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Developing countries advance WTO reform proposals

A proposal for development-centred WTO reform has gained support from a large number of developing member states of the trade body. The proposal, which among others addresses longstanding imbalances in the multilateral trade rules, injects a developmental perspective into ongoing discussions on WTO reform that have thus far been dominated by proposals seen as sidelining developing-country interests.

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South rallies around proposals to advance developmental agenda

A proposal to highlight development concerns in the ongoing discussions on WTO reform has received backing from a large number of developing countries.

by D. Ravi Kanth

GENEVA: After four years of fractious divisions, amid sustained attempts to hijack the Doha Development Agenda (DDA) negotiations, the developing and least-developed countries have finally rallied around two proposals at the World Trade Organization seeking to advance their developmental agenda as part of WTO reforms.

A "ray of hope" was provided at the WTO General Council meeting on 24 July when the two proposals, "Strengthening the WTO to promote development and inclusivity" and "An inclusive approach to transparency and notification requirements in the WTO", came up for discussion, trade envoys told the *South-North Development Monitor (SUNS)*.

Ever since the WTO's tenth Ministerial Conference in Nairobi in December 2015, the developing countries and least-developed countries (LDCs) had remained divided on one issue or another, said a trade envoy who asked not to be quoted.

If, as evident at the General Council meeting, they can now remain united, they can counter the one-sided narrative on WTO reforms that is being advanced by the United States and other developed countries, the envoy said.

At the meeting, the two proposals tabled by developing countries dominated the proceedings. In contrast, a proposal by the US to introduce differentiation/graduation among developing countries for availing of special and differential treatment (S&DT) was largely rejected by developing countries and LDCs.

Bringing balance

The proposal on "Strengthening the WTO to promote development and inclusivity", which was put forward by Bolivia, Cuba, Ecuador, India, Malawi, South Africa, Tunisia, Uganda and Zimbabwe, was introduced by India. (On the content of the proposal, see the following article in this issue. On the proposal on transparency and notification requirements, see the article "Developing countries propose an inclusive approach to transparency" in this issue.)

India's Ambassador to the WTO J.S. Deepak said the proponents wanted to "bring balance to the ongoing discussions on WTO reform by reaffirming the importance of development to the work of this organization."

"As the original proponents of reforms to correct the asymmetries in the covered [WTO] Agreements, developing Members are more than willing to engage constructively in these discussions," said Deepak.

He expressed sharp concern over "a one-sided narrative" being advanced by major developed countries, especially the US, that disregarded "issues of importance and concern to developing countries" and "erodes the core principles of consensus-based decision making, non-discrimination and S&DT".

Deepak maintained that the recent proposals "to differentiate between developing Members, impose punitive strictures for non-compliance with notification obligations, and do away with S&DT in negotiations on fisheries subsidies are illustrative of the lack of balance in the reform proposals that have been tabled."

"This [one-sided narrative] needs to be remedied and soon," the Indian envoy said, emphasizing that "we need to have on the table reform proposals that reflect the views of developing countries including LDCs."

The proposal circulated by the nine developing and least-developed countries, said Deepak, aimed to "ensure that issues of their interest are not sidelined in ongoing discussions on WTO reform."

The concept paper, said Deepak,

stated emphatically that "the Marrakesh Agreement Establishing the WTO recognizes that international trade is not an end in itself, but a means of contributing to certain objectives including ensuring that developing countries and LDCs secure a share in international trade commensurate with the needs of their economic development." Therefore, discussions on WTO reform "should be premised on the principles of inclusivity and equity, and not serve to widen existing asymmetries in the covered agreements".

Deepak said that preserving the core values of the multilateral trading system with a view to building trust among members must remain the central goal of the WTO members. Consequently, preserving and strengthening the WTO must include:

- Disciplining laws and regulations of WTO members which mandate unilateral action on trade issues that are inconsistent with WTO rules.
- Strengthening the multilateral character of the WTO, especially through the preservation of the practice of decision-making by consensus and respecting Article X of the Marrakesh Agreement on amendments.
- Ensuring that plurilateral joint statement initiatives do not change the fundamental architecture of the WTO.
- Correcting the existing imbalances in the covered agreements as mandated in the Doha Round by building on the work done so far, in accordance with existing mandates.

Deepak went on to elaborate on other aspects such as:

- Resolving the impasse in the WTO dispute settlement system, particularly resolution of the Appellate Body impasse as a central priority in the reform agenda.
- Safeguarding development concerns based on S&DT, which is a non-negotiable, treaty-embedded right for developing and least-developed members.
- Rebalancing the asymmetric rules of the Uruguay Round by strengthening S&DT provisions in accordance with paragraph 34 of the Doha Ministerial Declaration.
- Transparency and notification requirements without any punitive measures and taking into consideration capacity constraints faced by developing countries and LDCs.
- The developed members should lead by example in submitting comprehensive, timely and accurate notifications especially regarding their final bound AMS commitments, Mode 4 market access commitments, Article 66.2 of the TRIPS Agreement, and disclosure of origin of biological resources and associated traditional knowledge in patent applications.
- Transparency should permeate the full spectrum of the operation of the WTO, from its day-to-day meetings to Ministerial Conferences.
- The need to take into account the resource constraints of small country delegations by rationalizing the number of meetings at the WTO to ensure there are no overlaps. In areas where there are active negotiations, these meetings should as far as possible take place in formal mode, including having a minuted record of discussions.

Deepak concluded his statement by emphasizing that "our immediate priority in WTO reforms should be to resolve the ongoing impasse in the Appellate Body and to address the unilateral measures as these pose serious existential challenges for the organization."

Further, "any reforms must be development-centric, preserve the core values of the system, strengthen the provisions of special and differential treatment in existing and future agreements and preserve the multilateral character of WTO," Deepak said.

In response to the joint proposal by the nine developing and least-developed countries, the US said that it would completely reject the proposal seeking "development and inclusivity" by reopening the Uruguay Round agreements, said a trade envoy who asked not to be quoted.

The US further claimed that the Doha Development Agenda negotiations had been closed at the Nairobi Ministerial Conference.

The US trade envoy said the US' own proposal for differentiation/graduation among developing countries in availing of S&DT must be concluded.

The EU did not reject the joint developing-country proposal but said there were several aspects that it could not support.

Several other developed countries such as Canada and Japan adopted a nuanced approach in response to the joint proposal. Among the developed countries, only Norway showed a degree of amenability towards the proposal.

A few middle group developing countries such as Peru said they would support the joint proposal.

Several developing-country coalitions – the African Group, the Africa, Caribbean and Pacific (ACP) Group, and the LDC Group – strongly supported the proposal.

"Similar views"

China's Ambassador to the WTO Zhang Xiangchen commended "India and other co-sponsors for their efforts in putting forward" the joint proposal. He said "China shares similar views on various issues raised in the paper, on which we have clearly expressed our positions in China's proposal on WTO reform."

"In particular, we agree that WTO reform does not mean accepting either inherited inequities or new proposals that would worsen imbalances," the Chinese envoy said, emphasizing that "reforms must be premised on the principles of inclusivity and development."

He said "the priorities for WTO reform must be addressing immediate existential crises including Appellate Body selection impasse and the resort to unilateral measures."

"Also, any reform must reaffirm the principle of Special and Differential Treatment, which is a treaty-embedded and non-negotiable right for all developing members," the Chinese envoy said.

Zhang said he would agree that "the multilateral process remains the most effective means to achieve inclusive development-oriented outcomes, while we may also need to explore different options to address the challenges of contemporary trade realities in a balanced manner."

He said "developing members, including LDCs, are catching up and getting more and more involved in the WTO reform process. This document is a very good example. This kind of effort is extremely important because the WTO reform should never be one-sided but in-

clusive and balanced."

"China will continue working with other members to ensure developing members' voices are not ignored in this process," the Chinese envoy maintained.

Core values

In the closing statement on the joint proposal, South Africa's Ambassador Xolelwa Mlumbi-Peter emphasized that "developing countries have been proponents for the reform of the WTO virtually from the first moment the ink on the Uruguay [Round] Agreements dried as many countries have alluded to."

"The Doha Round was commonly seen as an opportunity to address unfinished business," she said. "However, virtually 20 years to date, we have not been able to cement the Doha issues and there is no agreement regarding the direction of the reform."

She said the WTO members had committed in the Marrakesh Agreement to continuing to make positive efforts to ensure that developing countries, and especially LDCs, secure a share in the growth of world trade commensurate with the needs of their economic development.

Sharply disagreeing with the US position that "the Doha Development Round is dead", the South African trade envoy reminded the US that "decisions in the WTO are reached by consensus and there is no decision by the WTO that declares the Round concluded."

"The trade and development nexus is a recognized principle and development has to be core to the work of the WTO," said Mlumbi-Peter.

"S&DT is a right which is embedded in WTO agreements and has to be preserved and is not subject to the whims of members and abstract prognostications," she emphasized.

Without naming the likes of Brazil and Kenya, the South African envoy said, "We note that there might be WTO members who wish to opt out of S&DT; it is their prerogative to self-declare that they do not require flexibility in implementation of WTO agreements."

However, she said "any attempts to put pressure on members to give up their rights are not acceptable and will continue to be rejected with the contempt it deserves."

The developing countries, she said, have reiterated the view that "WTO reform must preserve the core values and basic principles of this organization, including S&DT and consensus decision making which are critical to preserve the functioning of the multilateral trading system and are important to build trust."

"In this context," she asserted, "as developing countries we continue to be guided by the Doha mandate, [and] in our paper we express the importance of balance, inclusivity and priorities outlined under this mandate."

"The WTO reform agenda cannot be in only one direction as some members seem to suggest," she said, arguing that "there remains a substantial body of unfinished business under the Doha Development Agenda including addressing asymmetries in agriculture, strengthening special and differential treatment, and addressing implementation issues amongst other things."

Further, "the credibility and continued relevance of the multilateral trading system is premised on two essential features – mutual benefit from the system and mutual trust. Also important is the need to ensure that multilateral rules are supportive to the country`s development objectives," she said.

She expressed sharp concern that "the reform is happening without a discussion and consensus about its objectives and expected outcomes."

"In our view, 'WTO reform' does not mean accepting inherited inequities or new proposals that would worsen imbalances," she said, demanding that "reforms must be premised on the principles of inclusivity and development and respond to the underlying causes of the current backlash against trade and the difficulties that developing members continue to face vis-a-vis their industrialization challenges."

Therefore, she said, the two most serious and immediate risks to the relevance of the multilateral trading system are:

- the unprecedented challenges of unilateral trade measures that violate WTO rules and principles and the manner in which national security measures are implemented, which have "taken us into uncharted territory"; and
- the continuing impasse in the Appellate Body selection process threatens the dispute settlement mechanism that is the foundation of a functioning multilateral trading system. Without a resolution by 10 December, the dispute settlement mechanism will be rendered obsolete. In the absence of a functional, effective and independent mechanism for enforcing the rules, negotiating new rules becomes futile.

While the joint developing-country proposal garnered support from many members, the US proposal for introducing differentiation/graduation among developing countries was denounced by many developing countries and LDCs.

The US, said a trade envoy who asked not to be quoted, "remained isolated as there was little support, with the EU offering some conditional support." *(SUNS8955)* ❐

South proposes strengthening WTO to promote development

The joint developing-country proposal on WTO reform aims to "keep development at [the] core" by, among others, redressing existing inequities in the WTO rules and rejecting fresh measures that would further the imbalance.

by D. Ravi Kanth

GENEVA: India, South Africa and seven other developing and least-developed countries have challenged the one-sided WTO reform proposals advanced by the US and other developed countries, and tabled their own proposal for "strengthening the WTO to promote development and inclusivity."

In their five-page proposal submitted to the WTO General Council on 11 July, India, South Africa, Uganda, Zimbabwe, Malawi, Tunisia, Bolivia, Cuba and Ecuador insisted that "a sine qua non for strengthening the system is unblocking the [impasse over filling up] vacancies in the Appellate Body."

"This is an urgent priority since in the absence of a functional, effective and independent mechanism for enforcing rules, negotiating new rules in any area makes no sense," the nine countries said in their proposal.

The United States has been blocking the launch of a process for filling up the vacancies in the Appellate Body (AB), while insisting on fundamental reforms such as differentiation/graduation to deny special and differential treatment (S&DT) flexibilities to more than 30 developing countries, and doing away with the consensus principle for adopting decisions at the WTO.

If the vacancies are not filled, the AB will become dysfunctional on 11 December when it would be reduced to just one member from its current strength of three members. For over two years now, the US has repeatedly blocked new appointments to the AB on the grounds that its concerns about the functioning of the AB have not been addressed.

Inequities and imbalances

Commenting on the wider "crisis of multilateralism", the nine countries in their proposal said "inequities and imbalances in some of the existing multilateral trade rules have provided an inherent advantage mainly to the developed Members."

While "WTO rules such as those on border trade measures have helped developing countries by providing certainty to trade, more often than not, developing Members found themselves constrained from pursuing their development and industrialization objectives due to other rules which have been overly intrusive or imbalanced," the nine countries said.

Among others, they cited the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that provides "monopoly rents" while diminishing the possibility for technology transfer. Then there is the Agreement on Trade-Related Investment Measures (TRIMs) which "has disallowed Members to use local content requirements."

Also, the Agreement on Subsidies and Countervailing Measures has constrained "the policy space developing countries need to nurture their industries" while allowing "advanced economies that have the financial means to provide substantial support to their high-tech, knowledge-intensive industries deemed critical to their future prosperity," the nine countries said.

Moreover, the Agreement on Agriculture has allowed "developed countries to continue their high subsidies on agriculture products, including those exported to developing countries, impacting [the latter's] small farmers' livelihoods and food security."

"This has been compounded by the lack of inclusiveness and transparency in the process of WTO negotiations," the nine countries said.

Despite repeated proposals and demands for "certain reforms in the WTO since 1996 in an effort to address asymmetries and bring balance to the WTO rules, as well as create more policy space for themselves to pursue development and to use the same policy tools as developed countries to industrialize," there has been little progress, said the nine.

