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Outlook on MC12 agriculture, fisheries subsidies outcomes uncertain

With the WTO's 12th Ministerial Conference (MC12) due to take place in June, it remains to be seen whether ongoing negotiations at the trade body in a number of areas can deliver meaningful outcomes for the Nur-Sultan meeting. The chair of the agriculture talks has suggested that any progress on farm trade reform is likely to be incremental, while prospects for an MC12 agreement to regulate fisheries subsidies hinge on overcoming substantial differences in position among member states.

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Trends & Analysis

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Agriculture chair suggests incremental outcomes on SSM, PSH at MC12

The WTO agriculture negotiations are unlikely to yield a far-reaching outcome on farm trade reform – including on the issues of special safeguard mechanism and public food stocks long flagged by developing countries – at the trade body's 12th Ministerial Conference this June, suggests a report issued by the chair of the talks.

by D. Ravi Kanth

GENEVA: The chair of the Doha agriculture negotiations envisages outcomes on the mandated issues of special safeguard mechanism (SSM) for developing countries and the permanent solution on public stockholding for food security purposes (PSH) to largely remain incremental at the WTO's 12th Ministerial Conference (MC12), to be held in Nur-Sultan, Kazakhstan, in June.

Ambassador John Deep Ford of Guyana also ruled out any likely deliverable on "ambitious, expeditious and specific" reductions in the trade-distorting domestic support for cotton, an area of existential concern for the four West African countries of Benin, Burkina Faso, Chad and Mali.

In a report (WTO document JOB/AG/180) circulated on 14 February, the chair has almost ruled out the permanent solution on PSH as demanded by the G33 group of developing and least developed countries on grounds that "members' positions on this issue have not evolved significantly since the deadline was missed at MC11 [the WTO's 11th Ministerial Conference in Buenos Aires in 2017]" and "the ideas on the table and the positions remain broadly the same, so do the concerns from both sides".

As regards the SSM, which remains an unresolved issue since MC10 in Nairobi in 2015, Ford ruled out any substantial outcome due to continued differences among members. He suggested that more work needs to be done in the post-MC12 meeting on this issue.

Significantly, the chair did not include the joint proposal from China and India for the elimination of Amber Box domestic subsidies. However, he urged members to settle for "an incremental, balanced and forward-looking outcome for MC12".

He underscored the need for securing an agreement at Nur-Sultan on "elements and process for a possible outcome" in seven areas of global farm trade: (a) domestic support, (b) market access, (c) export competition, (d) export prohibitions and restrictions, (e) cotton, (f) special safeguard mechanism, and (g) public stockholding for food security purposes.

Ford said that the report was circulated under his own responsibility, following his consultations with members on their proposals based on different approaches. The "main purpose" of the report, he said, "is to search for incremental, balanced and meaningful elements and processes that reflect movement forward towards continuing the agricultural reform".

"There is no hierarchy between the elements and processes, there are only differences in levels of engagement, their maturity and time period of processes," the chair emphasized.

Based on members' engagement over the next three months and their "collective reflection", the chair hoped a draft text can be prepared that "forms the basis of an incremental, balanced and meaningful outcome at MC12".

"Success would be agreed elements that advance the fair and efficient functioning of agricultural markets," the chair said.

Even though he draws his mandate from the Doha work programme that was agreed among WTO members in 2001, the chair did not even remotely suggest that the substantial work was already done in all the seven areas of agriculture, which was often claimed as the engine of the Doha negotiations, said a trade envoy who asked not to be quoted.

SSM and PSH

On the two mandated issues of the SSM and PSH, the chair suggested various doable elements at this juncture.

With regard to the SSM, he said that "considering the wide divergences in Members' positions, the only realistic option at this time appears to be to promote further engagement to clarify and fully understand each other's positions and concerns". He made the following observations:

"i. Some proponents emphasize that an agreement on SSM is indispensable for them to undertake agricultural Market Access liberalization. I do not necessarily see this position as limiting progress on an SSM, as non-proponents appear not to oppose an SSM if it could facilitate Market Access reforms. The challenge rather arises from the fact that the Market Access discussions are at an early stage and there is still a reluctance on the part of Members to launch negotiations on a tariff reduction modality.

"ii. In recent discussions, the proponents have argued that the challenges, sought to be addressed through an SSM, originate principally in trade distortions and heavy agricultural subsidization. Non-proponents have responded by expressing their willingness to engage in technical discussions on how to remedy or address distortions/subsidized trade without negatively affecting Market Access of Members who do not contribute to such distorting subsidization.

"iii. The proponents from the G33 group have also alluded to the current situation where only a select group of Members have access to special agricultural safeguards (SSGs) and have considered it as a symbol of an imbalance in existing AoA [Agreement on Agriculture] rules. Some other Members have simultaneously reminded the proponents about the negotiating balance of the Uruguay Round (UR) where Members could negotiate the SSG rights on specific agricultural products as a part of the tariffication package. I am aware of the discussions in the past, including during the SSM Working Group process in 2019, where Members deliberated on how the UR modality of SSG could possibly inspire the SSM negotiations."

