adherence to their international human rights obligations, international institutions, including the EU, its bodies and financial institutions, are not beyond the reach of international human rights law, the Independent Expert stressed. This applies to international organizations, including multilateral financial institutions, such as the IMF and the World Bank.

"When making policy recommendations or setting binding conditionalities for providing loans, institutions and bodies of the European Union have – at an absolute minimum – to respect international human rights treaties to which all their Member States have become a party."

The rights expert reminded all EU member states (including euro area states acting as international lenders) that they are bound by the International Covenant on Economic, Social and Cultural Rights and other relevant core human rights treaties they have ratified. "States parties to the International Covenant on Economic, Social and Cultural Rights would be acting in violation of their obligations under the Covenant if they were to delegate powers to an international organization (e.g. the ESM [European Stability Mechanism] or IMF) and allow such powers to be exercised without ensuring that they will not infringe on human rights."

Bohoslavsky noted that the EU has developed several guidelines and tools for carrying out social and human rights impact assessments. "However, when it comes to macroeconomic policies in the context of financial crises, human rights standards have so far not been explicitly used as benchmarks to assess economic reform programmes. It is therefore deplorable how little lending conditionalities were formally assessed on their potential harm to human rights-holders before they were implemented."

The rights expert welcomed the fact that the European Commission has undertaken for the first time, in August 2015, a social impact assessment for the third economic reform programme currently implemented in Greece. Regarding it as "a first step in the right direction", he however said that this assessment, produced on short notice, does not have the ambition to assess the economic reform measures against international human rights standards.

"Economic reform programmes should not only undergo social, but also human rights impact assessments that live up to their name. Such assessments should be carried out in consultation with affected rights-holders and civil society and be more than tick-box exercises in order to be meaningful."

In addition, he said, evaluations of past reform programmes should not only assess whether they managed to reduce budget deficits, restore debt sustainability or enhance economic growth, but whether they ensured a fair and equal distribution of the burden of adjustment within society.

"We need to put the human person back into the equation, as the economy should serve the people, not vice versa. Therefore, it is absolutely relevant to know to what extent economic and social rights have been successfully protected in the context of adjustment policies, what gaps exist and who is most affected by lack of protection of their rights."

The Independent Expert said that this exercise would not only allow learning from past mistakes to be better equipped for the future, but ensure that identified infringements of social and economic rights can be addressed and corrected.

"No credible argument could be made that what should be done externally for the benefit of rights holders outside the European Union cannot be done internally, for the benefit of its own EU citizens and residents."

Rather, said Bohoslavsky, a human rights-based approach should guide country-specific recommendations to EU member states in the field of macroeconomic policy and the lending policies of European institutions to their own EU member states.

"States need sufficient fiscal space to ensure that they can protect and progressively realize economic, social and cultural rights. Debt obligations should never take preference over human rights." It is therefore equally important to combat tax avoidance and tax evasion to prevent states falling into a debt trap and to ensure that they have sufficient revenues at their disposal to uphold economic and social rights.

"It is time to revive social rights within the European Union," the Independent Expert also said. In his view, some recent initiatives from the European Commission, such as the European Pillar on Social Rights, will contribute to this aim. "I have stressed during my visit that such a pillar needs to be based on a solid foundation."

This foundation should not only reflect the social acquis of the EU, but also build on the international human rights obligations of EU member states and the recommendations emanating from international and regional human rights mechanisms, Bohoslavsky concluded. *(SUNS8266)* ❐

Access to medicines fundamental to achieving right to health

The UN's Human Rights Council has recognized access to medicines as a fundamental element of the right to health, while noting that at least a third of the global population lacks such access on a regular basis.

by Kanaga Raja

GENEVA: The United Nations Human Rights Council, in a resolution adopted on 1 July, has recognized that access to medicines is "one of the fundamental elements in achieving progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

In the resolution, which was orally revised and adopted without a vote, the Council decided to convene a panel discussion at its thirty-fourth session next March "to exchange views on good practices and key challenges relevant to access to medicines as one of the fundamental elements of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, taking into account all relevant reports, and that the discussion shall be fully accessible to persons with disabilities."

The resolution was adopted during the Council's thirty-second session, which convened on 13 June-1 July.

Elusive goal

When introducing the draft resolution on behalf of Brazil, China, Egypt, India, Indonesia, Senegal, South Africa, Thailand and some 72 additional cosponsors, Brazil said that for millions of people throughout the world, the full enjoyment of the human right to health still remains an elusive goal.

According to the World Health Organization (WHO), at least one-third of the world's population has no regular access to medicines.

"It is our firm understanding that no effort should be spared to realize this right for all," said Brazil.

Health is a fundamental human right, indispensable to the enjoyment of many other human rights and necessary for living a life in dignity, it said.

According to Brazil, the present initiative was aimed at reaffirming access to medicines as a fundamental element in the realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

India said that according to the WHO World Medicines Situation Report of 2011, a third of the global population has no regular access to medicines. India underlined that for millions of people around the world, lack of access to safe, affordable and quality medicines remains a major barrier in realizing the full right to health.

The challenges are no longer limited to developing countries or to the so-called neglected diseases, but are affecting people in the Global North as well, stretching the health budgets of all governments and impacting frequent to common diseases like hepatitis and cancer.

"This indeed is a serious human rights issue," India emphasized.

It said that the existing global framework does not allow the fruits of medical innovation to be equitably shared, in particular with those who are most in need of them. "It has only resulted in skyrocketing prices for life-saving medicines and vaccines, promoted discriminatory access to medicines based on geographic location or economic status and has further widened the health inequities."