"The reform agenda put forth by developing Members was incorporated into the Doha Development Agenda in 2001," they noted. This included "the strengthening of special and differential treatment provisions, implementation issues [and] addressing the existing asymmetries in the WTO agreements, particularly in agriculture with a view to facilitating the realization of the SDGs [Sustainable Development Goals] on food security and alleviation of rural poverty". But the reform agenda of the developing countries has been repeatedly undermined on extraneous considerations, the nine countries said.

According to the nine countries, "increasingly the WTO is moving away from the principles entailed in the Marrakesh Agreement and the negotiations mandate contained in the Doha Development Agenda which sought to place the needs and interests of developing countries at the heart of the Work Programme."

Without naming the US and other developed countries, the nine countries maintained that "in recent months, some Members have suggested a broad range of reforms at the WTO including a slate of new rules, even though existing mandates from the DDA [Doha Development Agenda] remain unaddressed."

"'WTO reform does not mean accepting either inherited inequities or new proposals that would worsen imbalances," the developing-country proponents said.

Therefore, "reforms must be premised on the principles of inclusivity and development and respond to the underlying causes of the current backlash against trade and the difficulties that developing Members continue to face vis-a-vis their industrialization challenges," they stressed.

Core principles

To start with, the reforms must preserve core principles of the multilateral trading system by amending "laws and regulations of WTO Members which mandate unilateral action on trade issues that are inconsistent with WTO rules." Such amendments, the nine countries argued, "will ensure that WTO Members are not perpetually under the threat of unilateral action on trade issues by some Members."

The nine countries emphasized that the rules in the Marrakesh Agreement must be respected, pointing out that the following rules remain fundamental:

- Articles II and III (of the Marrakesh Agreement) on the multilateral functions of the WTO;
- Article IX on the continuation of the practice of decision-making by consensus;
- Article X – when there are amendments to WTO rules, there must be consensus, followed by ratification by Members. New rules enter into force only when the ratification numbers required have been attained.

Further, "multilateral avenues, based on consensus, remain the most effective means to achieve inclusive development-oriented outcomes," the nine countries argued.

Commenting on the informal Joint Statement Initiatives for plurilateral negotiations launched at the WTO's eleventh Ministerial Conference in Buenos Aires in 2017, the nine countries demanded that "provisions governing plurilateral agreements in the Marrakesh Agreement must be adhered to."

"If they are to be multilateral agreements, the outcomes of these initiatives, by way of new rules, can be introduced into the WTO when there is consensus," the nine maintained, arguing that "Article X of the Marrakesh Agreement on amendments must govern any changes

or additions to the WTO Agreement."

There is also an urgent "need to address the implementation issues (correcting the imbalances in WTO Agreements) as mandated in the Doha Round and also build on the work done so far in negotiations, in accordance with existing mandates," the nine countries said.

For "resolving the dispute settlement issues," the nine countries said, "a functioning, independent and effective dispute settlement system is indispensable for preserving the rights and obligations of all WTO Members and for ensuring that the rules are enforced in a fair and even-handed manner. Without such a system, there would be no incentive to negotiate new rules or to undertake reforms."

"Therefore, resolution of the Appellate Body impasse needs to precede other reforms," the nine countries emphasized.

Citing Articles 17.1 and 17.2 of the WTO's Dispute Settlement Understanding (DSU), the nine countries said "all WTO Members have a collective duty to ensure the maintenance of a standing Appellate Body comprising of seven members."

Without naming the US, the nine countries said "it would be disingenuous to use the pretext of the Appellate Body's alleged digression from the clear mandate of the DSU to justify wilful non-compliance with the same by the Membership."

It is important that the current "attempts at addressing the crisis in the dispute settlement system must preserve its essential features, namely an independent, two-tier dispute settlement system, automaticity in the launch of proceedings and decision-making by the Dispute Settlement Body (DSB) by negative consensus, where provided," the nine countries argued.

"Developing Members' concerns about affordability and equitable access to the use of the dispute settlement system are also very important," they maintained.

Development issues

Under the subject heading of "safeguarding development concerns", the nine countries in their proposal asserted that S&DT "is a treaty-embedded and non-negotiable right for all developing Members."

Countering the US proposal to deny S&DT to many developing countries through differentiation/graduation, the nine developing countries said "the preservation and strengthening of the [S&DT] provisions in both current and future WTO agreements, with priority to outstanding LDC issues", must remain at the centre of the WTO work.

It is important that the "multilateral trading system must give policy space for developing Members to fulfil their development goals including industrialization" with enhanced S&DT provisions.

The nine countries also argued that "the long-awaited outstanding 'development' issues from the Doha Round continue to be paramount", including:

- implementation issues – aimed at rebalancing the imbalanced rules from the Uruguay Round such as in the areas of agriculture, TRIMs, TRIPS, subsidies etc.;
- S&DT – strengthening and making effective and operational the S&DT provisions in WTO agreements, in accordance with paragraph 44 of the Doha Declaration;
- cotton – the imbalances in agriculture domestic support due to AMS beyond *de minimis* leading to subsidized exports by some, show up clearly in the area of cotton, where cotton prices have been depressed. This has impacted negatively on rural livelihoods and employment across many developing countries;
- public stockholding (PSH) – a permanent solution must be agreed upon and adopted. According to the WTO General Council decision of 27 November 2014, "If a permanent solution for the issue of PSH is not agreed and adopted by the 11th Ministerial Conference, the mechanism ... shall continue to be in place until a permanent solution is agreed and adopted";
- Special Safeguard Mechanism (SSM) – the Nairobi Ministerial Conference mandated Members to "pursue negotiations on an SSM for developing country Members in dedicated sessions of the Committee on Agriculture in Special Session";
- agriculture domestic support – to rectify the imbalances in the existing rules due to some Members having AMS (Aggregate Measurement of Support) entitlements whilst others do not. High per-farmer subsidies by developed countries with huge flexibility continue to have serious implications on food insecurity and rural poverty in developing countries.

The developing-country proposal also underlined the need to address the following issues in any reform process:

- fisheries subsidies – the Doha, Hong Kong and Buenos Aires Ministerial Declarations all emphasize the importance of S&DT in the outcome of the negotiations on fisheries subsidies because of the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns. SDG 14.6 also reinforces S&DT;
- discussions under the 1998 e-commerce work programme in the relevant WTO bodies;
- the alleged theft of traditional knowledge that is held, preserved and developed by traditional communities/ indigenous people;
- the rules of the multilateral trading system must also support developing countries in building their technological capacities, and their access to affordable medicines and medical technologies.

The nine countries added that the SDGs have articulated "important development challenges still confronting developing countries, including overcoming poverty and hunger. WTO rules must be supportive, rather than a constraint to these efforts."

Transparency and notification

In the area of transparency and notification reforms, the nine countries demanded improvements in the following notifications:

- regular notification of entry-related measures affecting existing Mode 4 commitments of Members;
- Article 66.2 of the TRIPS Agreement – developed countries have a legal obligation in the area of technology transfer towards LDCs. More transparency would be supportive of LDCs' efforts to build a viable technological base;
- disclosure of origin of traditional knowledge and genetic resources in patent applications;
- transparency in tariffs – non-*ad valorem* tariffs should be notified in *ad valorem* terms or converted to *ad valorem* tariffs.

Further, the nine countries demanded that "transparency must permeate the entire functioning of the WTO", including as follows:

- Taking note of the resource constraints of small delegations and thus rationalizing meetings at the WTO so that there are no overlaps. In areas where there are active negotiations for outcomes, these meetings should as far as possible take place in formal mode. They

should always be open, inclusive and transparent and take seriously the resource constraints of developing countries.

- The basic principles and procedures for Ministerial Conferences and the processes preceding them in Geneva need to be agreed upon. For instance, all meetings in the Ministerial Conference, which is the body for decision-making, should be open to all Members without restricting the decision-making process to smaller "Green Rooms".

In short, the nine countries said, any reforms at the WTO must "keep development at its core through delivering on the long-promised development concerns, in particular the outstanding development issues of the DDA", while addressing "the asymmetries in WTO Agreements such as those in Agriculture and other areas".

The WTO reforms, the nine countries argued, must also "strengthen the multilateral character of the WTO, especially preservation of consensus decision-making and respecting Art. X of the Marrakesh Agreement on Amendments."

"Last but most importantly, reform must reaffirm the principle of Special and Differential Treatment, which is a treaty-embedded, non-negotiable right for all developing countries in the WTO, and promote inclusive growth, widening spaces for states to pursue national development strategies in the broad framework and principles of a rules-based system," the nine countries concluded. *(SUNS8946)* ❐

Developing countries propose an inclusive approach to transparency

Pointing to the difficulties they face in complying with requirements to notify their trade measures to the WTO, a group of developing countries have urged an "inclusive and cooperative approach" to the issue instead of punitive actions against non-compliance.

by D. Ravi Kanth

GENEVA: The developing and least-developed countries have coalesced around a joint proposal that calls for an inclusive approach to transparency and notification requirements at the WTO.

At the WTO General Council meeting on 24 July, the developing countries led by South Africa drove home a strong message that while they acknowledge the importance of prompt "transparency and notifications", there is a crying need to take into consideration "capacity constraints that developing countries are facing."

South Africa's trade envoy Ambassador Xolelwa Mlumbi-Peter, who introduced the joint proposal by the African Group, Cuba and India, said "transparency is not only a developing country issue, developed countries must lead by example by submitting comprehensive, timely and accurate notifications."

The developing countries demanded that "transparency should also permeate every aspect of the operation of this organization, including how meetings are convened and the conduct of Ministerial Conferences."

Mlumbi-Peter urged her counterparts from the US and other developed countries to adopt "a developmental and inclusive approach to transparency."

The US along with other developed countries and some developing countries have put forward a separate proposal which calls for enhanced transparency and notification requirements – including punitive and naming and shaming provisions for non-compliance – to stop what they call "wilful non-compliance" by many WTO Members.

Mlumbi-Peter highlighted the difficulties faced by developing and least-developed countries in complying with transparency and notification requirements, saying that the inability of many of them to fulfill their notification obligations does not and should not equate to wilful neglect of multilateral obligations.

For example, she said, some notifications are complex and require detailed data, which exceeds the capabilities of members due to the lack of central databases containing all the legislation, statistics and data for different government agencies. Non-compliance relates to the lack of proper infrastructure and limited institutional capacity.

While technical capacity and support provided by the WTO secretariat is very important, she said, it should be reviewed to make it more targeted to specific constraints facing members.

Mlumbi-Peter called for a cooperative approach whereby developing countries are incentivized to comply with their notification obligations. She denounced "punitive approaches" as proposed by the US and its allies for non-compliance with notification requirements.

The developing-country proposal underscored the need for "constructive and effective solutions based on the nuancing of obligations in the context of an S&DT approach," maintaining that "punitive approaches to enforce notification and transparency obligations are not acceptable."

Holistic approach

"Transparency is not only limited to notifications but should permeate all aspects of the function of the WTO," South Africa said on behalf of the proponents.

The developing countries want "a holistic approach to transparency", Mlumbi-Peter said, arguing that transparency should underpin "how an organization like the WTO is run, including the day-to-day function of the WTO, Ministerial Conferences, decision-making processes, including the organization of various types of committee meetings to ensure effective participation and that the process is inclusive."

She said that transparency issues arise because some discussions take place in small committees, informal open-ended meetings, Green Rooms etc. "Such practices limit the ability of developing country Members to effectively participate in important deliberations," she argued.

Mlumbi-Peter also drew attention to the non-compliance by developed countries with notification obligations in various areas, including regarding final bound AMS commitments in agriculture and notification obligations under Article III.3 of the WTO's General Agreement on Trade in Services (GATS), in which developing countries have a much better notification record than major developed countries. Other concerns remain around

GATS Mode 4.

In addition, Article 66.2 of the TRIPS Agreement is another area where more transparency could assist the promotion of technology transfer to LDCs. Further, the TRIPS Agreement establishes an obligation for Members to require patent applications to disclose the origin of biological resources and/or associated traditional knowledge, including prior informed consent (PIC) and access to benefit sharing (ABS). However, despite a long discussion in the TRIPS Council in Special Session, no outcome has been produced on this important issue.

Mlumbi-Peter reiterated that it is not in developing countries' interests to expand their notification obligations under the existing WTO agreements. She called for "a solutions-based, development-oriented, inclusive and cooperative approach to transparency" that takes the following into account:

- In so far as obligations undertaken under the Marrakesh Agreement and its annexes are concerned, treaty obligations must be performed in good faith. Having said this, it is clear that the obligation to comply is not blind to the situation that a particular Member or groups of Members may find themselves in.
- Simplification of notification formats and longer timeframes to comply with notification periods would assist developing countries, while LDCs should not be subject to any notification except in areas where they may have interest.
- Any work in this area should be on supporting and incentivizing developing countries to address these difficulties, while punitive approaches as suggested by some will not resolve such capacity constraints and will tend to target Members who are already not able to comply and who remain under financial administrative measures currently.

While a large majority of developing countries, including China, strongly endorsed the joint proposal by the African Group, Cuba and India, the developed countries raised concerns, saying that it does not address the fundamental issues concerning non-compliance. *(SUNS8955)* ❐

Reclaiming development in the WTO

A recent panel discussion underlined the imperative of prioritizing the development objective in the WTO's work – and of safeguarding the flexibilities accorded to developing countries in the WTO rulebook. *Kanaga Raja* reports.

GENEVA: Development must be at the centre of the WTO work programme and special and differential treatment (S&DT) must be preserved in order to allow developing countries the space to formulate their domestic trade policies in a way that would allow them to reduce poverty, industrialize and integrate meaningfully into the global trading system.

The reform of the WTO will be doomed to failure if it fails to put development at the centre and continues to ignore the needs of developing countries on S&DT.

These were among the main conclusions highlighted by panellists at an event co-organized by South Africa and India on 2 July at the WTO. The theme of the high-level panel discussion was "Reclaiming Development in the WTO."