In relation to the PSH issue, the chair argued that the proponents such as the G33 group led by Indonesia, India and China "see the Permanent Solution as an important tool to guarantee their food security, while the non-proponents remain concerned about potential trade distortions and an opening for unlimited market price support (MPS)".

The African Group of countries recently suggested the need to "ensure that stocks procured do not distort trade or adversely affect the food security of other Members". In addition, the Group suggested that no exports be made from "products benefiting from this provision".

The chair said that "several trade-offs have been suggested to break the impasse on this issue". The trade-offs include:

- nature of requirements and a cap on programmes (e.g., less stringent requirements if programmes are capped and vice versa);
- flexibilities for new programmes and nature of safeguards (e.g., more flexible requirements if the safeguards are made stronger and vice versa); and
- product coverage and the nature of safeguards (e.g., the broader the programme's coverage, the stronger the safeguards and vice versa).

Against this background, and not ruling out consideration of other initiatives being deliberated, the chair said he would like to propose the following elements for a permanent solution that members may work on with a view to achieving an outcome at MC12:

- Core provision: Bali-type solution [i.e., a commitment by members not to challenge through the WTO dispute settlement mechanism compliance of a developing member with its obligations under Articles 6.3 and 7.2(b) of the AoA];
- Product coverage: traditional staple food crops;
- Programme coverage: limited extension to new programmes;
- Transparency: the Bali transparency provisions, amended to ensure that they are not too onerous by over-straining the already limited capacity of developing members;
- Anti-circumvention and safeguards: Bali anti-circumvention and safeguards provisions, amended to address the concerns of the non-proponents regarding exports from stocks; and
- Monitoring: periodic examination by the WTO Committee on Agriculture.

Effectively, the chair reproduced what had been proposed by Amina Mohamed of Kenya, who was the chair of the "green room" discussions on agriculture at MC11, said a trade envoy who asked not to be quoted.

Instead of a permanent solution as mandated by trade ministers at MC9 in Bali in 2013, the chair has offered only an incremental blueprint over and above the Bali decision, the envoy said.

On cotton, which impinges on the lives of tens of millions of farmers in West Africa, the chair lamented that "despite tireless efforts in recent months, including in the Cotton Quad (the United States, the European Union, Brazil, and the Cotton-four countries — Benin, Burkina Faso, Mali, and Chad) Plus configuration, there has been at best minimal engagement by Members on Cotton".

"Thus, there have been no signs of convergence, as some delegations have expressed the view that reaching a substantive outcome on Cotton trade-distorting support might be out of reach by MC12, bearing in mind the limited engagement on Cotton and the situation of the overall negotiations on Domestic Support," the chair said.

Domestic support

On the domestic support pillar of the agriculture negotiations, the chair said it is "a high priority" area for most of the WTO members, especially Brazil and Australia from the Cairns Group of farm exporting countries, and also an area of urgent reform for making progress so as to achieve the United Nations Sustainable Development Goals on poverty and food security.

Following a January meeting of the Cairns Group trade ministers in Davos, the chair appears to have included their proposals in the roadmap, said a trade envoy who asked not to be quoted.

The chair said that there "is a level of convergence" among members "on some elements as evidenced in the circulated submissions and proposals to address TD DS [trade-distorting domestic support]". These elements are:

- Approach: any approach should aim at harmonizing support levels in the future, reducing imbalances and taking into account characteristics of members' agricultural sectors, non-trade concerns and levels of development. All members are to gain from a fairer playing field that

would allow them to address the most pressing challenges, including food security and environmental protection.

- Broad objective: overall TD DS should be capped and reduced, starting with a commitment to further limit TD DS entitlements by a certain percentage over a specific period of time. This is a longstanding objective and considered long overdue.
- Differences among domestic support categories: different categories of domestic support are generally considered as having different levels of trade-distorting potential and this should be taken into consideration.
- Improved implementation of current disciplines: members should ensure that less TD DS measures remain as envisaged and that they are used in accordance with the prescribed criteria. Strengthening the monitoring together with enhancing transparency and/or clarifying the existing disciplines are some of the options put forward.
- Transparency: enhanced transparency is critical for successful negotiations and should be pursued in all components under the domestic support pillar, taking into consideration the concerns expressed by many developing members regarding the assumption of burdensome obligations that would put a further strain on their already limited capacity. It has been suggested that providing more complete information on different components of domestic support and reporting additional data such as the value of production data for all products for which support is provided and for the agricultural sector in general even where the *de minimis* provision is not invoked would be a step in the right direction.

Ford said, however, that "there is a divergence in Members' views on which kinds of Domestic Support should be addressed (all Article 6 support or some of its sub-categories only) and how this should be done".

The United States as well as the Cairns Group want to include Article 6.2 of the AoA on special and differential treatment in future negotiations on trade-distorting domestic support, said a trade envoy who asked not to be quoted.