The increasing healthcare costs have become the leading cause of induced poverty, pushing nearly 150 million people into impoverishment every year. Moreover, the innovation model that thrives on the current system has failed to address the health research and development (R&D) needs of the developing countries, said India. This is evident from the lack of any new medicines and vaccines for long-known infectious diseases like tuberculosis and malaria, which continue to take a huge public health toll.

India noted that a number of Council resolutions have reaffirmed the right of member states to give primacy to public health over trade and intellectual property considerations, as enshrined in the Doha Declaration on the TRIPS Agreement and Public Health.

"We need to once again place the human rights dimension of access to medicines at the centre of our efforts to create favourable conditions at the national, regional and international levels to ensure the full realization of the right to health and health-related goals of Agenda 2030," it said.

Problematic provisions

In a general comment, the United Kingdom, while joining the consensus on the resolution, said it found that a number of provisions in the text were problematic. For example, the UK said that while it fully supported the right of everyone's enjoyment of the highest attainable standard of physical and mental health, it did not recognize its link with access to medicines as set out in operational paragraph 1 of the resolution.

Switzerland said it had some reservations about the resolution. It fully supported its aim, i.e., the full enjoyment of the highest attainable standard of physical and mental health for all. Though it joined the consensus, Switzerland said that it would have liked to see a more well-balanced resolution, and, in this context, drew attention to preambular paragraph 10 and operational paragraphs 3, 4 and 5 of the draft resolution.

Switzerland maintained that the reference to the price of medicines in operational paragraphs 3 and 5 was an inadequate simplification. Patents and prices were not directly linked, it claimed. The prices of medicines depended on a number of different factors including import taxes, the national medicines supply system and the role of intermediaries, it said.

In an intervention, the Netherlands, on behalf of the European Union member states of the Human Rights Council, explained that it was fully committed to the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. However, the EU maintained, the assumption that the rights of inventors were the single or even the main impediment to innovation and access to health overlooked a key finding of the 2012 joint WHO / WTO / WIPO study on promoting access to medical technologies and innovation, that the lack of ac-

cess to medical technologies was rarely due entirely to one single determinant.

The EU also expressed its concerns about the risk of duplication with discussions in other fora. It however said that it would join the consensus on the draft resolution as orally amended.

Council's concerns

In the resolution, the Human Rights Council noted with appreciation the UN Secretary-General's decision to establish a High-level Panel on Access to Medicines with the mandate to make proposals on how to address policy incoherence in public health, trade, the justifiable rights of inventors, and human rights. It recognized the participation of the Office of the UN High Commissioner for Human Rights in the expert advisory group supporting the Panel.

The Council noted with concern that, for millions of people throughout the world, the full and equal enjoyment of the right to the highest attainable standard of physical and mental health remains a distant goal.

It was concerned about the inter-relatedness between poverty and the realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, in particular the fact that ill health can be both a cause and a consequence of poverty.

It recognized that universal health coverage implies that "all people have access without discrimination to nationally determined sets of the needed promotive, preventive, curative, palliative, and rehabilitative essential health services, and essential, safe, affordable, efficacious, and quality medicines and vaccines, while ensuring that the use of these services does not expose users to financial hardship, with a special emphasis on the poor, vulnerable, and marginalized segments of the population."

The Council recalled that the Doha Ministerial Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Public Health "confirms that the Agreement does not and should not prevent members of the World Trade Organization from taking measures to protect public health and that the Declaration, accordingly, while reiterating the commitment to the Agreement, affirms that it can and should be interpreted and implemented in a manner supportive of the rights of members of the Organization to protect public health and, in particular, to promote access to medicines for all, and further recognizes, in this connection, the right of members of the Organization to use, to the full, the provisions of the above-mentioned Agreement, which provide flexibility for this purpose."

The Council regretted the high number of people still without access to affordable, safe, efficacious and quality medicines, and underscored that improving such access could save millions of lives every year.

It noted with deep concern that, according to WHO in its World Medicines Situation Report of 2011, at least one-third of the world population has no regular access to medicines, while recognizing that the lack of access to medicines is a global challenge that affects people not only in developing countries but also in developed countries, even though the disease burden is disproportionately high in developing countries.

It was concerned "at the lack of access to quality, safe, efficacious and affordable medicines for children in appropriate dosage forms, and problems in the rational use of children's medicines in many countries, and that, globally, children aged under five years still do not have secure access to medicines for the treatment of pneumonia, tuberculosis, diarrheal diseases, HIV infection, and malaria, as well as medicines for many other infectious diseases, non-communicable diseases and rare diseases."

The Council was also concerned that the increasing incidence of non-communicable diseases constitutes a heavy burden on society, with serious social and economic consequences, which represent a leading threat to human health and development.

It recognized the urgent need to improve accessibility to safe, affordable, efficacious and quality medicines and technologies to diagnose and to treat non-communicable diseases, to strengthen viable financing options, and to promote the use of affordable medicines, including generics, as well as improved access to preventive, curative, palliative and rehabilitative services, particularly at the community level.

The Council expressed deep concern at recent outbreaks of highly infectious pathogens with epidemic potential, which demonstrate the potential vulnerability of populations to them, and, in this context, reaffirmed and underscored the importance of the development of new and innovative medicines and vaccines and of ensuring access to safe, affordable, efficacious and quality medicines and vaccines to all, as well as strengthening health system capacities for preventing and responding to outbreaks.

It recalled the WHO Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property, and commended the efforts of WHO to fill gaps in health research and development for the relevant needs of developing countries, including neglected diseases and potential areas where market failure exists, through the follow-up to the report of the Consultative Expert Working Group on Research and Development.

It reiterated that "health research and development should be needs-driven, evidence-based, guided by the core principles of affordability, effectiveness, efficiency, and equity, and considered a shared responsibility."