The panellists included Ambassador Francois Xavier Ngarambe of Rwanda, who is also Chair of the WTO Committee on Trade and Development in Special Session; Ambassador Zhang Xiangchen of China; Ambassador Diego Aulestia Valencia of Ecuador; Ambassador J.S. Deepak of India; and Richard Kozul-Wright, Director of the Division on Globalization and Development Strategies at the United Nations Conference on Trade and Development (UNCTAD).

The panel discussion was moderated by Ambassador Xolelwa Mlumbi-Peter of South Africa.

Coordinating positions

In her opening remarks, Mlumbi-Peter noted that this panel discussion was a continuation of a process launched at a meeting of developing-country trade ministers in New Delhi in May which agreed that developing countries needed to coordinate positions in the WTO to ensure that the discussions around WTO reform would enable them to promote inclusive growth and sustainable development.

She said that the multilateral trading system from the early days of the General Agreement on Tariffs and Trade (GATT) had recognized the differences in the level of development between developing and developed countries. It ensured that S&DT was one of the cornerstone principles of the multilateral trading system, and it was still an important principle that needed to be preserved for both current and future negotiations.

She said that the aim of the principle was to ensure that negotiated outcomes at the WTO take into account the differences in capacities of developing countries and also give policy space to developing countries to integrate and calibrate trade integration in a way that supports development, employment creation as well as poverty reduction.

"It is why in 1979 the Enabling Clause was negotiated so that we can take into account those differences in levels of development," she said.

The South African trade envoy emphasized that the enormous development divide between developing and developed countries when the Enabling Clause was integrated into the GATT was still as relevant today as it was back then.

Highlighting the old divides that were still there and the new divides that were emerging in the context of the digital economy, she underlined that any attempts at ignoring the importance of development and the developmental agenda, and the importance of flexibilities needed by developing countries in international trade, were "ill advised".

It would also make the negotiation of future agreements in the WTO very difficult because developing countries were able to undertake their commitments under trade agreements due to the necessary safeguards in the form of the flexibilities available to them, she said. "If those [flexibilities] are taken away, it will be difficult to then conclude new agreements. It will actually undermine the negotiating function of the WTO."

No progress

Ambassador Francois Xavier Ngarambe then reported on the negotiations in the WTO Committee on Trade and Development in Special Session which he chairs. (The Committee on

Trade and Development in Special Session is mandated to review S&DT provisions with a view to strengthening them and making them more precise, effective and operational.) On the status of the negotiations, he simply said, "No progress. [There is] nothing happening, [and] nothing to report."

He added that this had been the reality even before he assumed chairmanship of the committee.

It was high time that members sit and conduct deep analysis on how one of the most important founding principles, very clearly written in the Marrakesh Agreement, was simply ignored, he said. "It is not forgotten by accident. There is a determination by some to kill that objective. That is how things are serious. It is not an oversight. It's a political will by some to not progress on the development front."

Ngarambe noted that since the early GATT years and throughout various rounds of trade negotiations, it had been recognized that a certain degree of discrimination was necessary to create a level playing field for the weaker members of the organization – the very definition of S&DT which had been a defining feature of the multilateral trading system.

He said that following his election as Chair of the Committee on Trade and Development in Special Session, he had initiated a process of bilateral one-on-one consultations with key players representing all geographical regions in his quest for seeking clarity on the way forward. Reporting to the WTO Trade Negotiations Committee in May, he had said that he had not sensed any shift in members' positions. He had also reported that there was no declared or open disagreement among members on the centrality of development in the WTO and the role that WTO rules could play in enhancing it.

However, conceptual differences continued on how to achieve this objective, he said, pointing to two extreme views. For some, S&DT was now out of the question and a topic of the past. There was to be no more S&DT in current or future agreements, according to this view, under which S&DT and development were two different things.

The other position, said Ngarambe, held that S&DT was part of the founding agreement, and that S&DT was an entitlement for all developing countries, among which there should be no discrimination irrespective of their level of development.

A contested process

UNCTAD's Richard Kozul-Wright presented the main findings from a new UNCTAD research paper titled "From Development to Differentiation: Just how much has the world changed?" (see box next page).

He explained that development was a complex multi-dimensional process, which made it difficult to measure as a consequence. Development, he said, was a question of structural change. Structure was where the obstacles to development lay, the constraints on development, the gaps in the development process, and the thresholds that had to be crossed to move from being developing to developed.

He also said that in an interdependent world, development was never simply a local process. "You can never understand development simply by looking at what's going on within the country itself." In that context, "catching up" was a major challenge of the development process. Closing the gap on those countries that were clearly developed was integral to the discussion of what was development.

Development was also about the means and ends, particularly how means were connected to ends, he added. This raised issues of policy and of attitudes of institutions as being central to the question of what was development.

As to where trade fit into the story of what was development, Kozul-Wright said that trade was clearly a means to development and not an end. He said that trade policy – the connection between means and ends – was highly contested terrain and had been across the entire postwar period. Moving from the Havana Charter to the General Agreement on Tariffs and Trade (GATT) was a highly contested process.

Kozul-Wright noted that a report commissioned by the GATT in the late 1950s as a first attempt to put development into the GATT was highly contested and led to some extent to the establishment of UNCTAD as an alternative way of thinking about the relationship between trade and development.

The shift from the New International Economic Order to the Uruguay Round was also a highly contested process, he said, as was the move from the "Singapore issues" to the Doha Development Agenda. "And where we go next is also a highly contested process," said Kozul-Wright.

He said: "What particularly concerns us is that trade policy in the last 30 years has been linked with efforts to reduce or indeed remove development from the multilateral discourse."

Pointing to the inherent hypocrisy in the "do as I say, not as I did" approach, he said it was clear from the work of Ha-Joon Chang and other economic historians that countries, including the middle-income countries, had successfully used inflation, the role of the state and import substitution as part of their development strategies. The largest user of tariffs in the history of modern capitalism was the United States. When it was a middle-income country at the end of the 19th century and in the early 20th century, it had historically high levels of tariffs as a way of building up its own productive capacity to meet the challenges of the more developed countries in Western Europe at the time.

"Ultimately our understanding of the challenges around trade policy and managing trade is that we live in a second-best world at best," said Kozul-Wright. "And in a second-best world at best, policy space matters a lot to countries having the tools and the means to meet the kinds of challenges that we see in the international trading system."

Policy space and the fight for more policy space was being linked to other means of levelling the playing field including S&DT, as a way of trying to handle these potential challenges in a way that moves developing countries forward, said Kozul-Wright.

Chinese Ambassador Zhang Xiangchen agreed that the panel discussion was a continuation of the dialogue from the New Delhi ministerial meeting in May. He also noted that China had held in June a retreat among developing countries in Geneva on the issue of WTO reform.

He pointed to a recent paper put for-

UNCTAD study makes case for continued S&DT

The UNCTAD research paper "From Development to Differentiation: Just how much has the world changed?" traces the history and reasons for the emergence of special and differential treatment provisions in the trade negotiations, and examines various development indicators in order to assess whether the developing world has evolved to the extent that a change in this basic principle of the multilateral trading system is required.

The paper (UNCTAD Research Paper No. 33, June 2019) argues that the economic and social gaps between developed and developing countries remain significant despite the gains in some countries over the last quarter-century.

Moreover, the policy challenges of the 21st century facing all parts of the developing world, including those triggered by the growing digital divide and environmental degradation, are mounting just as the commitment of advanced economies to international development cooperation is waning.

The paper concludes that development goes much beyond trade and includes multiple economic, social and environmental challenges and their interaction, the consequences of which can only be fully assessed by countries themselves which should, consequently, be allowed to self-declare their development status.

Persistent gaps

Examining the economic gaps that continue to divide developed from developing countries, the paper argues that these remain significant despite the gains in some countries over the past 25 years.

The fact that some gaps have closed (and some widened) more than others does not provide the basis for removing the designation "developing" as a useful way of examining the persistent gaps, biases and asymmetries in the global economy and the daunting policy challenges those countries are facing in the 21st century.

Aggregating these trends into a single composite measure of development is impossible since development is a multi-dimensional challenge, including economic, social and environmental areas, as also noted in the 2030 Agenda for Sustainable Development, said the paper.

The paper said that based on the higher World Bank poverty benchmark of $5.50 per day, it can be seen that the number of people below the poverty line has not declined in the world (excluding China) and that China itself still has a long way to go to eliminate poverty. Also, excluding China, the decline in the number of people below the poverty line in the world is much smaller using the $1.90 and $3.20 benchmarks.

Moreover, many scholars have argued that even the higher World Bank benchmark is an underestimation of the global poverty challenge. According to Jason Hickel, if global poverty is measured at $7.40 per day, the number of people living under this line is estimated to have increased dramatically since measurements began in 1981, reaching some 4.2 billion people in 2018. The Harvard economist Lance Pritchett suggests that a more realistic figure should be between $10 and $15 per day, adding to the poverty challenge everywhere in the developing world.

According to the UNCTAD paper, trends in the UN Development Programme (UNDP)'s Human Development Index (HDI) also confirm the wide gap between developing countries and developed countries. Even the large developing countries like China and India rank 86 and 130 among 189 countries in the HDI.

The absolute income gap between China and the US continues to remain wide and, on some measures, is widening; and catching up with developed countries, i.e., moving from lower to middle and from middle to higher income groups, has become even more difficult in the recent period of globalization.

Given these various trends and future challenges, and given the commitment of the entire international community, including its most advanced members, to achieving a more inclusive world by 2030, there are no grounds for changing the terms on which special and differential treatment has been agreed for developing countries, said the paper.

Indeed, if anything, in light of the ambition of the 2030 Agenda, the call should be for more not less, it argues. Developing countries may be at different stages of development, but they continue to face the same biases and asymmetries in the global economy and similar development challenges.

The question of whether countries should be allowed to self-declare their development status or not brings focus on a more fundamental issue: Does the WTO, which is essentially a trade-rulemaking organization with trade delegates, have the capacity to define and measure development? Unlike the UN, the WTO is not a development agency.

The presence of this flexibility has allowed the WTO negotiations to move forward and built confidence of developing countries that they will be able to adapt the negotiated rules to their local specificities. And only developing economies themselves have adequate knowledge of their local conditions to decide whether they should be categorized as developing members to avail of S&DT or not.

The paper suggested that differentiating between developing countries on a subset of criteria would therefore be a skewed exercise which may cause further problems in concluding the Doha Development Round in the WTO, which needs to be prioritized if trust in the multilateral trading system is to be restored and a path to move forward found to meet the many other challenges facing the international community in the 21st century. *(Kanaga Raja/SUNS8940)* ❐

ward by China, India, South Africa and other developing countries which argued that development was a centrepiece of the WTO and that S&DT was legitimate for all developing members.

Zhang said that WTO reform should put development at the centre. In 2001, for the first time, the WTO put development at the centre of the multilateral trade negotiations, with the launch of the Doha Development Agenda. "Unfortunately, we failed to achieve the objec-

tive of the Doha Development Agenda" and the central element of S&DT when enacted in many aspects of the negotiations, he said.

He pointed out that S&DT was not a form of charity granted to developing countries but was "an outcome of our long-term struggle, and it is not something like a magic bullet."

"It is not a big benefit that we get from the multilateral trading system. Actually it's just a minimum condition that we need to participate in the multilateral trading negotiations. So, we need to preserve our legitimate right," he said.

"Of course, we recognize the different levels of development among developing countries. But it is up to us to make a decision when, what and how to get this special treatment and to what extent we can make a contribution in the future of the negotiations."

Referring to proposals by some WTO members to discuss new rules on industrial subsidies, Zhang said China could not go along with the view held by some that the current trade tensions were due to the so-called non-market economy regime of China and support to its own industries.

He explained that developing countries including China were at the low end of the global value chain. "Of course, it is our legitimate right to support our industry, to have them … better integrated into the global value chain, but our capacity to support our industry is limited, and the impact of this kind of support is also limited. So, that is the reason why we cannot go along with this logic, this narrative, [that] the current trade war is because of China."

Instead, according to Zhang, the trade tensions had their roots in the failure of some developed countries to address their domestic problems. These countries failed to help the sections of their population who were in a difficult position and now wanted to shift the focus to international trade and find a scapegoat, with China serving as this scapegoat.

While it was mainly China that was being targeted at the moment, said Zhang, this would have systemic implications on other developing countries. The latter's strategies to achieve their objective of industrialization would be restricted if the rules on industrial subsidies were tightened.

"That is the reason why we ask the developing countries to look at this kind of proposal carefully from the development perspective, and to reject those proposals which will have negative impact on our policy space," he said.

On the issue of transparency, Zhang said this was an obligation for all members, both developed and developing. For the smaller developing members, what was needed was to help and encourage them to improve their notifications, but not to punish them. "We cannot go along with this so-called financial punitive approach," he said.

On the "new issues" such as the Joint Statement Initiative on e-commerce, Zhang said the developing countries also had defensive interests and concerns such as the digital divide. He said that China chose to join the e-commerce initiative in order to participate in the discussions with the demandeurs.

"We think that maybe we can achieve a balance between technology and digital development and the legitimate public [policy] objective of the developing countries," he said, adding that China had the same or similar concerns as India.

"It is our legitimate right to protect our valuable data. But how to achieve this objective, we have a different approach," he said. "I said on [another] occasion that maybe I'm naive but I am not stupid. I'm naive because I want to try to see if we can achieve this balance or not. I'm not stupid because I know where I need to stop. If I recognize I couldn't achieve my legitimate objective, I will walk away from the table."

He concluded by saying that "if we fail to put development at the centre, if we continue to ignore the need of developing members on S&DT, the reform of the WTO is doomed to failure."

Search for development

Ambassador Diego Aulestia Valencia of Ecuador said that WTO reforms had to be sought in terms of increasing the importance of development. He said that S&DT was central to the multilateral trading system and was needed to decrease the gap between developed and developing countries.

"We need to reclaim development in the discussions. The intended reform [of the WTO] needs to be guided by a true search of development," he stressed.

Ambassador J.S. Deepak of India said the developing members were more than willing to engage constructively in the discussions on WTO reform. However, the reform agenda being propagated by some developed members sought to push a one-sided narrative with disregard for issues of importance and concern to developing countries, and would erode the core principles of consensus-based decision-making, non-discrimination and S&DT.