Against the above backdrop, the chair said members must strive for "an incremental, balanced and forward-looking outcome for MC12".

He said that "there is a need for continued engagement and compromise on the overall framework and on components within the Domestic Support pillar", suggesting that "the importance of special and differential treatment remains essential and thus the need for flexibilities that recognize and take into account different conditions that Members face".

"Most Members seem to share the view that no further commitment would be required from LDCs [least developed countries]," he said.

Market access

Commenting on market access, which is the priority area for the US and the Cairns Group, the chair said "there is a general recognition among Members that the prevalence of high tariffs and other trade-restrictive instruments continue to impede Agricultural Market Access and that effecting Market Access reforms continues to be important".

Ford said his consultations with members in various formats revealed that "members are not yet ready to launch discussions on the core issue of a tariff reduction modality" probably due to high political sensitivity for the vast majority of members.

However, he suggested a few areas in market access where progress can be made. They include addressing issues such as the "water" between bound tariffs and applied tariffs, tariff simplification by converting all the specific and opaque tariffs into *ad valorem* equivalents, and improving the delivery of tariff rate quotas.

"The issue of linkage and balance invoked in the Market Access negotiations also manifests in frequent cautionary messages against any cherry-picking of elements within the Market Access dossier," said Ford.

He suggested the following elements for achieving an outcome on market access at MC12:

- changes in applied tariffs and treatment of consignments en route;
- tariff simplification;
- transparency of tariff rate quota administration;
- framework and process towards market access reforms: MC12 may also be an important opportunity for members to agree on a broad framework and principles to guide the market access negotiations after the conference.

Significantly, the chair drew a link between "the limited engagement on market access reforms multilaterally" and "members' increasing reliance on free trade agreements (FTAs) for furthering their market access objectives".

"It may be a useful and revealing exercise for Members to delve deeper into the linkage between multilateral Market Access commitments and autonomous reforms undertaken especially within the setting of the FTAs with a view to holistically dealing with the 'water' in Members' tariff profiles," Ford suggested.

Export competition

Commenting on the export competition pillar, the chair said "the best doable option in this area would be to develop a process forward building upon the elements".

The elements include "export credits, export credit guarantees or insurance programmes, agricultural exporting state trading enterprises and international food aid, with due consideration of the specific situation of LDCs and Net Food Importing Developing Country Members (NFIDCs)".

As regards export restrictions, the chair said "there seems to be broad agreement among the membership that the exemption of foodstuffs purchased for non-commercial humanitarian purposes by the World Food Programme from the application of Export Restrictions could be one of the elements to be considered for agreement at MC12".

"It is my considered view that a pathway could be found to achieve agreement on this first element, bearing in mind some concerns expressed in relation to the fact that an unconditional exemption could potentially compromise domestic food security during periods of very critical shortages," the chair said.

The chair indicated a work programme for meetings before Nur-Sultan, including special session meetings on 24 and 25 February and tentatively on 23 and 24 March, 27 and 28 April, and 27 and 28 May. *(SUNS9070)*

Third World ECONOMICS No. 692, 1 -15 February 2020

South nations insist on S&DT in fisheries subsidies agreement

WTO member states are continuing to negotiate an agreement on regulating fisheries subsidies, with varying approaches being proposed and with developing countries calling for special and differential treatment.

by D. Ravi Kanth

GENEVA: India, South Africa, Indonesia, the African Group and the African, Caribbean and Pacific (ACP) Group have demanded effective special and differential treatment (S&DT) for developing countries and least developed countries (LDCs) in the Doha fisheries subsidies agreement, trade envoys told the *South-North Development Monitor* (*SUNS*).

The conclusion of such an agreement at the WTO's 12th Ministerial Conference in Nur-Sultan, Kazakhstan, in June has been mooted.

At an urgently convened meeting of the Doha rules negotiating body on 13 February, developing countries delivered the strongest message yet on the need to prohibit subsidies that contribute to illegal, unreported and unregulated (IUU) fishing, and overcapacity and overfishing (O&O) based on effective special and differential treatment.

The chair of the negotiating body, Ambassador Santiago Wills of Colombia, convened the meeting following a news report which suggested that an agreement on fisheries subsidies was unlikely to be concluded at Nur-Sultan due to sharp differences over the reports prepared by the negotiations' facilitators as well as a lack of direction in the talks.

At the meeting, the chair urged members not to vent their grievances outside the negotiating sessions, said a person who asked not to be quoted.

In an email to members on 10 February, the chair had informed them that he would be discussing "acceptable landing zones" as well as preparing draft legal texts so as to finalize an agreement.

At the meeting, he merely informed members that he would intensify his consultations in the following week for preparing a draft text, the person said.

Wills said that there had been some progress during the last two clusters in January and February, but pointed out that it had not been enough. He urged members to suggest the way forward and their concerns for finalizing the proposed agreement, the person said.