Promoting access to medicines

The Council stressed the responsibility of states to ensure access for all, without discrimination, to medicines, in particular essential medicines, that are affordable, safe, efficacious and of quality.

The Council called upon states "to promote access to medicines for all, including through the use, to the full, of the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights which provide flexibility for that purpose, recognizing that the protection of intellectual property is important for the development of new medicines, as well as the concerns about its effects on prices."

The Council also called upon states "to take steps to implement policies and plans to promote access to comprehensive and cost-effective prevention, treatment and care for the integrated management of non-communicable diseases, including, inter alia, increased access to affordable, safe, efficacious and quality medicines and diagnostics and other technologies, including through the full use of Trade-Related Aspects of Intellectual Property Rights flexibilities."

It reiterated the call upon states to continue to collaborate, as appropriate,

on models and approaches that support the de-linkage of the cost of new research and development from the prices of medicines, vaccines and diagnostics for diseases that predominantly affect developing countries, including emerging and neglected tropical diseases, so as to ensure their sustained accessibility, affordability and availability and to ensure access to treatment for all those in need.

The Council called upon the international community to continue to assist developing countries in promoting the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, including through access to medicines that are affordable, safe, efficacious and of quality, and through financial and technical support and training of personnel, while recognizing that the primary responsibility for promoting and protecting all human rights rests with states.

It recognized the innovative funding mechanisms that contribute to the availability of vaccines and medicines in developing countries, such as the Global Fund to Fight AIDS, Tuberculosis and Malaria, the GAVI Alliance and UNITAID.

In this context, it called upon all states, UN agencies, funds and programmes, in particular WHO, and relevant intergovernmental organizations, within their respective mandates, and encouraged relevant stakeholders, including pharmaceutical companies, while safeguarding public health from undue influence by any form of real, perceived or potential conflict of interest, "to further collaborate to enable equitable access to quality, safe and efficacious medicines that are affordable to all, including those living in poverty, children and other persons in vulnerable situations."

The Council further urged all states, UN agencies and programmes and relevant intergovernmental organizations, especially WHO, within their respective mandates, and encouraged non-governmental organizations and relevant stakeholders, including pharmaceutical companies, "to promote innovative research and development to address health needs in developing countries, including access to quality, safe, efficacious and affordable medicines, and in particular with regard to diseases disproportionately affecting developing countries, and the challenges arising from the growing burden of non-communicable diseases, taking into account the Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property of the World Health Organization."

It invited member states and all stakeholders, including relevant UN bodies, agencies, funds and programmes, treaty bodies, special procedure mandate holders, national human rights institutions, civil society, and the private sector, to promote policy coherence in the areas of human rights, intellectual property and international trade and investment when considering access to medicines.

The Council requested the High Commissioner for Human Rights to prepare a summary report on the panel discussion and to submit it to the Council at its thirty-sixth session. *(SUNS8275)* ❐

Unfounded debt fears block economic recovery

Fiscal hawks' fixation with cutting government deficit and debt levels not only lacks sound basis but is also impeding growth prospects, maintain *Anis Chowdhury* and *Jomo Kwame Sundaram*.

Debt anxieties are not new, often fanned by political competition. But so is a double-dip recession due to premature deficit reduction.

For example, to seek re-election, US President Franklin D. Roosevelt backed down from his New Deal in 1937, promising that "a balanced budget [was] on the way". In 1938, he slashed government spending, and unemployment shot up to 19%.

Deficits and debt

Many countries had huge public debts when World War II ended. Despite such anxieties and calls for drastic spending cuts, governments continued to spend. Had they caved in, Europe would not have been rebuilt so soon.

As governments continued with massive expenditure to rebuild their countries, economies grew and the debt burden diminished rapidly with rapid economic growth. Clearly, debt is sustainable if government expenditure enhances both growth and productivity.

When the debate about deficits and public debt was raging during the Great Depression, growth theory pioneer Evsey Domar noted, "That deficit financing may have some effect on income ... has received a different treatment. Opponents of deficit financing often disregard it completely, or imply, without any proof, that income will not rise as fast as the debt ... There is something inherently odd about any economy with a continuous stream of investment expenditures and a stationary national income."

After the 2008-09 financial meltdown brought many developed OECD economies to a standstill, there was a brief revival of fiscal activism. Many OECD governments initially responded with large fiscal stimulus packages, while bailing out influential financial institutions. Major developing countries also put in place well-designed fiscal stimulus packages including public infrastructure investment and better social protection. Hence, there were sudden increases in debt-GDP ratios, mainly due to large financial bailout packages and some fiscal activism.

But with the first hints of "green shoots" of recovery from mid-2009, fiscal hawks stepped up their calls for winding back, sounding dire warnings about ballooning deficits. They argued that rapid fiscal consolidation would boost confidence, particularly in the finance sector, creating an expansionary impulse.

Thus, the affected countries undertook rapid fiscal consolidation measures with large cuts in public expenditure, especially in the areas of health, education, social security and infrastructure. Yet, their debt-GDP ratios continue to rise as they struggle to reignite growth.

Meanwhile, the International Monetary Fund (IMF) has admitted that its initial fiscal consolidation advice was based on erroneous ad hoc calculations. Overwhelming recent research findings, including from the IMF, indicate that discretionary counter-cyclical fiscal policy in recessionary periods augments and catalyzes aggregate demand, encourages private investment and enhances productivity growth, instead of raising interest rates and crowding out private spending.

Optimal debt-GDP ratio?

The fixation with a particular debt-GDP ratio lacks any sound basis. The 60% ratio, used by the European Commission and the IMF as the upper threshold for fiscal sustainability by 2030, was simply the median pre-crisis ratio for developed countries and the median debt-GDP ratio of EU countries at the time of the Maastricht Treaty.