"We need to have on the table proposals that reflect the views of developing countries including LDCs," said Deepak. "Without balance, the idea of WTO reform will be dead as a dodo."

He said the US had employed selective economic indicators to argue that there had been significant re-ordering among countries. "However, while developing countries have achieved progress on some economic indicators since the inception of the WTO, the old gaps in the levels of development are far from being bridged and, in some areas, have even widened. Further, new divides especially in the digital and technological spheres which are the new engines of growth … are becoming more pronounced."

Deepak said the claim that many developing countries no longer needed S&DT rested to a considerable extent on the poverty statistics. This methodology, as pointed out by the UNCTAD paper, had major flaws.

He said studies on the correlation between poverty reduction and rural development gains showed that reduction in poverty trends did not provide any basis for pronouncing an end to the development challenge and reclassifying countries on such a basis.

If economic indicators were to be used to gauge the development level of a country, these must be per capita indicators because the essence of development was the human being, he said. On a per capita basis, developing countries differed greatly from developed countries.

Highlighting some startling figures, Deepak pointed out that India was home to 35.6% of the world's poor, compared with 38% in all LDCs put together. During the period 2010-17, India's per capita GDP on average was 2.9% that of the US. Approximately 61.5% of India's population were dependent on agriculture for their livelihood, and yet data from 2016 showed that domestic support per

farmer in the US was 267 times that of India.

In view of this stark development divide, it would be grossly unfair and iniquitous if a country like India were required to undertake the same obligations as developed countries, he said, adding that other developing members faced similar challenges.

He added that access to broadband, which was the basis for a number of 21st-century growth engines like e-commerce, was the broadest indicator for measuring digital development. From 2007 to 2016, mobile broadband penetration increased from 19 percentage points to 90 percentage points in developed countries, as compared with an increase from one percentage point to 41 percentage points in developing countries.

Given the clear empirical data on the challenges faced by developing countries in various stages of development, there were no grounds for diluting S&DT, the Indian envoy underlined. Indeed, if anything, in light of the imprecise, unenforceable and best-endeavour nature of existing S&DT obligations in the WTO agreements, the call should be for more, not less, S&DT.

Deepak said S&DT was indispensable for allowing all developing members the space to formulate their domestic trade policy in a way that helps them to reduce poverty, industrialize, generate employment and integrate meaningfully into the global trading system.

He also pointed out that the self-declaration of development status was a longstanding practice going back to the early days of the GATT, and therefore became part of the customary practices to be followed by the WTO within the meaning of Article XVI of its foundational Marrakesh Agreement.

Depriving developing members of the policy space that was a right and that was enjoyed by each developed member in the latter's process of structural transformation and economic growth – something so well illustrated by the statistics and data presented in the UNCTAD paper – would be a gross violation of the basic tenets of equity and justice and would strike at the very legitimacy of the rules-based system, said Deepak.

Only developing economies themselves had adequate knowledge of the local conditions to decide whether they should be categorized as developing members to avail of S&DT or not, he said.

"There is no 'one size fits all' definition of development, and therefore attempts at differentiating between developing members based on arbitrary and selective criteria would be a certain recipe for intractable deadlock in the negotiations," Deepak cautioned.

"We need to be clear that all developing countries including LDCs will benefit from the provisions of S&DT, which is a fundamental pillar of the Marrakesh Agreement. We cannot give up on this."

Emphasizing the need for unity among developing countries in taking the agenda forward, Deepak said "we need to be clear that unless we hang together, we are likely to hang separately." *(SUNS8940)* ❐

Trump declares "trade war" against South on S&DT

Even as proposals for development-friendly WTO reforms are being tabled, the US has stepped up its push to deny many developing countries continued recourse to special and differential treatment at the trade body.

by D. Ravi Kanth

GENEVA: The United States President has declared a trade war over special and differential treatment availed of by developing countries at the WTO, threatening the likes of China, India, South Africa and Indonesia to give up S&DT in the current and future trade agreements negotiated at the WTO.

"The WTO is BROKEN when the world's RICHEST countries claim to be developing countries to avoid WTO rules and get special treatment. NO more!!!" President Donald Trump tweeted on 26 July.

"Today I directed the US Trade Representative to take action so that countries stop CHEATING the system at the expense of the USA!" Trump wrote.

Presidential memorandum

Coinciding with the president's remarks, the White House issued a detailed memorandum which, among others, stated that "although economic tides have risen worldwide since the WTO's inception in 1995, the WTO continues to rest on an outdated dichotomy between developed and developing countries that has allowed some WTO Members to gain unfair advantages in the international trade arena."

The presidential memorandum claimed that "nearly two-thirds of WTO Members have been able to avail themselves of special treatment and to take on weaker commitments under the WTO framework by designating themselves as developing countries."

Apparently adopting a divide-and-rule strategy, the memorandum said "while some developing-country designations are proper, many are patently unsupportable in light of current economic circumstances."

It said "7 out of the 10 wealthiest economies in the world as measured by Gross Domestic Product per capita on a purchasing-power parity basis – Brunei, Hong Kong, Kuwait, Macao, Qatar, Singapore, and the United Arab Emirates – currently claim developing-country status." Further, "Mexico, South Korea, and Turkey – members of both the G20 and the Organization for Economic Co-operation and Development (OECD) – also claim this status."

The memorandum said that "when the wealthiest economies claim developing-country status, they harm not only other developed economies but also economies that truly require special and differential treatment."

It added that "such disregard for adherence to WTO rules, including the likely disregard of any future rules, cannot continue to go unchecked."

The memorandum suggested that "China and too many other countries have continued to style themselves as

developing countries, allowing them to enjoy the benefits that come with that status and seek weaker commitments than those made by other WTO Members."

However, even a cursory glance at the commitments undertaken by China upon joining the WTO in 2001 would clearly show that Beijing had agreed to substantial commitments in market access and rules which are closer to those applying to developed countries.

The White House memorandum also stated that "these [developing] countries claim entitlement to longer timeframes for the imposition of safeguards, generous transition periods, softer tariff cuts, procedural advantages for WTO disputes, and the ability to avail themselves of certain export subsidies – all at the expense of other WTO Members."

As part of the S&DT provisions, developing countries are allowed longer time periods for implementing WTO agreements and commitments, a lower level of commitments based on what is called "less than full reciprocity", and measures to increase trading opportunities.

The Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries – which is called the Enabling Clause in trade jargon – further concretized the S&DT framework at the end of the Tokyo Round trade negotiations in 1979.

Turning a blind eye to these treaty-embedded provisions that have been concluded in various rounds of GATT negotiations, the memorandum claimed that "these [developing] countries have also consistently sought weaker commitments than other WTO Members in ongoing negotiations [fisheries subsidies negotiations], which has significantly stymied progress."

Denouncing the self-designation rule for availing of S&DT, the memorandum maintained that "many of the world's most advanced economies have used developing-country status as an excuse not to comply with the most basic notification requirements under WTO rules, depriving United States traders of vital trade data. The status quo cannot continue."

The memorandum went on to suggest that "the WTO is in desperate need of reform, without which the WTO will be unable to address the needs of workers and businesses or the challenges posed by the modern global economy."

Claiming that the US has already demanded reforms in other international organizations, it expressed concern that "with respect to the WTO, there is no hope of progress in resolving this challenge until the world's most advanced economies are prepared to take on the full commitments associated with WTO membership."

US measures

The US, according to the memorandum, will leave no stone unturned "to make trade more free, fair, and reciprocal by devoting all necessary resources toward changing the WTO approach to developing-country status such that advanced economies can no longer avail themselves of unwarranted benefits despite abundant evidence of economic strength."

In the memorandum, the president directed the US Trade Representative (USTR) to, "as appropriate and consistent with applicable law, use all available means to secure changes at the WTO that would prevent self-declared developing countries from availing themselves of flexibilities in WTO rules and negotiations that are not justified by appropriate economic and other indicators."

The memorandum further suggested that the USTR "shall pursue this action in cooperation with other like-minded WTO Members."

The European Union, Japan, Canada, Australia and several other industrialized countries, barring Norway, will press ahead with seeking differentiation/graduation among developing countries in availing of S&DT, said trade envoys who asked not to be quoted.

If the developing countries fail to forgo S&DT within 90 days, then, according to the memorandum, the US will "(i) no longer treat as a developing country for the purposes of the WTO any WTO Member that in the USTR's judgment is improperly declaring itself a developing country and inappropriately seeking the benefit of flexibilities in WTO rules and negotiations; and (ii) where relevant, not support any such country's membership in the OECD."

The USTR will also resort to naming and shaming provisions in case the developing countries do not fall in line by giving up S&DT. They include publishing on the USTR's website "a list of all self-declared developing countries that the USTR believes are inappropriately seeking the benefit of developing-country flexibilities in WTO rules and negotiations."

Rejected proposal

Coming days after the 24 July WTO General Council meeting in which a US proposal for differentiation among developing countries was roundly rejected, the memorandum appeared to be a desperate act engineered by the USTR through the White House, said trade envoys who asked not to be quoted.

The US proposal had already been dismissed at previous meetings over the past five months.

One trade envoy who asked not to be quoted said it would not gain consensus because it had "no legal basis." According to another envoy, it was "ridiculous" to ask developing countries to forgo their S&DT without credible reasons.

Perhaps the US could secure some support for its memorandum from major South American countries and a few Asian countries such as Singapore, South Korea and Hong Kong, but the majority of developing countries would oppose it, the envoy said.

The US has already received support from Brazil, which has declared that it will begin to forgo S&DT at the WTO. Subsequently, there have been sustained attempts by the US to bring about differentiation/graduation to deny S&DT to China, India, South Africa, Indonesia and some 30 other countries in current and future trade negotiations.

In a 26 April letter sent to developing-country trade ministers on behalf of Trump, the USTR Robert Lighthizer had written, "I am reaching out to you to ask you to support this [American] initiative by agreeing to forego special and differential treatment in current and future WTO negotiations."

However, at three successive WTO General Council meetings, China, India, South Africa and a majority of countries opposed the US proposal.

It remains to be seen how the developing countries will step up their battle for development-oriented reforms when they return to the WTO after the summer break, given the escalating threats from the US to bring about differentiation/graduation in availing of S&DT. *(SUNS8957)* ❐

EU, Canada agree on interim appeal arbitration arrangement

The EU and Canada have agreed to resort to arbitration to hear appeals of panel reports in trade disputes between the two countries if the WTO's Appellate Body ends up hamstrung by a lack of members.

by D. Ravi Kanth

GENEVA: The European Union and Canada on 25 July announced their agreement on a bilateral interim arbitration procedure on appeals over panel rulings, acknowledging that the WTO's Appellate Body (AB) would become dysfunctional if "the blockage of new appointments" in the AB persists.

The accord, according to the EU-Canada announcement, will be under Article 25 of the WTO's Dispute Settlement Understanding (DSU), which provides for arbitration to resolve trade disputes.

The announcement coincided with a restricted report issued by the facilitator appointed by the WTO General Council to address the AB impasse. The four-page report listed the areas of "convergence" that the facilitator, Ambassador David Walker of New Zealand, said he detected during his consultations with various WTO member delegations (see below).

At a meeting of the General Council on 23 July, the United States said that while the facilitator's report acknowledged several issues raised by the US, "some" members were not even prepared to tackle the central issue as to why the AB had strayed from its DSU mandate all these years.

However, several developing countries at the meeting criticized the US for adopting stonewalling tactics without offering any concrete solutions to the problems it had raised about the functioning of the AB, several trade envoys told the *South-North Development Monitor (SUNS)*.

For the past two years, the US has blocked the selection process for filling vacancies at the AB, on the grounds that the WTO's highest adjudicating body has failed to adhere to various provisions under the DSU. If the current and future vacancies remain unfilled, the AB would be reduced to just a single member in December, rendering it unable to hear any appeals. (An AB division of three members is needed to hear an appeal.)

Recourse to arbitration

Amid this backdrop, the EU-Canada appeal arbitration procedure seems to be an attempt at testing the waters at the WTO as to whether more members would join the arbitration process.

In their announcement, the two sides recognized that "the Appellate Body may no longer be able to fulfil its functions in the near future, should the blockage of new appointments continue."

The EU and Canada maintained that they would like "to preserve the essential features of the WTO dispute settlement system which include its binding character and two levels of adjudication [the panel process followed by the AB] through an independent and impartial review of panel reports."

The two countries said that they would resort to "arbitration under Article 25 of the DSU as an interim appeal arbitration procedure, if the AB is not able to hear appeals of panel reports in any future dispute between Canada and the European Union due to an insufficient number of its members."

In such cases, the EU and Canada said, they "will not pursue appeals under Articles 16.4 [appealing the panel ruling before the AB within 60 days] and 17 [appellate review] of the DSU."

The two sides claimed that their appeal arbitration procedure would "replicate as closely as possible all substantive and procedural aspects as well as the practice of Appellate Review pursuant to Article 17 of the DSU including the provision of appropriate administrative and legal support to the arbitrators by the Appellate Body Secretariat."

According to the EU and Canada, "under the appeal arbitration procedure, appeals will be heard by three former members of the Appellate Body, serving as arbitrators pursuant to Article 25 of the DSU."

The WTO Director-General will select the arbitrators "from the pool of available former members of the AB", the two sides stated.

The EU reckons there will be 13 former AB members who would be available for performing the arbitration assignments.

There is however no clarity yet as to who will pay the arbitrators for overseeing the arbitration process, said a person who is familiar with the decision.

The "same principles and methods" that apply to form a division of the AB under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review will remain applicable to the bench under the arbitration mechanism, but two nationals of the same country will not serve on the same case, according to the EU-Canada announcement.

To operationalize the appeal arbitration procedure in particular disputes between the EU and Canada, the two sides will notify their agreement "pursuant to Article 25.2 of the DSU within 60 days after the date of the establishment of the panel."

Further, "if either Canada or the European Union initiates an appeal under this appeal arbitration procedure in a dispute related to the same matter for which one or more other WTO members

have also initiated an appeal under a similar appeal arbitration procedure, Canada and the EU envisage that a single arbitration panel should be formed to hear the appeals together," the two sides suggested.