In response, many developing countries and several developed countries demanded a draft consolidated text before discussing any "landing zones".

Continued support

India's Ambassador J.S. Deepak told the chair that "as you work steadfastly on the mandate, which is to discipline harmful fisheries subsidies with effective special and differential treatment for developing countries including LDCs who need it, you can count on the continued support of India", said a participant who asked not to be quoted.

Deepak said "there has been almost no convergence in the O&O pillar as many different approaches are on the table". He added that this pillar "requires strong disciplines on harmful subsidies to protect the ocean and for the sustainability of fishing".

The Indian trade envoy expressed satisfaction that "almost all members have agreed to limit the scope of the accord to fishing and fishing-related activities at sea, thereby keeping onshore activities out of it". He saw this as "a positive development as it is a cross-cutting issue across all the three pillars of the discipline".

In the face of billions of dollars of fuel subsidies provided by several developed countries as well as by some developing countries, Deepak reminded the chair that "the other major issue in scope [for tackling overcapacity and overfishing] relates to the specificity element particularly as it relates to fuel subsidies".

He said "a dollar of fuel subsidies, whether horizontal or specific, will have the same effect on fish stock", as "fuel subsidies are substantial and constitute about 22% of all subsidies and more than 85% of these subsidies are availed of by large-scale industrial fishing vessels".

He said fuel subsidies would constitute a "large component, according to some estimates, of $4 billion of harmful subsidies".

Deepak said India favours a "small, tight Green Box which includes livelihood support for fishermen during the period in which fishing is banned and subsidies for vessel monitoring system as well as equipping boats with navigation and safety equipment".

He emphasized the need to safeguard the interests of the "large number of subsistence and artisanal fishermen who in many developing countries like India get minuscule subsidies and who would be rendered destitute without such [Green Box] support". He said subsistence and artisanal fishermen "operate mostly in territorial seas and EEZ [exclusive economic zones], have low fishing capacity and their presence is least damaging to the ocean".

Deepak noted that leaders had agreed in United Nations Sustainable Development Goal (SDG) 14.6 to protect the livelihoods of such fishermen through "effective special and differential treatment".

"Therefore, an effective special and differential treatment for developing countries and LDCs would involve a carve-out from the disciplines in the territorial sea across all the pillars as well as protecting subsidies in EEZ, except for large-scale industrial fishing," he said.

"In other words, the discipline should largely target subsidies promoting fishing on the high seas."

India cautioned against "capping subsidies at present levels", arguing that it "would reward the big subsidizers who are largely responsible for the present state of the oceans".

The US, China and several South American countries have called for capping of subsidies with differing approaches.

Deepak called for moving towards "a consolidated negotiating text in all areas soon and this text should reflect all the points of view put forward even if it contains a large number of brackets and alternatives at this stage".

He suggested that "more time be devoted to the plenary sessions which could be 3 to 3.5 days from the March cluster, by when we should have a text, to

make a better use of capital-based experts for inputs on technical issues".

He underscored the need for discussing "special and differential treatment elements under each pillar" till the contours of the agreement become clear.

He suggested keeping the negotiating work as simple as possible by targeting "harmful subsidies which help industrial fishing, promote distant water fishing and which is the life blood of the fish factories in the high seas". "At the same time, we need to protect subsidies available to small and artisanal fishermen especially in developing countries including LDCs."

Acceptable landing zone

In her intervention, South Africa's Ambassador Xolelwa Mlumbi-Peter said "an acceptable landing zone in our view has to first and foremost deliver on SDG 14.6".

She called for proper approaches for finalizing the agreement that would "deliver on all the pillars of the negotiations".

Mlumbi-Peter cited a study in the journal *Marine Policy* which found that $35 billion of public money went into fisheries subsidies in 2018. She said the study classified $22 billion as harmful subsidies, with fuel subsidies representing nearly a quarter (22%) of all financial support provided to fishing fleets.

She said 85% of fisheries subsidies benefited "large industrial fleets, thereby distorting markets to the detriment of small-scale artisanal fishers".

"A prohibition of subsidies targeting large industrial distant water fishing would directly address the core contributor to the devastating state our marine resources are in," she emphasized. "In addition, it would directly address the social and environmental dimensions."

"The approach to deal with [overcapacity and overfishing] must respond to the mandate in SDG 14.6 and should not result in unintended consequences of prohibiting beneficial subsidies that contribute to the sustainability of marine resources such as those related to R&D, restore biodiversity, rebuild the stock and reduce effort," the South African trade envoy argued.

"The prohibition should be on certain forms of harmful subsidies and these would be those that increase fishing effort (operating costs – fuel, ice, bait) or increase fleet capacity (capital costs)," she said.

Commenting on the proposed elimination of subsidies that contribute to IUU fishing, she said there is a need to ensure that members "are given adequate time to build the requisite capacity to implement the disciplines".