Similarly, the 3% budget deficit rule of the EU happened to be the median budget deficit ratio at the time of the Treaty. None of these ostensible benchmarks implies optimality in any meaningful economic sense.

Public debt in Japan soared to well over 200% of GDP over two-and-a-half decades of deflation. Yet, interest rates have remained low for many decades.

In 1988, Belgium had the highest public debt, and Italy's debt rose above 100% of GDP during this period. Neither of them experienced spiralling inflation or very high interest rates, as austerity hawks claim will happen when government fiscal deficits rise.

Meanwhile, studies of public finance in the United States do not find any significant relationship between debt-GDP ratios and inflation or interest rates during 1946-2008. However, real interest rates may be adversely impacted by whether the debt is denominated in domestic or foreign currencies. In other words, a sovereign country should have the option to monetize debt.

The problem arises when that option does not exist, as with countries in the eurozone. This is clear from the contrasting experiences of Spain and the UK during the recent rapid public debt build-up. The UK public debt-GDP ratio was 17 percentage points higher than the Spanish government debt (89% versus 72%) in 2011. Yet, the yield on Spanish government bonds rose strongly relative to the UK's from early 2010, suggesting that international bond markets costed Spanish risk much more than UK government bonds. As a member of a monetary union, Spain does not have control over the currency in which its debt is issued, while UK public debt is mostly in its own currency, as in the US and Japan.

Therefore, much of the problem in the eurozone is not really about high public debt or deficits. Rather, it is rooted in the currency union that limits its members' policy space with regard to money creation and exchange rate policy. Hence, the only way they can improve what is seen as competitiveness is by cutting wages!

Then and now

Since 2014, even the IMF has changed its stance. In its October 2014 World Economic Outlook, it advised that "debt-financed projects could have large output effects without increasing the debt-to-GDP ratio, if clearly identified infrastructure needs are met through efficient investment".

There is, of course, one difference between now and the 1930s. The finance sector and rating agencies are much more influential and powerful now than they were then. Democratically elected governments have become hostage to

money-market investors who shift money from one place to another in search of quick profits.

Governments should not be driven by superficial diagnoses of complex economic issues by rating agencies. The record of rating agencies before the 2008 global economic crisis was abysmal, and the US Congress has seriously debated whether they should be prosecuted.

Trying to win their confidence is futile, and trying to anticipate them is hazardous, but they nevertheless hold finance ministries and central banks to ransom. *(IPS)* ❐

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How Africans are robbed of the benefits of mineral wealth

African countries can harness revenues from their vast mineral resources to fund broad-based socioeconomic development. But in order to do so, writes *Kwesi W. Obeng*, they must ensure that the mining corporations pay their fair share of taxes.

The remarkable extractives-driven economic growth of the last decade across Africa failed to trickle down. It was jobless, it benefited foreign corporates and the local elite, and it widened the gap between the rich and the poor. If Africa is to avoid the failures of the Millennium Development Goals (MDGs) era and successfully transition from its present state to that foreseen by Agenda 2030 for Sustainable Development, then it must better harness the potential benefits of its vast mineral wealth.

African countries must institute fiscal reforms that will ensure they are better positioned to derive maximum benefit from the next commodity price super-cycle; they must plug loopholes that continue to facilitate the bleeding of much-needed development revenues via illicit flows; countries must align all relevant local frameworks to the Africa Mining Vision (see below), thereby putting the needs of citizens at the centre of their natural resource management agenda; and, crucially, Africa must unite in a broad and strong push for long overdue global tax reforms.

Mineral- and oil-dependent African economies are currently in distress as they face severe fiscal and balance-of-payments deficits. These are tough times indeed. From minerals to oil and gas, commodity prices have collapsed in the last few years. The price of copper, for example, has dropped by 67% and oil by 51% since 2011.

Falling commodity prices, especially those of minerals and oil, yet again highlight the perils of commodity dependence and the dominant extractive model on the continent. About half of African economies are classified as "commodity-dependent". That is, these nations derive a substantial part of their incomes from minerals and / or hydrocarbons.

To prop up revenues and compensate for falling prices, the Democratic Republic of Congo, for example, increased copper production but the country still suffered a revenue decline of about $360 million. Equatorial Guinea also raised its oil exports by 13% but revenues plunged by about the same percentage.

In anticipation of prices going up, some African nations reduced supply. Angola and Nigeria, for example, cut their oil supply and revenues fell by about $5 billion for Angola. For Nigeria, the revenue decline was much larger, $26 billion, prompting President Muhammadu Buhari's government to withdraw fuel subsidies early in May. The government's withdrawal of subsidies has pushed up the price of fuel overnight, occasioning civil unrest across Nigeria. Liberia's revenue fell by two-thirds after the post-conflict state cut iron ore production. Zambia has also seen its revenues plunge by 23% after cutting back on copper production.

The slump in mineral prices is not bad news for all though. Consider the case of mining companies: the plunging value of the currencies of many mineral-rich African nations is helping mining companies, which had reaped windfall profits at the peak of the commodity price boom, to cut their costs further. South Africa-based gold miner, Goldfields Limited, which has operations in South Africa, Ghana, Australia and Peru, said its cash costs declined 3.1% in the second quarter of 2015 from a year earlier to $1,059 an ounce.

A lost opportunity for development

The commodity price booms in 2002-08 and 2010-14 essentially benefited mining and oil multinational corporations (MNCs). African economies lost a golden opportunity. From Ghana to Zambia, attempts by various African nations to review their fiscal regimes and tax provisions in mining contracts to raise additional revenue to fund development were mostly unsuccessful.