The EU and Canada also made it clear that "pursuant to Article 25.4 of the DSU, Articles 21 and 22 of the DSU shall apply mutatis mutandis to the arbitration award issued in this dispute."

The proposed arbitration mechanism will cease to apply "as soon as the Appellate Body is again fully composed", the EU and Canada said.

The EU is holding talks with several other WTO members to see if it could garner support for the arbitration mechanism but so far, the response has been lukewarm, said a trade envoy who had been approached regarding the arbitration mechanism.

"This is a backstop solution," another official said, adding that the EU and Canada want to save the AB from impending collapse.

Facilitator's report

The EU-Canada arbitration mechanism was announced hours before Walker circulated his facilitator's report.

Acknowledging that the report was based on his own judgement, Walker said: "From our deliberations, it has become clear that, although some concerns raised are shared by Members, there are also differences of view on the specifics of how to address those concerns."

Notwithstanding the differences of view on several issues, he said: "I have identified, on my own responsibility, the following areas or issues where I detect a certain degree of convergence during the discussion to date." He claimed that "the convergence I detect is across all these issues in a holistic manner."

Listed below are the "convergence elements" highlighted by Walker:

A. On transitional rules for outgoing Appellate Body members:

- The WTO's Dispute Settlement Body (DSB) has the explicit authority, and responsibility, to determine membership of the Appellate Body.
- To assist Members in discharging this responsibility, the selection process to replace outgoing Appellate Body members shall be automatically launched 180 days before the expiry of their term in office. Such selection process shall follow past practice.
- If a vacancy arises before the regular expiry of an Appellate Body member's mandate, or as a result of any other situation, the Chair of the DSB shall immediately launch the selection process with a view to filling that vacancy as soon as possible.
- Appellate Body members nearing the end of their terms may be assigned to a new division up until 60 days before the expiry of their term.
- An Appellate Body member so assigned may complete an appeal process in which the oral hearing has been held prior to the normal expiry of their term.

B. On the 90-day rule for submitting AB reports:

- Consistent with Article 17.5 of the DSU, an Appellate Body report needs to be issued no later than 90 days from the date a party to the dispute notifies its intention to appeal.
- In cases of unusual complexity or periods of numerous appeals, the parties may agree with the Appellate Body to extend the time-frame for issuance of the Appellate Body report beyond 90 days. Any such agreement will be notified to the DSB by the parties and the Chair of the Appellate Body.

C. On how to treat municipal law:

- The "meaning of municipal law" is to be treated as a matter of fact and therefore is not subject to appeal.
- The DSU does not permit the Appellate Body to engage in a "de novo" review or to "complete the analysis" of the facts of a dispute.
- Consistent with Article 17.6 of the DSU, it is incumbent upon Members engaged in appellate proceedings to refrain from advancing extensive and unnecessary arguments in an attempt to have factual findings overturned on appeal, under DSU Article 11, in a de facto "de novo review".

D. Whether the AB should offer advisory opinions:

- Issues that have not been raised by either party should not be ruled or decided upon by the Appellate Body.
- Consistent with Article 3.4 of the DSU, the Appellate Body shall address issues raised by parties in accordance with DSU Article 17.6 only to the extent necessary to resolve the dispute.

E. On how to treat prior precedents in the rulings:

- Precedent is not created through WTO dispute settlement proceedings.
- Consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members.
- Panels and the Appellate Body should take previous panel/Appellate Body reports into account to the extent they find them relevant in the dispute they have before them.

F. On the alleged "overreach" by the AB:

- As provided in Articles 3.2 and 19.2 of the DSU, findings and recommendations of panels and the Appellate Body and recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.
- Panels and the Appellate Body shall interpret provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 in accordance with Article 17.6(ii) of that Agreement.

G. On regular dialogue between the DSB and the Appellate Body:

- The DSB, in consultation with the Appellate Body, will establish a mechanism for regular dialogue between WTO Members and the Appellate Body where Members can express their views on issues in a manner unrelated to the adoption of particular reports.
- Such mechanism will be in the form of an informal meeting, at least once a year, hosted by the Chair of the DSB.
- To safeguard the independence and impartiality of the Appellate Body, clear ground rules will be provided to ensure that at no point should there be any discussion of ongoing disputes or any member of the Appellate Body.

In short, the facilitator seems aware of the writing on the wall, said a trade envoy who asked not to be quoted. "The AB may not survive this current assault by one member," the envoy said. *(SUNS8956)* ❐

Digital transformation aid must not be conditioned on e-commerce rules

Adoption of proposed multilateral rules on electronic commerce should not be made a condition for aid to developing countries, which instead need to first build up their digital economic capacity, heard a recent forum on "aid for digital transformation".

by Kinda Mohamadieh

GENEVA: Developing countries should not join negotiations on multilateral e-commerce rules before having in place adequate digital industrialization policies.

This was a key message from a session on "Aid for Digital Transformation" organized by South Africa during the Aid for Trade Global Review at the WTO. The Review took place from 3 to 5 July.

Other core messages included that self-financing mechanisms and homegrown domestic financing solutions are needed for digital transformation and for investing in national and regional infrastructure.

If developing countries are not prepared, the digital revolution will not only impact their competitiveness in future markets, but might also lead to their loss of competitiveness in current markets.

Digital transformation strategy

The Ambassador of South Africa to the WTO, Xolelwa Mlumbi-Peter, who moderated the session, underlined the need to leverage digital transformation for development, which requires addressing the digital divide, investing in digital infrastructure, and enhancing developing countries' ability to manage and analyze data, in addition to advancing digital skills.

Rashmi Banga, from UNCTAD's Globalization and Development Strategies Division, highlighted that a comprehensive strategy for digital transformation entails digital infrastructure, digital industrial policies, a targeted approach towards digital start-ups and digital innovation hubs, building of digital data analytical skills, as well as developing digitally informed foreign trade policies.

She explained that information and communication technologies are just the first step in digital infrastructure. Along with that, countries need to develop digital skills, build mass market Internet software applications and programs, develop big data infrastructure and cloud computing, and consequently utilize data in artificial intelligence processes.

Data infrastructure is at the heart of the digital infrastructure, she said. National data regulatory policies, including data processing infrastructure, are a core to digital industrialization, she added.

Without such preparedness, the digital revolution might translate for many developing countries as a growing digital divide and loss of competitiveness.

Banga also stressed the importance of investing in cooperation at the regional level, including in building regional cloud computing infrastructure, regional broadband infrastructure, promoting e-commerce at the regional level, regional digital payments, advancing regional digital markets, sharing experiences on e-government, forging partnerships for building smart cities, developing digital innovations and technologies, as well as collecting statistics for measuring digitalization.

She also noted that the potential revenue from customs duties on electronic transmissions is estimated by UNCTAD at $10 billion per annum for developing countries, including $2.6 billion per annum for countries of Sub-Saharan Africa. This could form a source of financing for investing in digital infrastructure and transformation, she stressed.

Vahini Naidu, Counsellor in the South African Permanent Mission to the WTO, underlined that digital transformation requires state-led policies that treat data as a valuable economic resource.

She pointed out a number of regional options for supporting digital transformation in Africa, including the contribution of national and regional development banks, such as the African Development Bank, and the role of regional economic communities of the African Union in enhancing cross-regional cooperation, including in supporting smaller countries of the African continent and advancing regional digital innovation hubs.

Naidu stressed that the promise of aid should not be used to influence developing countries into accepting new multilateral rules on e-commerce. She pointed out that aid promises have often not materialized and that aid should not be conditioned on accepting rules that negatively impact developing countries' policy space.

(The rules on e-commerce proposed by some WTO member states participating in plurilateral negotiations under the informal joint initiative on e-commerce include: a permanent ban on customs duties on electronic transmissions; prohibition of mandatory source code/algorithmic disclosure requirements; enhanced market access and national treatment for digital service providers; adoption of an unrestricted cross-border data flows regime, including prevention of data localization and of requiring the use of domestic computing facilities or network elements; restrictions on technology transfer requirements; and restrictions on governmental intervention in regard to determining appropriate electronic authentication methods.)

Caution on new rules

The Ambassador of India to the WTO, J.S. Deepak, participating from the floor, highlighted that e-commerce rules proposed for negotiations at the WTO could result in the withering away of existing rules and commitments under the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS).

The proposed rules would restrain developing countries from undertaking regulatory measures that could one day allow them to take a leadership role in digital trade, he added.

The immense costs associated with such constraints cannot be compensated by any kind of aid schemes. At the same time, aid should not be utilized as a tool to convince developing countries to agree to e-commerce rules, he stressed.

(continued on page 25)

Big Tech's control of consumer data raises concerns

Competition policy should be adapted to the features and business models of digital platforms, whose control of consumers' data has fuelled concerns over abuse of market power in the digital economy, says a UN development body.

by Kanaga Raja

GENEVA: Large technology companies have penetrated many aspects of people's lifestyles, with such digital platforms providing many benefits but also gaining significant control of consumer data which confers market power, raising competition-related concerns as well as concerns related to consumer protection and privacy.

This was one of the main conclusions highlighted by the United Nations Conference on Trade and Development (UNCTAD) in a Secretariat Note for the eighteenth session of the Intergovernmental Group of Experts on Competition Law and Policy which took place here on 10-12 July.

In its Secretariat Note, UNCTAD said that many countries are studying the negative effects of the market power of digital platforms and seeking ways to deal with the related challenges.

UNCTAD noted that technological developments have provided consumers with new products and services, often free of charge. Digital platforms are at the centre of such developments and have had disruptive effects in many economic sectors. The platforms provide a digital infrastructure for a variety of services, including marketplaces (Amazon), application stores (Apple), social networking sites (Facebook) and search engines (Google).

Platformization has implications not only for the nature of transactions in certain economic sectors but also for the ability of firms to scale rapidly, thereby affecting the structure of sectors. Large technology companies have changed the global business landscape. The top 10 global companies by market capitalization in 2009 included only one technology company and three oil and gas companies; in 2018, the list included five technology companies and two consumer services companies that are both large and online marketplaces.

The top 10 global companies in terms of market capitalization (as at 31 March 2018) were: Apple, Alphabet (the parent company of Google), Microsoft, Amazon.com, Tencent Holdings, Berkshire Hathaway, Alibaba, Facebook, JPMorgan Chase, and Johnson and Johnson.

With regard to specific sectors, Amazon held an over 90% share in five different product markets in the first quarter of 2018; Facebook is the leading social networking site, with a 68.95% share as at February 2019; and Google dominates the search engine market, with an 89.95% share as at January 2019. A preliminary report on an inquiry into digital platforms by the Australian Competition and Consumer Commission has found that, in Australia, 50% of traffic to Australian`news media websites comes from Facebook or Google.

The market power and dominance in certain markets of key platforms affect small innovative companies and their access to and survival in these markets. Dominant platforms such as Amazon, Apple and Google may own and operate infrastructure or provide a service on which traders and developers depend, and they must compete with the service provider in these markets.

Data-driven business models

Focusing on competition concerns arising from big technology, the UNCTAD document noted that digital platforms have new business models and function with algorithms, which are designed to collect and process data, with decisions made based on that data. Such platforms require high up-front sunk costs and have low marginal costs. The technologies required to store and process data can be costly but, once a system is operational, the marginal costs related to additional data are low, and the data can help improve the algorithms to provide better and more personalized services to consumers.

This cost structure "is characterized by high economies of scale and scope and can therefore facilitate market concentration of big data in the hands of a few players".

Data-driven network effects are one of the features that characterize digital platforms. A network effect refers to "the effect that one user of a good or service has on the value of that product to other existing or potential users". For example, people may wish to use Facebook for social networking simply because their friends do so. The value of using digital platforms directly depends on the number of users.

Data is a crucial component of the business models of digital platforms, and control of data confers market power to such platforms, said UNCTAD.

Economies of scale and scope, data-driven network effects and control of data create high barriers to entry. For example, Google can use the search data of users to improve its search engine algorithms; new entrants to the market do not have this advantage.

According to UNCTAD, establishing a successful platform that can attract sufficient online traffic is a significant challenge for newcomers. Even if start-ups enter the market, they soon face competitive pressure and may eventually be acquired by dominant platforms. Google has acquired 212 business entities since its founding in 1998 and the value of these acquisitions exceeds $17 billion.

Digital platforms have challenged the neoclassical approach to doing business, which defined the goal of a private company as maximizing profits. The new business models prioritize growth over profits in the short to medium terms, that is, the maximization of the number of users rather than profits. Dominant plat-

forms can afford such a business strategy, given leeway to incur losses by investors. For example, Amazon was permitted by investors to grow without pressure to show profits, and thereby expanded its business and entrenched its dominance as an e-commerce marketplace.

Dominant platforms have also expanded into other related businesses, with the objective of accessing more data. For example, Google gives its Android operating system free of charge to mobile telephone manufacturers, thereby enabling it to collect user data. In addition, Google provides many other services, including video sharing, price comparison, cloud computing and online payment system services, and these have provided additional consumer data, increasing the quality of, on the one hand, its search engine services and, on the other hand, the value of data sold to advertisers for better-targeted advertising. Facebook and Google are the dominant digital advertising companies, and had a combined share of 58% of the $111 billion market in the United States in 2018; Amazon, the world's largest online retailer, has a 4.2% market share.

These figures highlight the key linkages between control of data, market power and the increasing monetization of data through digital advertising in the business models of digital platforms, said UNCTAD.

Challenges for competition policy

According to UNCTAD, the quick pace of technological development has changed the nature of markets and business models. This has posed some challenges for competition law and policy, which need to be adapted to the new market realities and business models. This is crucial to ensure competitive and contestable markets.

The current dominant approach in anti-trust is the consumer welfare standard, which is based on measuring benefits or harm to consumers in the form of lower or higher prices, respectively. Under this framework, there is no concern over practices such as predatory pricing, which is a key element of the business strategy of dominant platforms providing an online marketplace, to grow and monopolize their market. This practice results in lower prices for consumers in the short to medium terms, until competitors are driven out of the market. Afterwards, prices may increase, and choice decreases due to there being less or no competition. However, such practices do not come under anti-trust scrutiny since, given the lower prices, they seem to be to the benefit of consumers at the start.