"This should be in the form of transitional periods to incorporate the disciplines in national legislation and capacity building to develop the measures to ensure effective implementation of the disciplines," she said.

Mlumbi-Peter said since 30% of fish stocks globally are in an overfished condition and since the WTO is not a management institution, "the disciplines must therefore prohibit subsidies to a fishing vessel or operator fishing targeted fish stocks that are in an overfished condition as determined by a coastal state in accordance with its national laws or relevant RFMO [regional fisheries management organization]".

"85% of fisheries subsidies benefited large industrial fleets, thereby distorting markets to the detriment of small-scale artisanal fishers"

Members, she said, "will need to agree how to make provision for beneficial subsidies that aim to rebuild the stock and promote cessation of fishing for stocks that are in an overfished condition".

She further said that S&DT "has to be an integral part of the outcome" while the disciplines for prohibited subsidies "must target large-scale industrial fishing and preserve policy space to protect the livelihoods and food security of vulnerable coastal communities, as well as support the broader blue oceans strategies of members".

She called for an "inclusive, transparent and member-driven" process, suggesting that South Africa would support the chair's proposal to allow three days of plenary session during cluster weeks so as to make progress".

She said "while it is important to move towards text-based negotiations, the draft text must be balanced and reflect the state of negotiations on various issues".

Transparency and inclusiveness

The ACP Group urged the chair to follow "the principles of transparency [and] inclusiveness", arguing that it is important to focus on "subsidies disciplines and not on fisheries management". "The WTO has no mandate or competence to make pronouncements" on fisheries management, the Group coordinator argued.

"Our ambition is to achieve binding disciplines that hold major subsidizers accountable for the harm that their subsidies to large-scale industrial fishing cause," the coordinator said.

"Effective special and differential treatment is important to all our [ACP] members, and remains an indispensable aspect of any outcome in fisheries subsidies negotiations," the coordinator emphasized.

The ACP Group, which had earlier suggested a 2% (of global fish catch) threshold for availing of S&DT, said it is "ready to work with members on shaping the best approach for strong disciplines that does not penalize developing countries who are not large-scale distant water fishers, not responsible for subsidies causing harm and that does not reward those providing harmful subsidies to distant water fishing".

The United States said the outcome on fisheries subsidies must "constrain" the big subsidizers, said a participant who asked not to be quoted.

"The US position on big subsidizers is self-serving as it is also the second or third biggest subsidizer," said a negotiator from a developed country.

The European Union has indicated a position that includes eliminating all subsidies contributing to IUU fishing while preparing a way forward on subsidies to address overcapacity and overfishing. Brussels wants certain positive subsidies to be maintained, said a participant who asked not to be quoted.

China has called for capping subsidies, the participant said.

More than 30 members made interventions on their specific concerns, insisting that the draft legal text must properly reflect all the proposals made by members. *(SUNS9069)*

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US continues to block appointment of new AB members

The WTO's Appellate Body remains inoperative after the US once again stymied attempts to replenish its depleted membership.

by Kanaga Raja

GENEVA: The United States has again blocked a joint proposal by other WTO members calling for the start of the selection process to fill six vacancies on the seven-member WTO Appellate Body (AB).

The repeated blocking by the US of the selection process has resulted in the AB becoming dysfunctional from 11 December 2019, when it was reduced to only one sitting member. A minimum of three AB members is required to constitute a division bench to hear an appeal.

At a regular meeting of the WTO Dispute Settlement Body (DSB) on 27 January, the US again said that it was not in a position to agree to a joint proposal, introduced by Mexico on behalf of 120 WTO members (Nepal became the latest co-sponsor of the joint proposal), that called for the simultaneous launch of the selection process to fill the six vacancies as soon as possible.

Repeating the arguments that it had made in previous DSB meetings, the US said that as it had explained in prior meetings, "we are not in a position to support the proposed decision. The systemic concerns that we have identified remain unaddressed."

The proposal had called for the DSB to take a decision with regard to the following:

(1) to launch the selection process to replace each of the six AB members who had either resigned or left after their term of office expired;

(2) to establish a Selection Committee, consistent with previous selection processes, composed of the WTO Director-General and the respective chairpersons of the General Council, the Goods Council, the Services Council, the TRIPS Council and the DSB, to be chaired by the DSB chair;

(3) to set a 30-day deadline for WTO members to submit nominations of candidates; and

(4) to request the Selection Committee to carry out its work in order to make recommendations to the DSB within 60 days after the deadline for submitting nominations, so that the DSB can take a decision to appoint six new AB members as soon as possible.

In introducing the joint proposal, Mexico said that the increasing and considerable number of co-sponsors to the proposal reflected a common concern with the current situation in the AB that was seriously affecting its workings and the overall WTO dispute settlement system against the best interest of its members. WTO members had a responsibility to safeguard and preserve the AB and the dispute settlement and multilateral trade systems, it added.

According to trade officials, nearly 20 members took the floor on this issue, with most reiterating the importance of resolving the impasse and re-establishing a functioning AB.