The continent ranks first or second in global reserves of bauxite, chromite, cobalt, industrial diamond, manganese, phosphate rock, platinum-group metals, soda ash, vermiculite and zirconium. In 2010, Africa's share of diamond, chromite, gold and uranium was 57%, 48%, 19% and 19%, respectively, according to the UN Economic Commission for Africa. However, fiscal regimes and public agencies governing the extractive sector in many African countries are weak and porous, making it much more difficult for these economies to effectively tax the sector to fund broad-based socioeconomic development. In many cases, companies enjoy excessive tax incentives and African nations forfeit large portions of revenue which would otherwise have gone to fund national development.

At the height of the commodity super-cycle, a number of mineral-rich countries sought to review their fiscal regimes and mining contracts to ensure that their economies shared in the high profits. Many of these efforts, however, failed not least because African economies reacted too late or faced a major pushback from mining MNCs and their governments. Secondly, many African nations had been unprepared for the boom and when the price surge was underway, many more were too slow or unwilling to undertake the necessary measures.

The problem of low revenues from the extractive sector is further exacerbated by the extensive use of unethical tax avoidance, transfer mispricing and anonymous company ownership schemes by MNCs to maximize their profits at the expense of millions on the continent who lack basic services such as healthcare and education.

The January 2015 report of the African Union High Level Panel on Illicit Financial Flows from Africa shows that the continent loses a colossal $50 billion through illicit financial flows (IFFs) each year, essentially via aggressive tax planning schemes by MNCs and powerful local elites. The extractive industry, which is a key part of the commercial sector on the continent, is the biggest perpetrator of the theft of Africa's financial resources through IFFs, the Panel emphasized.

It was precisely to address this weakness and more that, after decades of responding to externally driven transparency agendas, African governments embraced the Africa Mining Vision (AMV) in 2009 as the continent's overriding framework for mineral sector governance. The AMV's ultimate strategic goal is to use Africa's mineral resources to promote broad-based socioeconomic development of the continent. One of the pillars of the AMV is the Fiscal Regime and Revenue Management. Yet, seven years after its adoption, studies show that implementation of the AMV is slow at best. In a number of cases, measures taken by African governments undermine the AMV and erode their own countries' revenue bases.

Yet, tax revenue is the most sustainable and predictable source of development finance. Without adequate domestic revenue to underpin their development, it is practically impossible for developing economies such as Africa's to comprehensively and concretely meet the basic needs of their citizenry, let alone industrialize.

Tiered weaknesses

Crucially, natural resources are finite. It is therefore essential for resource-rich African nations to tailor their economic policies to effectively harness and utilize natural resource revenues to improve the productivity of non-mineral, oil and gas-related sectors to break out of the extractive enclave.

Indeed, evidence from multiple sources shows that nations that rely largely on their mineral resources, characterized by widely permissive regulatory regimes, lose much more revenue than nations which have developed sector-specific fiscal instruments to optimize revenues. Ironically, this lost revenue is even higher during price booms.

On the whole, the inability of African countries endowed with mineral resources to reap the full benefits of the sector is down to a number of reasons. At the national level, the lack of political will among African nations to strike a balance between national interests and company interests is hampering the beneficiation of mining to African economies. This has also fed into a fierce and unnecessary competition among African economies to attract foreign direct investment. Attracting FDI is at the core of the dominant but dysfunctional extractive model which has reduced the African state to a taker of external initiatives and undermined nationally determined and driven agendas to maximize the benefits of the extractive sector to host countries.

Secondly, in many countries, national agencies including revenue authorities are poorly equipped or lack the necessary capacity to adequately monitor and assess mining company records to ensure these companies pay their fair share of taxes.

At the global level, the financial architecture is heavily skewed against African countries especially those endowed with resources. As also noted by the AU High Level Panel on Illicit Financial Flows from Africa, mining MNCs are most culpable in shifting profits offshore to avoid paying appropriate taxes to African countries where they generate their wealth.

A recent example from Malawi vividly highlights how the current international financial architecture and mining MNCs are bleeding African nations of investible capital through IFFs. Over a six-year period, Malawi lost $43 million in revenue from a single Australian mining company, Paladin, which owns a uranium mine in this impoverished southern African nation. The company used complex corporate structures to exploit loopholes in international tax rules after negotiating a huge tax break from the government. The company received tax incentives to the tune of $15.6 million. Paladin also used a subsidiary in the Netherlands that has no staff to route the payments for management fees to Australia. Through this aggressive scheme, the company succeeded in avoiding the payment of millions in tax contribution to Malawi. For a relatively poor country like Malawi, this is a significant loss of much-needed resources.

Inadequate global response

It is against this backdrop that the G20 grouping of the world's major economies commissioned the Organization for Economic Cooperation and Development (OECD) in 2013 to propose new rules to tackle tax cheating by MNCs under the Base Erosion and Profit Shifting (BEPS) project.

The BEPS outcome, adopted by the G20 in Antalya, Turkey last November, thus represents the first serious global effort to combat widespread corporate tax cheating and related weaknesses that have handed MNCs a significant advantage at the expense of mineral-dependent countries in Africa.

That notwithstanding, the BEPS outcome failed to tackle the central flaw that allows MNCs to exploit the international tax system, particularly the way in which tax rules treat subsidiaries of MNCs as if they were merely loose collections of "independent entities" trading with each other in "arm's length" transactions. This allows companies, most of which are incorporated in the Global North but do business in the South, to trade with subsidiaries set up in tax havens and / or secrecy jurisdictions, where they often have no real economic activity, so as to shift profits from African economies.

The G20 mandate for the BEPS project was that international tax rules should be reformed to ensure that MNCs could be taxed "where economic activities take place and value is created". This implied a new approach, to treat the corporate group of an MNC as a single firm and ensure that its tax base is attributed according to its real activities in each country. Yet, the BEPS outcome continued to emphasize the independent-entity principle.