Consumer welfare should therefore be broadened to include other criteria such as consumer privacy and choice, personal data protection, switching costs and the lock-in effects of dominant platforms, said UNCTAD.

It noted that some scholars have proposed a new approach to competition investigations that focuses on the anti-competitive effects of the control of personal data by platforms, and others have suggested reforms of privacy and competition policy, considering the relationship between market share and the control of data.

Adjustments to the anti-trust framework and tools need to be made to be able to address 21st-century challenges, said UNCTAD.

Digital platforms are characterized by their network effects and by being multi-sided, as well as by having high switching costs, economies of scale and levels of control of data, all of which are pertinent in the definition of the relevant market.

Small but significant non-transitory increase in price and hypothetical monopoly tests rely on price mechanisms and may therefore not be appropriate tools for providing a relevant market definition in cases involving digital platforms, as the latter provide free products or services in exchange for data.

To define a multi-sided market, competition authorities need to consider not only monetary transactions but also data flows that may be observed in the market.

Competition authorities need to employ additional criteria for the definition of the relevant market in digital sectors, said UNCTAD.

Market power assessment in the context of digital platforms requires analyzing different criteria. Access to and control of data is crucial and confers market power, and this feature is further reinforced by network effects.

According to UNCTAD, digital platform market power is further entrenched through vertical integration. Dominant platforms such as Amazon and Apple have engaged in expanding their businesses vertically into upstream and downstream markets, and become competitors to traders or application developers that use their platforms. Such expansion improves their capacities to collect more data and increase their competitiveness and confers on them the role of gatekeepers of online stores and application markets, in which they are both owners and users.

This situation may at any time give rise to abusive and exclusionary conduct by dominant platforms. For example, said UNCTAD, Amazon started as an online bookstore but later diversified, and sells music, audio-books and other consumer goods, and has also moved into manufacturing and retailing its own brands, competing with other traders on its marketplace, thereby making it possible for the dominant platform to discriminate against independent traders that are its clients and competitors at the same time. Sellers have become dependent on Amazon to the extent that they perform most of their sales on Amazon despite fees of 6-50%. Amazon's quasi-monopoly position could potentially give rise to abusive conduct through, for example, predatory pricing and discrimination against rivals at the retail level.

It is essential to ensure that the particularities of digital platforms are either reflected in competition law or considered in competition law enforcement. Competition law and enforcement need to integrate the interface between competition law, consumer protection and data protection. These areas have become more intertwined due to the market power which consumer data provides for digital platforms.

There is a need for a more flexible approach to abuse of dominance assessments in the data-driven digital

economy, said UNCTAD.

There are growing concerns about the abuse of market power by key platforms, the extent of their control of data and the harm not only to consumers but also to society. Some of these platforms have become dominant and almost indispensable to consumers, who have little choice, tend to use the same platforms and show an unwillingness to switch. Such platforms are often compared to utilities in the sense that users feel they cannot do without them and so have little choice but to accept their terms of service.

Regulatory response

There is a need for further reflection on whether competition law enforcement is the most appropriate or best-placed tool to address concerns arising from digital platforms. It may be more effective to regulate such platforms to ensure open and fair access for all businesses and provide for a level playing field rather than trying to address competition problems ex post under competition law.

Another concern with dominant digital platforms is neutrality, said UNCTAD. One way to ensure neutrality may be to apply the essential facilities doctrine to dominant platforms, similar to the regulation of the telecommunications sector, in which an incumbent firm usually owns or operates the infrastructure and has its own telephone and/or mobile telephone operator, yet is required to provide access to other telecommunications operators at a fair rate. Application of the essential facilities doctrine could help prevent the abuse of dominance by platforms operating similar infrastructures, such as the Apple application store or Amazon marketplace, while allowing them to maintain the benefits of scale.

One much-debated idea is to break up dominant digital platforms, including large technology companies, to mitigate the concentration of power in a single platform. This subject has moved beyond competition circles to, for example, election campaigns in some countries, with proposals for breaking up large technology companies to promote competition and safeguard small businesses.

Policy measures such as specific legislation adopted by ministries in charge of trade and the economy may have a positive effect on competition in the digital economy, said UNCTAD. For example, the Indian government introduced new e-commerce rules in 2018 to promote competition and prevent restrictive practices by online e-commerce platforms such as Amazon and Flipkart. The new rules, which came into effect on 1 February 2019, prohibit e-commerce platforms from selling products from companies in which they have an equity interest; platforms are required to provide services, including fulfilment, logistics, warehousing, advertisement and marketing, payments and financing to sellers on the platform at arm's length and in a fair and non-discriminatory manner; and platforms are not permitted to mandate any seller to sell any product exclusively in their marketplaces.

These rules were established following complaints from retailers and traders that large e-commerce platforms used their control of inventory from their affiliates and through exclusive sales agreements to create an unfair marketplace that allowed them to sell some products at low prices. The new rules are expected to prevent anti-competitive and abusive practices, as well as predatory pricing by large e-commerce platforms to the detriment of local small and medium-sized online traders.

Most developing countries have relatively young and small competition authorities with limited resources for taking on competition cases in an increasingly concentrated global economy. If the rules of the game for platforms are clearly set out through regulation, there may be less need for ex post competition law enforcement by competition authorities, as regulations should have preempted some of the competition concerns ex ante.

Considering the limited resources of competition authorities, in particular in developing countries, it is worth reflecting on such a policy response, said UNCTAD.

For example, given the growth of e-commerce, if appropriate e-commerce policies and regulations are put in place in developing countries, as for example through the new rules in India, to ensure open access to platforms under fair terms and conditions by local small and medium-sized enterprises, they could derive more benefits from the digital economy. Small and medium-sized enterprises will have more chances to grow if they have fair and equal access to e-commerce platforms.

Another challenge in developing countries relates to supporting local start-ups in a digital world where the small usually end up being acquired by the large, said UNCTAD.

Developing countries could join together at the regional level within trade and economic frameworks. Such regional arrangements could facilitate intra-regional trade and help ensure larger markets for local companies. E-commerce, competition and consumer protection policies and rules at the regional level may be more effective in dealing with abusive practices by global digital platforms and the mergers of digital companies and ensuring that dominant platforms remain fair and open to local and regional companies under fair terms and conditions.

Recent competition cases show that competition law frameworks and enforcement need to be adapted to the features and business models of digital platforms.

Traditional anti-trust cases involve price competition and competition for higher market shares in the same or upstream or downstream markets, while in the digital economy, the scale and scope of data confers market power and erects entry barriers for competitors.

Digital platforms controlling consumer data have a responsibility to ensure privacy and respect individual rights to data protection and privacy.

There is a need, therefore, to adapt the competition framework by broadening the consumer welfare standard beyond price and market share considerations, as consumer welfare involves not only lower prices but also choice, privacy, data protection and innovation.

Monopolization in the digital economy may harm not only economies but also societies and democracies. Competition authorities in both developed and developing countries need to be vigilant and forward-looking, said UNCTAD. *(SUNS8945)* ❐

Vulture funds gain at expense of human rights

The "predatory" practices of vulture funds, which make disproportionate profits on the back of countries experiencing debt distress, have come under critical scrutiny by an expert advisory panel to the UN Human Rights Council.

by Kanaga Raja

GENEVA: Vulture funds are inherently exploitative, and they deploy predatory financial strategies to obtain disproportionate and exorbitant gains at the expense of the realization of human rights, particularly economic, social and cultural rights, and the right to development.

This was one of the main conclusions highlighted by the Human Rights Council Advisory Committee in its final report on the activities of vulture funds and their impact on human rights.

The Human Rights Council Advisory Committee, composed of 18 independent experts, functions as a think-tank for the Council and works at its direction.

The report by the Advisory Committee went before the forty-first session of the Council, which took place on 24 June-12 July.

"Seeking the repayment in full of a sovereign debt from a State that has defaulted, or is close to default, is an illegitimate purpose. In a debt crisis, more than financial obligations are at stake," said the Advisory Committee.

Excessive claims awarded to vulture funds have allowed them to reap profits at the expense of the welfare and sustainable development of the poorest countries, without taking due account of the negative consequences of such actions on the capacity of a State to fulfil its human rights obligations.

The duty to observe due diligence to prevent a negative impact on and potential violations of economic, social and cultural rights applies to all States and stakeholders, including the management of vulture funds. The impact of their activities on the enjoyment of economic, social and cultural rights should therefore be systematically assessed, said the Advisory Committee.

According to the report by the Advisory Committee, there is no international legal regime governing cases of State insolvency or bankruptcy. When a State defaults on its sovereign debt, it must initiate a process for restructuring the debt in order to obtain a reduction in the debt or an extension of the repayment terms. That implies undertaking complex and protracted negotiations with a very diverse range of creditors. Participation in such restructuring processes is voluntary and therefore even a small percentage of creditors may well decide to hold out with a view to obtaining a higher level of repayment in future.

It is at this point that vulture funds come into play. These commercial entities are not lenders, but private hedge funds that purchase on the secondary market (or collect from other bondholders) distressed debt at discounted prices and then sue the debtor for a much higher amount.

The ways of the vultures

They are popularly called "vultures" because of their modus operandi, whereby they:

• Target States with distressed economies and a weak capacity for legal defence. According to the African Development Bank, 20 of the 36 poorest developing countries have been threatened or targeted by aggressive litigation by vulture funds since 1999. The World Bank estimates that more than a third of the countries that qualified for its debt relief initiative have been targeted by lawsuits by at least 38 litigating creditors, with judgments totalling $1 billion in 26 of those cases.

• Operate and take advantage of the lack of regulation of the secondary market. To obtain significant discounts, vulture funds acquire sovereign bonds when the indebted country either is close to default or has already defaulted on its debt. In the secondary market, they can operate with great secrecy in terms of both ownership and operations. Sovereign bonds are thus traded between investors without the debtor State concerned necessarily being aware or informed of such operations.

• Refuse systematically to participate in orderly debt restructuring processes. Once the State starts negotiations with private bondholders to restructure the sovereign debt, vulture funds exercise their "right" to hold out and/or start collecting and purchasing sovereign distressed bonds; they then wait until the country's financial situation has improved to start negotiations for a better deal. In addition to difficulties in gaining access to the international capital markets again, the debtor State is under the threat of being subjected to a long and costly process with a particularly aggressive litigator. The additional pressure may easily prompt some governments to accept highly disadvantageous deals.

• Sue the country for reimbursement of the full value of the bond, plus interest and procedural costs. If the debtor State does not surrender to the claims of the vulture funds, then the next step in the strategy is to file legal claims seeking reimbursement of an amount much higher than the price they paid in the secondary market (usually the face value of the bonds), increased with interest, delay penalties and legal expenses.

To ensure that they get a favourable court decision, they make sure that "creditor-friendly" jurisdictions are involved in the resolution of the dispute. The courts of debtor countries may increasingly become an option, as weaker legal systems are easily overwhelmed by the level of technical detail involved in this kind of litigation.

Procedures are particularly protracted (on average six years), costly and

burdensome (with annualized returns ranging from 50% to 333%). As a consequence, the financial and reserve management capacities of the debtor State remain compromised for a long period.

- "Chase" the country to enforce the judgment. Once vulture funds have obtained a favourable judgment, they seek its enforcement before different courts through "forum shopping" practices, until they secure the enforcement action they desire. Figures show that attachment of a country's assets abroad has become a particularly common legal strategy in past years. Despite many unsuccessful attempts, such pressures have often helped vulture funds to achieve a favourable out-of-court settlement.
- Obtain exorbitant profits. Vulture funds have achieved, on average, recovery rates of some 3 to 20 times their investment, equivalent to returns of 300-2,000%. In some cases, the claims of vulture funds constitute a significant portion (12-13%) of a country's gross domestic product (GDP).
- Operate in jurisdictions where bank secrecy rules apply. Most vulture funds are incorporated in tax havens, where there is no obligation to disclose information on benefits or ownership and it is feasible to hide gains to avoid or evade taxation. Such jurisdictions facilitate the secretive manner in which vulture funds operate and the flight of much-needed capital, particularly from developing countries.

According to the Advisory Committee, the predatory practices of vulture funds in relation to developing countries, particularly heavily indebted poor countries, have a long history. The countries most commonly targeted have unsustainable debt burdens and lack both the capacity and the resources needed to face such complex and protracted judicial processes.

In recent years, vulture funds have aimed their profit expectations at middle-income countries, particularly Argentina. With more than 50 lawsuits filed by commercial investors after the default of 2001, the country accounts for a third of the total number of lawsuits brought by vulture funds.

The Advisory Committee analyzed a number of case studies to highlight the human rights impact deriving from the activities of vulture funds, including *Donegal International Ltd. v. Zambia; FG Hemisphere v. Democratic Republic of the Congo*; and *NML Capital Ltd. v. Argentina.*

In *NML Capital Ltd. v. Argentina*, in the context of the deteriorating economic, financial and social situation that led Argentina to a catastrophic collapse in 2001, the government, soon after defaulting, recognized the need to restructure roughly $81 billion of debt.

In two successive exchanges of offers, in 2005 and 2010, Argentina succeeded in reaching an agreement with more than 92% of its creditors, which agreed to take an approximately 70% "haircut" on their bond holdings.

A group representing 1.6% of bondholders, led by NML Capital Ltd. (a hedge fund based in the Cayman Islands), refused to restructure and decided to sue the country in the New York State courts for the full amount.

Some of the defaulted bonds had been bought on the secondary market just before the country's default in 2001, but most were purchased afterwards, at bargain prices. The vulture funds allegedly paid about $48.7 million for more than $220 million in defaulted bonds soon after the default; others were purchased even after the bond exchanges of 2005 and 2010.

In November 2012, a New York district court judge ordered Argentina to pay NML Capital and other "holdouts" in full (about $1.3 billion), an amount that may represent a profit of about 1,600%. The court ruling was first confirmed by a decision of the United States Court of Appeals for the Second Circuit and subsequently endorsed by the Supreme Court, which stated that the country could not pay the creditors that had accepted the exchange offers until the "holdout" creditors had been paid in full.