Many members pointed out that it was the obligation of members to begin the AB selection process, as Article 17.2 of the WTO's Dispute Settlement Understanding (DSU) required members to fill AB vacancies as they arose.

According to trade officials, Canada, China and Singapore noted the declaration by 17 WTO members in Davos on 24 January on developing a multi-party interim appeal arrangement.

(In their Davos statement, the trade ministers of the 17 members said they would work towards "putting in place contingency measures that would allow for appeals of WTO panel reports in disputes among ourselves, in the form of a multi-party interim appeal arrangement based on Article 25 of the WTO Dispute Settlement Understanding". The ministers said the arrangement "would be in place only and until a reformed WTO Appellate Body becomes fully operational", adding that the arrangement "will be open to any WTO Member willing to join it". The ministers further stated that they "have instructed our officials to expeditiously finalize work on such an arrangement".)

Deep regret

China said it deeply regretted that the AB had come to this paralysis due to the illegal blockade by the US. Article 17.2 of the DSU could not be clearer about the obligatory nature of filling vacancies in the AB. Yet, the persistent blockade by the US continued to frustrate the collective willingness of 163 members to fulfil this legal obligation, it said.

China said it deeply regretted that the AB had come to this paralysis due to the blockade by the US

It noted that over the past two years, members had made various efforts to address the raised concerns of the US. Twelve proposals and a draft General Council decision had been tabled and vigorously discussed in different configurations. However, the lack of constructive engagement from the US had stifled potential breakthroughs on the selection impasse and improvements in the functioning of the AB. Ironically, said China, the US itself had not tabled even a single concrete proposal to address its raised concerns.

The vital importance of the AB could not be overstated, China underlined. The AB crisis was indeed the crisis of the rules-based multilateral trading system. When the rule of law was replaced by the rule of the jungle in the international trade regime, every member would take a hit in the long term, said China.

At present, the devastating consequence of the AB paralysis had become reality. Ten pending appeals were forced to be suspended until the resumption of a functioning AB. If the paralysis continued, the other 33 pending panel disputes faced potential legal limbo, said China.

China said it renewed its commitment to the informal process established to unlock the AB impasse, and firmly supported the facilitator of the process and

the WTO Director-General continuing their respective efforts to address the selection deadlock. In addition, "we think it is equally important to find a timely interim solution during the paralysis of the Appellate Body."

In that regard, China and other like-minded members were currently structuring a multi-party appeal arbitration mechanism which could serve as a stop-gap means, it noted. "The Davos Ministerial Statement is the latest testimony of our strong commitment to uphold an independent and impartial two-tier dispute settlement system, which ensures disputes could be resolved based on rules rather than powers." China welcomed and encouraged other members to seriously consider subscribing to this interim option.

China also pointed out that institutional memory was extremely important to ensure the integrity of the rules-based multilateral trading system. It requested that during this period, the AB secretariat should remain stable and its structure maintained. Its staff should remain available at any time and be prepared to work on new cases in a timely manner, said China.

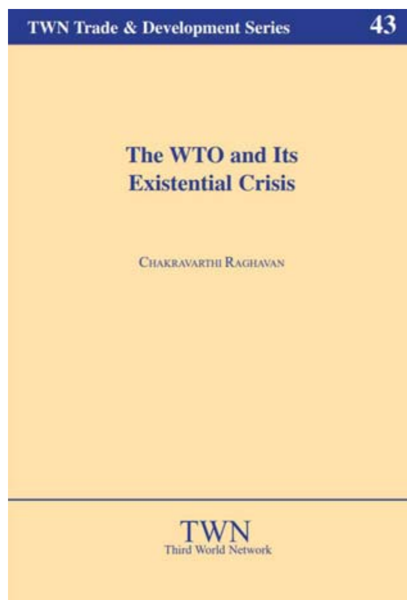
Japan said it noted the Davos declaration on an interim appeal arrangement with great interest and was ready to continue engagement on the initiative. It however said that any attempt to adopt measures of a provisional nature must serve the purpose of finding a long-lasting solution. Simply replicating the "discredited" AB would hardly be conducive to this ultimate goal, Japan said.

According to trade officials, the chair of the DSB and facilitator of the informal consultation process, Ambassador David Walker of New Zealand, recalled that his process had culminated in a draft General Council decision on the functioning of the AB which failed to secure consensus at the Council meeting on 9 December 2019 (see *TWE* No. 691). It was up to members to see how this work would be taken forward in the future, he said.

The chair also noted the statement made by WTO Director-General Roberto Azevedo on 9 December informing members that he would be undertaking more intensive high-level consultations on how to resolve the matter. Walker said he was advised that these consultations had begun. *(SUNS9056)*

The WTO and Its Existential Crisis

by Chakravarthi Raghavan



The multilateral trading system centred in the World Trade Organization (WTO) faces no less than an existential threat stemming from the United States' blocking of new appointments to the WTO's Appellate Body (AB) – a standstill which could effectively paralyze the entire mechanism for resolving trade disputes between countries.