Overall, this means that the BEPS outcome is nothing more than an attempt to patch up the broken old system. It essentially failed to capture the voice and interests of the Global South especially on issues around permanent establishment and the arm's length principle as opposed to a unitary tax regime. There is therefore a need for an alternative to BEPS, possibly a UN tax body or even an African tax body. ❐

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The witches' brew of Brexit

In the wake of the Brexit vote, economic and political uncertainties abound in the UK, the EU and beyond. Amid all the noise and confusion, what is needed, contends *Chakravarthi Raghavan*, is a measure of calmness and consideration to negotiate the complications that invariably lie ahead.

The outcome of the non-binding referendum on Brexit in the United Kingdom on 23 June, with a clear majority for the UK to exit the European Union, is creating a veritable witches' brew – with the cauldron still on a fire that is being stoked and everyone adding their own "herbs" to the brew and none the wiser as to whether it will be a potion to cure or kill.

There are various forces at play – of politics and the political economy of the UK, of Europe, of democracy spreading in varying hues across much of the world and spawning fragilities, national and international, in the wider world. Analyzing these forces, even in broad brushstrokes, would need the genius of British Marxist historian Eric John Ernest Hobsbawm (1917-2012).

The Brexit outcome has evoked some violent reactions from Brussels, and an element of panic is also evident in other capitalist centres, in particular the US and its financial centres. There is panic over the possible collapse of laissez faire economics and "globalization" – the "market fundamentalism" that Margaret Thatcher unleashed in the UK in 1979, was picked up and pushed by Ronald Reagan as US President from 1981, and was enforced on the rest of the world, in particular the developing world, by the IMF and World Bank, US "free trade economists" (theologians rather than theorists with facts backing their theories), and step by step by the GATT and then the WTO, and the EU and its executive Commission inside Europe and through its web of free trade agreements (FTAs) including with the African, Caribbean and Pacific economies.

This neoliberal economics, pushed by these economic "gurus", soon proved to be global neo-mercantilism and trickle-up economics, creating and accentuating vast inequalities within and amongst nations, enriching the top 1% globally while the middle classes find living standards falling and the underclass find themselves impoverished and marginalized. This is being driven by financial globalization, with finance no longer merely "oiling the wheels of industrial capitalism" but replacing it. It is an upside-down pyramid structure, inherently unstable.

The UK electorate's reaction against this elitist neoliberalism resulted in the "enough is enough" vote for "leave" in the referendum. It is this that has sparked the panicky reactions in the centres of financial capital and among the elites who benefit handsomely from "globalization". No one should be under the illusion that they will all just roll over.

In contrast to Marxian dialectics of accentuated class conflicts and predictions of revolutionary upsurges of the working classes, however, the alienation is also throwing up fascist tendencies a la Marine Le Pen in France (though there appears lessening support for a French exit from the EU).

Uncertainties and complexities

In opening the Scottish Parliament on 2 July, Queen Elizabeth (who has seen 12 Prime Ministers in the UK during her reign so far) spoke some words of wisdom: "We all live in an increasingly complex and demanding world, where events and developments can and do take place at remarkable speed and retaining the ability to stay calm and collected can at times be hard ... one hallmark of leadership in such a fast-moving world is allowing sufficient room for quiet thinking and contemplation, which can enable deeper, cooler consideration of how challenges and opportunities can be best addressed."

Such leadership capable of "quiet thinking and contemplation" is perhaps a missing element in the post-referendum state of affairs.

Brexit has raised questions of whether the three-century-old United Kingdom can or will survive in its current shape, and whether it will continue in the EU (despite the referendum, as elite financial media and columnists are still preaching) or in fact will exit by invoking Article 50 of the EU treaty. And if separation does take place, there is uncertainty over the future relationship between the UK and the EU, and over the direction of an EU where Germany is the dominant, almost hegemonic power – a hegemony which it failed to achieve in the last century in two wars but which is now evident, whether sought or not – an EU partially knit together in a web of integrated and evolving trade and other economic links, and by preferential accords with nations outside the bloc, an effort almost to replicate the colonial-era economy.

In this context, also coming to the fore are issues of democratic governance in the EU or, as civil society often complains, the EU's "democratic deficit"; and similar deficits in the world beyond the EU, including in the centre countries and in the various intergovernmental organizations, such as the so-called "rules-based" World Trade Organization (WTO).

Within the EU, member states with duly elected parliaments and governments accountable to their parliaments have ceded some powers to the Union by treaty, and created EU institutions of governance: a European Council, which comprises heads of state or government of EU members and which defines the EU's general political direction and priorities; the Council of the EU, where the relevant ministers from member states meet to discuss and adopt decisions on specified policy areas; an executive in the shape of a European Commission, with a President and Commissioners from each member, and under them a sprawling bureaucracy, to initiate and, after approval, put in place EU-wide policies and regulations in some areas (and in other areas where national parliaments have to act); and a European Parliament, with Members elected by direct vote and with powers to approve or veto initiatives or proposals of the Commission before the Council of the EU for adoption.

The presidents, prime ministers and ministers of member states negotiate and do some hard bargaining on individual issues, often well into the night, and take decisions. Back home, if some particular interests or the public get upset or dissatisfied, the member governments do not own up to responsibility (since those heading their governments had collectively taken the decision) but take shelter behind the country having to abide by the decisions of an external authority, the EU.

All this is so complex that it is confusing even for experts dealing with the EU. The functioning of various EU institutions, purportedly on a democratic basis, is so non-transparent and opaque that it is little understood by the EU public or even in many parts of the media or their parliaments. This adds to the perception amongst the public, as reflected in the Brexit vote, of non-accountability and rule by some external

colonial-type authority which is depriving a nation of its sovereign rights of democratic decision-making and governance.