In February 2016, with a newly elected government in office in Argentina, the United States court set a number of conditions for effectively lifting the injunction and allowing Argentina to service its restructured debts. Events accelerated from then on and in April 2016, ceding to massive financial pressure, Argentina abruptly reversed its previous policy regarding the claims and agreed in an out-of-court settlement to pay $6.5 billion to the "holdouts".

Disturbing

According to the Advisory Committee, that settlement represented a further setback in the process aimed at setting up an international sovereign debt restructuring mechanism based on the equal treatment of creditors.

"Paying vulture funds much more than was paid to cooperative creditors in previous debt restructuring is a disturbing outcome. Rewarding those who refuse to participate in debt restructuring efforts sends the wrong message," it said.

The case of Argentina is not an exception, but forms part of a more general trend, it added. Increasingly, non-cooperative creditors are reaping extraordinary profits owing to settlements reached or judgments obtained after disruptive litigation.

Not only do investors' expectations of obtaining high returns by suing countries asphyxiated by onerous financial terms benefit from the lack of a global mechanism on debt restructuring, but they may also be at the origin of this state of affairs.

In fact, statistics show that lawsuits and attempted attachments are increasingly becoming a common way of solving sovereign debt disputes, entailing costly and protracted judicial processes for the defaulting State. In the period from 1976 to 2010, there were about 158 lawsuits against 34 defaulting countries in the United States and the United Kingdom alone.

The high success rate (72%) certainly encourages this worrying tendency. Since the 1990s, the percentage of debt crises involving litigation has grown from 10% to almost 50%.

Africa has been by far the most harassed region, with an average of eight cases filed every year. Not for nothing do African countries have the lowest rate of winning cases and have disbursed more than 70% of the nearly $1 billion awarded to vulture funds as a result of lawsuits.

In other countries particularly hit by

the financial crisis, such as Ireland or Spain, vulture funds are developing speculative strategies in relation to non-performing private loans. In that context, their strategy is quite similar: they acquire distressed real estate assets, taking advantage of the difficulties people are having in repaying their loans to the banks, and wait until the mortgage is in default. In such a way, vulture funds progressively get a dominant position in the housing market that ends by allowing them to influence rents and house prices. Speculation drives up property costs and makes housing unaffordable for low-income households.

Legal framework

The report by the Advisory Committee noted that at present, only three countries, Belgium, France and the United Kingdom, have enacted some sort of legal framework to discourage disruptive litigation initiated by vulture funds. Attempts to enact similar initiatives in the United States have failed so far.

While these national laws have played an important deterrent role, it is evident that concerns raised by the activities of vulture funds can only be effectively tackled if more countries pass national laws to limit their claims. To avoid "forum shopping" strategies, regulation is particularly needed in those jurisdictions preferred by vulture funds for starting litigation or enforcing attachments, said the Advisory Committee.

National legislators may resort to useful guidelines deriving from existing domestic laws and experience of implementation, namely:

(a) protection should be extended to any debt-distressed country and not only to heavily indebted poor countries;

(b) procedures should allow for the identification of debts that are protected from the claims of vulture funds, on the basis of objective criteria;

(c) concerns about the socioeconomic situation of the debtor State and the well-being of its population should be adequately incorporated and addressed by the legislator; and

(d) issues regarding the lack of transparency in the secondary debt market and the operation of vulture funds in tax havens should also be tackled.

The Advisory Committee noted that a growing consensus on the need to curb the activities of vulture funds has emerged over the past 10 years. A number of States have expressed in several forums their support for undertaking common actions aimed at protecting heavily indebted poor countries from vulture funds and, more generally, at the establishment of an international mechanism for orderly debt restructuring.

Responding to the increasing demand for international action, in September 2014, the UN General Assembly adopted its landmark resolution 68/304 entitled "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes", in which it called for a legal framework aimed at facilitating the orderly restructuring of sovereign debts and capable of deterring creditors from disruptive litigation. One year later, the Assembly endorsed a set of principles that should guide the establishment of an international orderly sovereign debt restructuring workout.

In view of the efforts and the progress made over the past years, it is difficult to understand the reasons behind the current political deadlock in the process aimed at setting up a debt workout institution, building on General Assembly resolution 69/319 on Basic Principles on Sovereign Debt Restructuring Processes, said the Advisory Committee.

It noted that in April 2018, the European Parliament insisted on the need to set up an international debt workout mechanism capable of solving debt crises in a fair, speedy and sustainable manner. According to the resolution adopted by the EU Parliament, the roadmap on sovereign debt workout developed by the United Nations Conference on Trade and Development (UNCTAD) and the proposal to establish an international debt restructuring court should be at the heart of the new mechanism.

Meanwhile, vulture funds make the most of the absence of an international regulatory framework by exploring new ways to enforce the terms of their sovereign bonds, particularly through the international investment arbitration system. Despite the fact that the system is not designed to hear disputes over financial assets, it seems that arbitrators have opened the door to speculative claims, said the Advisory Committee.

Human rights impacts

The report by the Advisory Committee highlighted the following impacts of the activities of vulture funds on human rights: hindering the capacity of a State to fulfil economic, social and cultural rights; jeopardizing international poverty reduction initiatives; contributing to increased debt service; and undermining the realization of the Sustainable Development Goals.

The Advisory Committee recommended that the Human Rights Council maintain the issue of vulture funds and human rights on its agenda in order to assess the impact of their activities on economic, social and cultural rights and the right to development, and support further initiatives aimed at identifying and curtailing illegitimate activities by vulture funds.

The Advisory Committee further recommended that the Council adopt a new resolution, following the examination of the present report, entrusting the Advisory Committee with the follow-up to this issue, with a view to making concrete recommendations to States and relevant stakeholders.

A further study reviewing relevant national legislation and case law, as well as good practices, would help States in the process of establishing an adequate legal framework, it said.

The Advisory Committee also recommended that Member States enact legislation aimed at curtailing the predatory activities of vulture funds within their jurisdictions.

Domestic laws should not be limited to heavily indebted poor countries but should cover a broader group of countries and apply to commercial creditors that refuse to negotiate any restructuring of a debt. Claims that are manifestly disproportionate to the amount initially paid to purchase a sovereign debt should not be considered, said the Advisory Committee. *(SUNS8943)* ❐

Understanding global inequality in the 21st century

What is needed to tackle global inequality is not only national policy shifts but changes in the international economic architecture as well, contends *Jayati Ghosh.*

It is apparent – but still depressing to note – that inequality has increased since it caught the attention of the international community. The global financial crisis was preceded by a massive increase in within-country inequality; since then, things have got significantly worse. The Sustainable Development Goals foregrounded the reduction of inequality and included that as a major goal; since their announcement, inequality has increased in almost all economies.

The claims that global inequality has decreased because of the faster rise in per capita incomes in populous countries like China and India must be tempered by several considerations. First, these and similar fast-growing nations have mostly experienced significant internal increases in inequality. Second, when incomes are measured in the more realistic market exchange rates than in the ultimately fanciful Purchasing Power Parity exchange rates that substantially underestimate real poverty, convergence is much less apparent. Third, the famous "Elephant Curve" that shows big increases in income at the lower middle of global distribution is based on relative increases in income, which can appear large when the base incomes are low. When absolute increases in income are considered, the bottom half or the middle of the global distribution does not fare so well at all, and there is no hump in the middle.

In any case, people everywhere experience inequality within their own societies, and this experience has clearly deteriorated in this century. Wage shares of national income have fallen sharply, and in many cases continue to fall. The top 1% and top 10% of the population in most countries continue to increase their shares of assets and incomes. Economic inequalities continue to interact with and intensify social inequalities.

What are the processes responsible for this worsening state of affairs, which flies in the face of so many well-intentioned and even pious declarations by governments and international organizations? Of course, national policies are crucial in this; many governments have engaged in policies that have reinforced relative power imbalances and then been reflected in unequal economic outcomes. But the international economic architecture and associated patterns of trade and capital flows encourage such policies and generate processes that further accentuate inequalities of various sorts.

Ownership of new "assets"

This happens at two levels: at the level of primary distribution of income; and at the secondary level that takes into account patterns of taxation and public subsidies and transfers. At the primary level, one significant factor generating further inequality is the creation of new "assets" whose ownership and control are concentrated, which then provide revenue streams only to the privileged. These include, most of all, intellectual property rights (IPRs) that generate rents from the control over knowledge, control that is increasingly in private corporate hands. They also include the ownership of new products like data, which have become similarly commercialized and concentrated in terms of ownership. And they include the privatization of what should be public or social assets, like those in nature.

The primary distribution has also been affected by changes in the relative bargaining power of (mostly large corporate) capital vis-à-vis labour and vis-à-vis citizens in general. This shift has generally been attributed to the forces of globalization and technological change, which are presented as inexorable changes that states are powerless to prevent, shape or mitigate. But it is important to remember that these forces and the extent of their force and impact are the result of government policies and therefore of political choices. The current popular backlash against globalization in many parts of the world possibly reflects this growing realization. Furthermore, the weakening of the bargaining power of workers and citizens relative to capital is also very much an outcome of government policies of deregulation of capital and labour markets, some of which are purely domestic in nature.

All of these have led to enhanced concentration and monopoly control, as well as increased rent-seeking activities of major companies that further accentuate both the inequalities of asset ownership and the concentration of income streams from such assets.

Less progressive fiscal policies

The secondary distribution reflects what states can do and choose to do to change the initial primary distribution. Europe was significantly different from the rest of the world in that the secondary distribution was significantly better than the primary distribution, because of progressive taxation and spending policies that provided net transfers to the poor and less well-off groups, paid for by taxes that fell more on richer individuals and companies. However, over the past decades, fiscal policy in Europe as a whole has been less progressive than in the past, so that the secondary income distribution has come closer to the primary distribution, in other words has become more unequal. In other parts of the world, governments were already less successful in causing major changes in income distribution through their fiscal policies, and this has continued and worsened in the neoliberal period.

National policies (driven by the international context as well) that have furthered secondary inequality include inadequate direct taxation and the consequent reliance on regressive indirect taxation. This is enabled by national and international tolerance of tax avoidance measures that enable illicit financial flows across countries. Inequality is further worsened by skewed public spending patterns that do not prioritize the generation of good-quality employment and the universal public provision of good-quality services.

National and global policy responses

What is to be done about all this? Obviously, more national policy space is required for governments, especially in developing countries, to pursue trade and industrial policies, fiscal and monetary policies and social policies that would move towards more sustainable and equitable development. But this in turn necessarily requires significant changes in the global architecture.

To start with, the current obsession with trade wars and their possible outcomes should not distract us from considering how to deal with the changing nature of cross-border trade. The United Nations Conference on Trade and Development (UNCTAD) (in its *Trade and Development Report 2018*) has done considerable work on how more trade consists of "intangibles" and how a greater proportion of the value added from trade is appropriated by such intangibles, in particular by "headquarter functions" that really reflect rents and profits of multinational enterprises (MNEs). Some part of this expansion of trade in intangibles reflects real economic processes, but a significant and growing part also reflects monopoly profits and tax avoidance strategies of MNEs, which must be addressed by new global rules.

The current explosion of debt levels around the world suggests the urgency of a better, more just and effective system of sovereign debt management, in which the burden of adjustment is not disproportionately borne by citizens and workers in a country, but shared more equitably among those responsible for creating the problem, including creditors.

The problems of climate change and environmental destruction are no longer in the future but are already upon us – and so it is imperative to improve conditions of technology transfer and enable developing countries to develop and empower their own systems of "green" technology to mitigate and adapt to these changes. This requires both a fiscal push and a push to ensure access to the relevant knowledge on reasonable terms.

This also highlights the crucial need to revamp and restructure the global IPR regime, which is no longer fit for purpose. Intellectual property appropriation and control, especially by MNEs based in advanced countries, have become huge threats not only for development and the move to equality, but also to the survival of the planet. Inequalities in the creation of and control over knowledge are reinforcing existing inequalities of power and economic outcomes, and making them much harder to overcome.

None of this can be done without some international coordination, and so all of this points to the need to revive a progressive and acceptable form of multilateralism that supports the needs and desires of working people across the world, rather than the interests of large capital. Given the current travails and loss of popular legitimacy of the existing global multilateralist system, such a move is both more necessary and more possible today. ❐

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Financialization undermines real economy

The ascendancy of finance not only deprives the real economy of productive resources but also exposes it to the risk of destabilizing crises.

by Jomo Kwame Sundaram and Michael Lim Mah Hui

The relationship between finance and the real economy is arguably at the root of the contemporary economic malaise. Unlike earlier acceptance of simple linear causation, recent recognition of a curvilinear relationship between finance and economic growth, implying "diminishing returns", has important implications.

Financialization undermines the real economy in the following ways. While finance may promote growth of the real economy "in the early stages", "too much finance" is bad for growth.

The rise of market finance promises higher returns, i.e., more financial rents. With finance increasingly used for speculation, debt-financed share buybacks, as well as both "brownfield" direct and "portfolio" investments, purchasing existing assets means not creating new economic capacities.

Financialization has thus accelerated the "slow retreat" from providing credit for productive investments to funding speculation for short-term gain from unproductive investments. Meanwhile, smaller enterprises face higher interest rates and more difficult access to finance.

Second, "impatient" capital increases asset prices and financial volatility. Surging capital inflows – driven by banks or asset managers seeking quick yields – raise the prices of securities, derivatives and other assets, to the delight of their owners.

Reversals of capital inflows trigger sharp drops in asset prices, typically triggering systemic problems, sometimes destabilizing the real economy via violent price fluctuations or, worse, cataclysmic financial crises that may take years to recover from.

Third, the overblown financial sector sucks financial resources and human talent away from the real economy. Nobel economics laureate James Tobin lamented that the US was drawing its best human resources into finance with remuneration unrelated to social productivity. On the eve of the 2008 financial crisis, almost 70% of Harvard seniors chose to work on Wall Street upon graduation.