While the US stance has been seen as a means to force through a reshaping of the WTO in Washington's own interests, it has also cast a spotlight on longstanding flaws in the WTO dispute settlement system. As this paper points out, dispute panels and the AB have in several cases been perceived as unduly altering the balance of WTO member states' rights and obligations, often to the detriment of developing countries.

The priority now, asserts the paper, is to "call the US bluff" and address the AB impasse at the highest political decision-making level of the WTO. Separately, a review of the WTO dispute settlement regime, which is long overdue, should be undertaken in order to ensure that the system enshrines principles of natural justice.

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Investor-state dispute settlement "reform" discussions at UNCITRAL

Reform of the controversial system for adjudicating disputes between foreign investors and host states is under discussion at a UN trade law body. *Kinda Mohamadieh* has the latest.

GENEVA: The UN Commission on International Trade Law (UNCITRAL) Working Group III (WGIII) held its resumed 38th session between 20 and 24 January in Vienna to discuss reform of investor-state dispute settlement (ISDS).

Since UNCITRAL was entrusted with this mandate in July 2017, the multilateral debate on ISDS reform has been largely concentrated in this forum. However, this issue has been a matter of discussion for years at national, regional and multilateral levels, including at the UN Conference on Trade and Development (UNCTAD) in Geneva.

In its March 2019 Issues Note titled "Reforming Investment Dispute Settlement: A Stocktaking", UNCTAD had pointed out that states are adopting five different approaches to ISDS reform: not including ISDS in their treaties, adopting standing ISDS tribunals, limiting ISDS, improving ISDS procedures, or keeping ISDS un-reformed.

The deliberations at WGIII had identified four general categories of concerns with ISDS, including: costs and duration of proceedings; inconsistency, incoherence, unpredictability and incorrectness of decisions; arbitrators' and decision-makers' appointment methods and ethics; and third-party funding.

WGIII had also identified a number of "cross-cutting" issues that were raised mainly by developing countries, including: means other than arbitration to resolve investment disputes as well as dispute prevention methods; exhaustion of local remedies; third-party participation; counterclaims and investor obligations; regulatory chill; and calculation of damages. While there was agreement in WGIII that these issues will be taken into account as the working group develops tools to address various concerns, they are rarely being addressed in an integrated manner as discussions on reform options evolve.

Deliberations in WGIII take place primarily with reference to notes prepared by the UNCITRAL secretariat and guiding questions raised in those notes. The non-governmental Third World Network proposed in an intervention, during the meeting in Vienna, that it would be useful if the secretariat considers how to integrate the cross-cutting issues in its notes where and as relevant.

Generally, the discussions in WGIII do not touch upon changing the basic nature of the ISDS system, which is exclusively available to foreign investors and allows them to initiate claims against host countries based on alleged breach of standards of protection in underlying investment treaties. States cannot initiate claims against investors, even in cases where the investors had breached domestic law, but can attempt a counterclaim.

Currently, given that advance consent to arbitration by the state is assumed under international investment agreements, any foreign investor considered protected under such an agreement is able to bring a claim, and in many cases investors that have violated domestic or international obligations have been granted access to ISDS.

The possibility of identifying additional concerns with ISDS is not discarded in WGIII. There is, however, no allocated time for this. Any country interested in bringing up additional concerns will need to squeeze the issue onto the agenda either by linking it to other issues already under discussion or by raising it when the agenda of future meetings is discussed. Identification of agenda items for future meetings will be allocated time for discussion during the next session of WGIII, which is scheduled to take place in New York on 30 March-3 April.

The recent resumed 38th session in Vienna focused on issues pertaining to setting up an appellate mechanism to review decisions of investment arbitral tribunals, and the selection and appointment of tribunal members, including those of a proposed appellate mechanism.

(Many intervening delegations prefaced their interventions by clarifying that what they proposed was with no prejudice to their final decision on the issues under discussion.)

While these issues were the focus of the deliberations, the possibility of setting up a multilateral investment court and how it will deal with appeals and selection and appointment of adjudicators was weaved into the discussions at Vienna. These issues are discussed below.

(1) An appeals mechanism

WGIII considered the possible creation of an appeals mechanism. Discussions on the technicalities of appeal proceeded without an initial discussion on what specific objectives are sought as a result of the appeal and the preferred type of appellate mechanism.

A note by the UNCITRAL secretariat referred to multiple options for setting an appeal. One is a model appellate mechanism that could be used in three main ways: (i) for inclusion in investment treaties by parties; (ii) for use on an ad hoc basis by disputing parties; (iii) for use as an option available under the rules of institutions handling ISDS cases.

Another option is setting appeals as part of a permanent multilateral appellate body, which could either complement the existing arbitration regime or constitute the second tier in a multilateral investment court.

The discussions did not reveal a majority inclined towards any of the choices, but saw a significant variance among countries' approaches.