In sum, it is a mess, needing careful handling and explaining at every level, and the cool heads and calm thinking which Queen Elizabeth called for but which are in short supply everywhere.

Such complexities are also evident in decision-making mechanisms at international organizations, including the WTO. The WTO's administrative head, the Director-General, and the secretariat have even less powers than their counterparts at the UN and other international agencies; for example, they cannot initiate or make any proposals on their own but can only carry out tasks they are asked to do by the WTO legislative bodies. Nevertheless, the WTO secretariat and its various wings act on their own, promoting from behind the initiatives and interests of the dominant member states, and pronouncing themselves.

In a treaty organization like the WTO, where the functions, remit and jurisdiction of its various bodies are laid out in its founding treaty, no functionary bodies or officials discharging functions laid out in the treaty can claim inherent powers and the right to do what they have not been expressly forbidden to do. (The WTO's Appellate Body made such a claim in one ruling, in accepting a brief from a non-governmental organization when even WTO member states that are not parties or third parties to a dispute cannot file a brief!) This claim of ability to do what is not prohibited is a proposition unacceptable in any system of law or public international law codified in the Vienna Convention on the Law of Treaties.

External advice

In the Brexit context, before the actual vote in the UK, something that was exclusively within domestic jurisdiction saw many non-British persons giving advice. Given the wider effects of an UK-EU rupture on other nations and the global economy, various foreign leaders (including President Obama) went to the UK to publicly voice their advice, while some (like President Xi of China) did so from their capitals.

Several international organizations, including the International Monetary Fund (IMF), joined the debate to warn the UK voters of serious adverse consequences to them; and so did the WTO Director-General in some ill-advised remarks, interpreting provisions of the WTO agreements, in London on 7 June. These remarks related to the UK's complex web of trade relations at the WTO and with the EU and the EU's various preferential trade relationships through FTAs with non-EU countries.

Even normally, the public of any nation would not like outsiders to intervene and inject themselves into a sensitive and politically charged domestic issue. It is more so in the case of the insular UK, where the purported lack of control of the citizens over their destiny and grievances over the alleged external elements running the country were a major issue in the referendum.

After the vote, some wisdom has dawned on some external actors and institutions. For example, the IMF head Christine Lagarde intervened after the referendum merely to ask the UK and EU political leaders to discuss and reach arrangements without delay to end uncertainties – she did not venture any view on the nature of the detailed accords that should ensue.

Relations with the EU

Within the UK itself, the political process is in a shambles. Within the EU (minus the UK), the German Chancellor is playing a statesman-like role in public and speaking in terms of keeping the EU together and not showing undue haste or encouraging extreme hostility to the UK. Others, in particular European Commission officials, are talking tough – and loosely – about a messy divorce and threats of the UK's trade relations with the EU being in limbo while it brings up the rear of a long queue of nations seeking trade accords with the bloc.

Many on the EU side, though, are forgetting that the UK is still a major economy, even if it be correct that after the vote, its position has slipped from being the world's fifth largest economy to sixth spot. And if relations of the UK with the EU will be in limbo, so will it be, reciprocally, for EU members with the UK; and some of the EU's trading partners, which might have agreed to an FTA in the event that the UK were still part of the EU single market, may have second thoughts.

For example, there have been for some time now off-and-on negotiations for an FTA between the EU and India (stuck apparently on issues of investment and intellectual property rights). More recently, there was talk of accelerating the talks and concluding the FTA. However, after the Brexit vote, Indian officials have been quoted as saying that they might have to revise their market access offers, which were initially based on assumptions of meeting UK requests in terms of its EU membership, and that if the UK exits the EU, they no longer would need to provide the same access to the EU minus the UK.

There has been other negative fallout too. Switzerland has been having a series of bilateral arrangements with the EU in specific areas of the single market. These talks have stalled for the last two years over the issue of free movement of EU nationals – precisely the major sticking point in any post-Brexit EU-UK trade arrangements.

Two years ago, in a binding referendum, the Swiss voted (by a thin margin of 50.3% in favour) for a constitutional amendment to restrict foreigners moving to Switzerland and working. The Swiss Confederation has to give effect to the referendum outcome by enacting laws by a February 2017 deadline, and Swiss authorities have been negotiating with Brussels (and getting desperate). They have now been told that there can be no access to the EU single market if there is no free movement of EU citizens.

And Switzerland is far more dependent on the EU than the other way round. The Swiss export 56% of their goods to the EU. While some extreme right-wing parties are talking of going it alone, other Swiss parties are asking the Berne government to re-run the referendum to annul the previous one.

In the Swiss system, such binding referenda on specific issues can be at the instance of the Confederation government or by popular initiative. An impasse on the immigration issue threatens hundreds of other EU-Swiss bilateral agreements as well as the imposition of tariffs. Further talks were due recently but were postponed by the European Commission, which claimed that it was too distracted by Brexit.

The president of the European Parliament, Martin Schulz, has said the talks will not get easier because "free movement of people now plays a bigger role, in light of the imminent Brexit negotiations".

Swiss President Johann Schneider-Ammann has been quoted in Swiss media as saying that his efforts to press the EU for talks have met with the following response from European Commission President Jean-Claude Juncker: "If there is Brexit there would be no more time to deal with Switzerland."

The EU has previously shown its negotiating muscle by freezing research grants for Swiss universities worth hundreds of millions of euros and suspending the involvement of the Swiss in the Erasmus student exchange programme. The EU acted after the Swiss refused to sign a free labour market ac-

cess deal signed by the EU in Croatia. Swiss authorities, students and research scholars are worried about future access and scientific research contracts of Swiss institutions with the EU.