Banking before financialization

Before financialization, finance was dominated by banks engaged in both short-term and long-term lending. The former mainly funded working capital and trade while the latter financed capital investments and projects – what Hyman Minsky called "hedged financing". Hedged financing, mainly by

banks, funded productive investments, with borrowers servicing both interest and principal repayment.

Cross-border financial activity was constrained by the Bretton Woods system of fixed exchange rates and effective capital controls.

Besides bank-based financing, capital markets – mainly for securities, primarily equities and bonds – financed the long-term capital needs of corporations. Corporations issued securities to finance long-term capital investments, typically purchased by patient investors such as insurance companies and pension funds.

Investment banks, or "merchant banks" in the erstwhile British empire, were the main financial intermediaries in capital markets.

But commercial banks were often averse to financing the risky innovations necessary to accelerate economic and technological progress. In response, governments in many countries stepped in to provide development banking. Most countries which have successfully industrialized – the US, France, Japan, Korea, China, India, Brazil – have relied on public development banking as a critical tool.

Development banking has enabled states to provide subsidized long-term loans to "strategic" industrial sectors to promote the international competitiveness of local firms, in turn enhancing what is termed national economic competitiveness.

With financial liberalization, international financial institutions have encouraged the development of market finance in many countries to reduce reliance on bank financing.

Capital markets key

Financial systems based on capital markets are more prone to financialization. It is easier, faster and more lucrative for speculative investors to "chase yield" in such market-based financial systems.

The key is ensuring liquid secondary markets, especially with poorly regulated "repo" arrangements generating profits from movements in the prices of securities, either by owning them or by taking derivative positions on market price movements.

Market-making financial intermediaries quote prices at which they are prepared to buy – or sell – a security, securing profits from the buy-ask spread. Market makers meet demand for securities in secondary markets by either buying or borrowing them, using deregulated wholesale repo funding and derivative markets.

The sine qua non of securities market-making is liquidity – the ability to buy and sell, in order to profit.

For Keynes, the liquidity fetish is the most anti-social maxim of orthodox finance; as he warned, liquidity is only relevant to individual investors, not to the financial system as a whole.

This illusion of liquidity in securities-based financial systems became clear during the 2008 global financial crisis when the money market – the most liquid of markets – froze when no party was willing to take on credit and counterparty risks.

The bond markets of many emerging market economies rely on foreign investors to move the prices of securities. They prefer liquid securities markets offering easy entry and exit, and demand market infrastructures conducive to short-term positions. These typically include liberalized "repo" and derivative markets, to more easily finance and "short" securities.

Despite central bank concerns about the illusory nature of securities market liquidity as such liquidity can easily disappear when the foreign investors pull out, most authorities in these countries have nonetheless catered to their demands by creating the desired market infrastructures.

When large highly leveraged financial institutions in these markets collapse, e.g., Lehman Brothers in September 2008, central banks are forced to step in to salvage the financial system.

Thus, many central banks have little choice but to become securities market makers of last resort, providing safety nets for financialized universal banks and shadow banks. *(IPS)* ❐

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E-commerce is already flourishing and witnessing tremendous growth without the kind of e-commerce rules being proposed for negotiations at the WTO, Deepak emphasized. If a country has the needed infrastructure and skills in place, then it can access and benefit from e-commerce.

He questioned the reasons behind the urgency that some countries project in regard to agreeing to new multilateral rules on e-commerce. He cautioned that this hurry makes one wonder whether the idea is to lead developing countries into signing an extensive set of multilateral rules before understanding their implications on development.

Deepak said developing countries should not get into negotiations on e-commerce rules before having the needed domestic policies in place. In the meantime, potential revenues from customs duties on electronic transmissions, if the current moratorium is lifted, could be used to invest in digital infrastructure, electronic government and other needed digital investments.

He also spoke of the importance of considering the role of a digital tax, pointing as an example to the proposed tax on large digital technology companies in France.

French Finance Minister Bruno Le Maire was reported by the Deutsche Welle website as saying on 3 March that the tax was a matter of "fiscal justice" aimed at companies with worldwide digital revenue of at least €750 million and French revenue of more than €25 million. It was expected to yield French tax authorities some €500 million per year.

According to the article, "The tax would apply to commissions that internet platforms charge on sales made through them, and to revenue from targeted advertising and the sale of user data – but not to direct internet sales to consumers. That would mean Amazon earning money as a digital intermediary between a producer and a client would have to pay, but French electronics retailer Darty which sells directly to customers wouldn't". *(SUNS8941)* ❐

Sustainable development needs a hardware update

With the Sustainable Development Goals currently looking like an elusive target, getting back on course demands not only policy reform but also a reshaping of governance arrangements at all levels from the local to the global, stresses *Jens Martens*.

When UN member states adopted the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs) in September 2015, they signalled with the title "Transforming Our World" that business as usual is no longer an option and fundamental changes in politics and society are necessary.

Four years later, they have to admit that they are off-track to achieving the SDGs. The global civil society report *Spotlight on Sustainable Development 2019* shows that in many areas there is no progress at all, and in some even regression.

Destructive production and consumption patterns have further accelerated global warming, increased the number of extreme weather events, created plastic waste dumps even in the most isolated places of the planet, and dramatically increased the loss of biodiversity.

Fiscal and regulatory policies (or the lack thereof) have not prevented the accelerated accumulation and concentration of wealth but have only made them possible, and thus exacerbated social and economic inequalities.

Systemic discrimination keeps women out of positions of power, disproportionately burdens them with domestic and care-giving labour, and remunerates their formal employment less than it does that of men.

Total global military expenditure reached a historic high of $1.822 trillion in 2018. In contrast, net official development aid by members of the OECD Development Assistance Committee (DAC) was only $153.0 billion in 2018, thus less than one-tenth of global military spending.

Most governments have failed to turn the proclaimed transformational vision of the 2030 Agenda into real transformational policies. Even worse, national chauvinism and authoritarianism are on the rise in a growing number of countries, seriously undermining the social fabric, and the spirit and goals of the 2030 Agenda.

Despite these gloomy perspectives, there are signs of pushback. In response to the failure or inaction of governments, social movements have emerged worldwide, many with young people and women in the lead. They do not just challenge bad or inefficient government policies. What they have in common is their fundamental critique of underlying social structures, power relations and governance arrangements.

Thus, the implementation of the 2030 Agenda is not just a matter of better policies. The current problems of growing inequalities and unsustainable production and consumption patterns are deeply connected with power hierarchies, institutions, culture and politics. Hence, policy reform is necessary but not sufficient.

Meaningfully tackling the obstacles and contradictions in the implementation of the 2030 Agenda and the SDGs requires more holistic and more sweeping shifts in how and where power is vested, including through institutional, legal, social, economic and political commitments to realizing human rights.

In other words, a simple software update (of policies, norms and standards) is not enough – we have to revisit and reshape the hardware of sustainable development (i.e., governance and institutions at all levels).

Strengthening bottom-up governance

Revisiting the hardware of sustainable development has to start at the local and national level. While most governance discourses emphasize the democratic deficit, gaps and fragmentation in global governance, the major challenge for more effective governance at the global level is the lack of coherence at the national level. Therefore, it is necessary to strengthen bottom-up governance.

Bottom-up governance refers not only to the direction of influence from the local to the global. It also calls for more governance space to be retained at local and sub-national levels.

It enables, for instance, indigenous peoples, small farmers and peasant communities to exercise their rights in retaining their seeds, growing nutritious foods without genetically modified organisms, and accessing medicines without paying unaffordable prices set by transnational companies and protected by intellectual property rights.

The same is true for universal access rights to social protection. Social protection needs to be owned and governed by sub-national and national governments with fiscal space created in national budgets.

Universal, free access to essential public services is the foundation block of the SDGs and at the core of local governments' commitment to the 2030 Agenda. However, the privatization of public infrastructure and services and various forms of public-private partnerships (PPPs) often have had devastating impacts on service accessibility, quality and affordability.

Responding to these experiences, counter-movements have emerged in many parts of the world. Over the past 15 years, there has been a significant rise in the number of cities and communities that have taken privatized services back into public hands.

No policy coherence without governance coherence

Achieving the SDGs will not happen without an enabling environment at international level. But what we often see is a disabling environment that makes it difficult to raise the urgently needed domestic resources. Local and national (fiscal) policy space is often limited by external interventions. The International Monetary Fund (IMF) plays a central role in this regard. In many countries, for instance Egypt and Brazil, IMF recommendations and loan conditionalities have

led to deepening of social and economic inequalities and threats to human rights.

In endorsing the 2030 Agenda, governments committed to enhancing policy coherence for sustainable development (SDG target 17.14) and to respecting each country's policy space (SDG target 17.15). The achievement of these targets is constantly undermined by the inherently asymmetric nature of the global governance system, with the IMF and the World Bank dominating discourse and policies.

Thus, policy coherence will not be possible without overcoming governance incoherence.

The current system of global (economic) governance is marked by systematic asymmetry. The most striking example is the asymmetry between human rights and investor rights. Today's trade and investment agreements give transnational corporations far-reaching special rights and access to a parallel justice system to enforce them, the investor-state dispute settlement (ISDS) system.

Removing the ability of investors to sue states in the ISDS system and similar rules in investment and trade agreements would be a first step in reducing the systematic asymmetry in global governance. It would also be a step towards governance coherence for sustainable development.

Enhancing governance coherence also means that the relevant UN bodies, particularly the High-Level Political Forum on Sustainable Development (HLPF), must be strengthened and no longer de facto be subordinated to the international financial institutions and informal clubs like the G20.

Governments established the HLPF as a universal body and gave it a central role in overseeing a network of follow-up and review processes at the global level. But compared with other policy arenas, such as the Security Council or the Human Rights Council, the HLPF remained weak.

The SDG Summit in September 2019 and the HLPF review process to take place in 2019-20 are opportunities to reposition the HLPF more firmly in the UN General Assembly machinery, similar to the direction taken by the member states for the Human Rights Council (HRC) in 2005.

With an agenda of equal importance and intimately connected to those of the HRC, the General Assembly should transform the HLPF into a Sustainable Development Council, supported with complementary machinery at regional and thematic levels.

But the claim to make the UN system "fit for purpose" requires more than upgrading the HLPF and its related fora.

Adequate funding at all levels is a fundamental prerequisite to improve the governance of SDG implementation.

At the global level, this requires the provision of predictable and reliable funding to the UN system. Governments should reverse the trend towards voluntary, non-core and earmarked contributions as well as the increasing reliance on philanthropic funding. Democratic governance requires democratic funding instead of unpredictable support from private foundations of wealthy individuals.

Parallel to the global level, the widening of the public governance space requires, among other things, changes in fiscal policies at national level.

This includes, for example, taxing the extraction and consumption of non-renewable resources, and adopting forms of progressive taxation that prioritize the rights and welfare of poor and low-income people (e.g., by emphasizing taxation of wealth and assets).

Fiscal policy space can be further broadened by the elimination of corporate tax incentives and the phasing out of harmful subsidies, particularly in the areas of industrial agriculture and fishing, fossil fuel and nuclear energy.

Instead of engaging in a new arms race, governments should reduce military spending and reallocate the resource savings, inter alia, for civil conflict prevention and peacebuilding.

But as the massive protests by the Yellow Vests movement in France against rising fuel prices just recently demonstrated, interdependencies between environmental and social policy goals and targets require particular attention. Many environmental policy instruments have regressive effects on income distribution. But if priorities are properly defined and interdependencies effectively anticipated, fiscal policies can become a powerful instrument to reduce socioeconomic inequalities, eliminate discrimination and promote the transition to sustainable production and consumption patterns.

Revitalizing global norm-setting

Enhancing governance coherence requires providing the institutions responsible for the implementation of the 2030 Agenda and the SDGs not only with the necessary financial resources but also with effective political and legal instruments.

At global level, this requires changing the current course of relying on non-binding instruments and corporate voluntarism. This is particularly relevant in areas where significant governance and regulatory gaps exist.

The currently discussed post-2020 global biodiversity framework should include binding targets and implementation commitments for state parties, in accordance with the principle of common but differentiated responsibilities.

With regard to the governance of the oceans, there is currently no mechanism that coordinates the different legal frameworks, making it difficult to effectively address conflicts of interest. This is particularly relevant with regard to deep sea mining. To overcome these governance gaps may require even a new UN body on oceans.

There is also a need for a legally binding agreement to tackle plastic pollution. Many civil society organizations and legal experts call for a new global Convention on Plastic Pollution with a mandate to manage the lifecycle of plastics, including production and waste prevention.

Governance and regulatory gaps exist as well in the global digital economy. Self-regulation of Internet companies will not work, and neither will regulation through e-commerce trade agreements. The Internet Governance Forum of the UN has the potential to advance in this arena, but it lacks authority and does not have the mandate to make any rules.

Corporate social responsibility initiatives, such as the UN Global Compact,

and voluntary guidelines, such as the UN Guiding Principles on Business and Human Rights, have particularly failed to hold corporations systematically and effectively accountable for human rights violations. The Human Rights Council took a milestone decision in establishing an intergovernmental working group to elaborate a legally binding instrument (or "treaty") to regulate the activities of transnational corporations and other business enterprises. This "treaty process" offers a historic opportunity for governments to demonstrate that they put human rights over the interests of big business.

Democratic global governance at the crossroads

Scientists warn that the world is moving fast towards tipping points with regard to climate change and the loss of biodiversity, that is, thresholds that, when exceeded, can lead to irreversible changes in the state of the global ecosystem.

Similarly, the system of global governance is facing tipping points that, when transgressed, lead to irreversible changes. Multilateralism is in crisis.

But, as medical doctors tell us, a crisis points to a moment during a serious illness when there is the possibility of suddenly getting either worse or better.

There is still the danger of exacerbating authoritarianism and national chauvinism, and of not only shrinking but vanishing space for civil society organizations in many countries. But there is also a rapidly growing global movement for change, a movement that takes the commitment of the 2030 Agenda to "work in a spirit of global solidarity" seriously.

The year 2020 with its official occasions, particularly the 75th anniversary of the United Nations, provides an important opportunity to translate the calls of the emerging global movements for social and environmental justice into political steps towards a new democratic multilateralism. *(IPS)* ❐

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