If and when the UK invokes Article 50 of the EU treaty, the Article prescribes negotiations on separation arrangements which are to conclude with an agreement within two years (unless an extension is agreed upon by both the EU and the UK). This is to define and set out detailed provisions of EU-UK accords on various issues, including trade relations.

At the moment, UK and EU leaders are all engaged or indulging in some public discussions and negotiating postures, creating some uncertainty among their own enterprises, investors and public, but also among others outside. This uncertainty may or may not have an effect on the actual Article 50 negotiations when they begin. Crucial as this is, though, it is just one more imponderable in the uncertain and fragile world of international political and other instruments and organizations. And whatever pressure and influence external parties want to exert, it needs to be done more discreetly, from behind the scenes, than the ham-handed interference in the pre-referendum campaign.

Even if there is no agreement at the end of the two-year period after the UK invokes Article 50, it does not equate to a vacuum. UK-EU relations in such a situation will be decided according to applicable principles of international law (as would be the situation for any member of the EU exercising its international rights and giving notice and withdrawing from the EU treaty).

Any negative impacts on the UK – as laid out, for example, by the EU Trade Commissioner in an interview with the BBC – will have a mirror effect on EU members vis-a-vis the UK. It may be viewed calmly by the Commissioner but not by the member states themselves.

Position in the WTO

As for the UK and the WTO, there has been huge concern (or the impression to that effect) that, like in the case of new applicants for accession to the WTO, a whole lot of complex arrangements, including tariff schedules, will have to be renegotiated by the UK. However, the UK talks at the WTO will in fact be less complex than the talks with the EU. With some goodwill, and flexibility that the WTO and GATT have shown in the past, it is more easily solvable, and in mutual interest.

With or without any Article 50 agreement with the EU, the UK will continue as a founding member of the WTO. For, the UK was a founding contracting party of the General Agreement on Tariffs and Trade (GATT) 1947 and, after it joined the European Communities (EC), as part of the EC common market. The UK as such signed the Marrakesh Agreement Establishing the WTO in 1994, and as of that point with its tariff schedules in GATT 1947 (as the UK, and then as the EC, with a common external MFN tariff schedule). Those schedules were withdrawn and substituted by the common MFN external tariff schedule of the EC, as of 1 August 1994, by a 4 August 1994 notification of the EC to the Director-General of GATT 1947.

As a result, on the entry into force of the WTO on 1 January 1995, by virtue of Article XI:1 of the Marrakesh Agreement, the UK became a founding WTO member, and the UK's (the EC's MFN external common) tariff schedule of GATT 1947 became the UK's GATT 1994 schedule.

In his 7 June remarks in London, the WTO Director-General seemed to suggest that the EU's MFN external tariff schedule, which is the schedule of the UK as an EU member, cannot be mechanically transposed post-separation as the UK schedule. Such a reading of WTO law would lead to the absurd legal situation of the UK as a WTO member enjoying all the membership rights (flowing out of WTO treaty provisions and the schedules of commitments of other WTO members, including the EU) but having no obligations at the WTO.

Another, more credible reading is supported by former Indian Ambassador to GATT B.K. Zutshi, who negotiated the final stages of the Uruguay Round and signed the Marrakesh Agreement in 1994 as plenipotentiary of India, as well as academic Brett Williams. In posts on the International Economic Law and Policy Blog and comments by Williams and the writer, there is confirmation of the writer's view. (See: worldtradelaw.typepad.com/ielpblog/2016/06/whats-the-answer-to-the-variable-geometry-test-brittip.html; and Chakravarthi Raghavan, "Brexit overshadows BIS, world central bankers meet", *SUNS*, No. 8271, 28 June 2016.)

In this view, post-separation, in terms of WTO relations, the UK will continue to remain a WTO member. As a WTO member, the UK will have all the rights and obligations spelt out in the Marrakesh treaty and its annexed agreements.

The UK will also have rights arising out of the commitments of other WTO members, including the EU members, as set out in their various schedules of commitments. These commitments of other members will, post-Brexit, automatically be obligations of theirs to the UK.

As mentioned above, the UK was a founding member of GATT 1947 (with a tariff schedule, and when it became part of the EC customs union, the common external tariff schedule of the EC was thus the UK schedule too) and became a founding member of the WTO and its GATT 1994, with a GATT tariff schedule that was the common MFN external tariff schedule of the EC customs union notified by the EC to the GATT secretariat on 4 August 1994 as effective from 1 August 1994. The other common schedules filed by the EC also became schedules of the UK as a member of the customs union. If the UK separates from the EU without a separation agreement, all these schedules will continue to be UK schedules of commitments vis-a-vis other WTO members, including the EU.

If the UK then wants to reduce the tariff on any product line, it may do so like any other member, through an applied MFN tariff, and may even, after going through the needed procedural notification, amend its tariff schedule downwards and bind it.

However, if the UK wants to raise the level of its bound tariffs, it would need to invoke Article XXVIII of GATT 1994 and undertake renegotiation. Although such a procedure is not envisaged in respect of, for example, minimum imports in terms of the WTO Agreement on Agriculture (AoA) or its commitments under AoA schedules, it might still have recourse by invoking GATT Article XXVIII. For its GATS (General Agreement on Trade in Services) schedule, the UK will have to follow a similar procedure in terms of the equivalent GATS Article XXI, which in some respects is simpler.

The legality, and the balance of rights and obligations, if the issue arises in any future dispute, will be judged, not by the WTO secretariat but through the WTO's dispute settlement processes – by a dispute panel and, on points of law, by the Appellate Body.

The Brexit vote and its aftermath bristle with complications, but the leadership and decision-makers on either side, and international organizations and their leaderships, would do well to exercise patience and goodwill and help in resolution rather than add to the complications and confusion. *(SUNS8276)* ❐