Furthermore, no prior discussion was undertaken on the broader systemic implications that could result from building an appeal mechanism on top of the existing body of international investment rules.

Some systemic implications

The effect of an appeal, particularly whether it should bind the disputing parties only or whether it should have effect beyond these parties and the treaty underlying the dispute, carries several potential systemic implications.

An appellate review is fundamentally about substantive obligations. Beyond being a corrective instrument for flawed decisions, it will potentially have an effect on the substantive coordination under

international investment law, thus requiring consideration of the long-term consequences on international investment law.

The underlying normative framework, currently represented by over 3,200 investment agreements, is generally imbalanced, focusing on investor protection, lacking consideration of investor responsibilities, and lacking effective consideration of issues pertaining to sovereign regulatory space.

Increasingly significant differences are emerging between old treaties and newer ones that take sustainable development aspects into consideration. There is limited indication that states intend to get rid of old treaties.

Given the nature of the underlying normative framework, the development of a more stable investment law is not necessarily good by itself, especially because this might make it harder to go back and revisit the substantive content of investment treaties, including aligning this normative framework with sustainable development.

In comparison, in the World Trade Organization (WTO), appeals apply to an underlying body of law that is uniform for all concerned states and the developmental consideration is often inbuilt into the design of WTO treaties and mechanisms of undertaking commitments under these treaties.

Some of the discussed issues pertaining to appeals

Participating countries in the Vienna meeting debated the nature and scope of a potential appeals mechanism (particularly whether it will cover errors of law and fact as well as calculation of damages), the standard of review that will be adopted, the relation between the first instance and appeals, the relation between the appeals process and investment treaty parties, the effect of the appeal (i.e., whether it would bind only parties to the dispute or will also bind subsequent arbitral tribunals), enforcement of the appeal decisions and financing of an appeals mechanism.

The potential impact of an appeals mechanism on cost and duration was discussed as well. Reference was made to the role of a filtering mechanism to ensure appeals will not become systematic, and to other control mechanisms, such as security of costs to control frivolous appeals.

What decisions could be appealed, and when, was also discussed (i.e., whether final awards only or also preliminary issues and interim measures, as well as decisions from domestic courts and in contract cases).

When it came to covering decisions by domestic courts, such as those based on domestic investment laws with similar standards as international investment treaties, most interventions were skeptical of this option and many expressed their opposition.

Regarding treaty party participation, some noted that state parties should have the power to issue treaty interpretations that would bind an appeals body.

Another related question was whether states not party to the treaty underlying the case could interfere and make amicus contributions.

Participation of third parties, including local communities affected by the investment or dispute at hand, was also raised. Maintaining the role of domestic courts, particularly at the enforcement level, was deemed important.

Some countries were skeptical that achieving the sought objectives necessitates setting up a permanent appeals mechanism, and proposed that given the fragmentation of the underlying treaties and potential increase of costs and duration associated with appeals, more useful tools could be a scrutiny mechanism that would apply before issuance of awards, along with enhancing state party participation in treaty interpretation.

(2) Selection and appointment of adjudicators

WGIII considered issues pertaining to who should make up the universe of ISDS adjudicators, their required qualifications, and means for their appointment to ISDS cases.

Currently, there are no strict regulations on who can be appointed to investment arbitral tribunals. Studies have noted that the international investment arbitration industry is dominated by a small and tight-knit community of law firms and elite arbitrators mainly from Europe, the United States and Canada.

Delegations addressed the need to identify qualification criteria and mechanisms for selection, develop a list or roster of adjudicators including, for example, regional rosters, and set term limits and criteria for renewal.

Among other issues that were discussed were criteria for constitution of particular arbitral tribunals and a cooling-off period before an adjudicator on a potential court can take up other appointments.

There was broad agreement on the importance of independence and impartiality, as well as neutrality in resolving disputes.

Many delegations also stressed that adjudicators should not be subject to influence by investors or states. They referred to needed competence among arbitrators in public international law, sustainable development, international investment and economic law, relevant domestic laws, valuation of damages and procedural issues pertaining to managing disputes.

"Studies have noted that the international investment arbitration industry is dominated by a small and tight-knit community of law firms and elite arbitrators mainly from Europe, the United States and Canada"

Much was said about the need to ensure diversity, including in respect to gender, age, region, legal systems, culture and socioeconomic backgrounds. Diversity was discussed in the context of arbitrators as well as the secretariat of a potential court.

While several delegations noted the need to move away from appointment of adjudicators by parties to a dispute (i.e., the investor and the state), others said that party autonomy was key for them.

The room was divided between those who envisioned a new permanent body as the best way forward, which some suggested could be established under the auspices of the UN, and others who preferred to maintain the status quo ad hoc system of arbitration while adding to it a code of conduct for arbitrators and possibly a list or roster of pre-selected arbitrators.

Some also suggested ad hoc party appointments at first instance and a permanent mechanism of judges appointed by states at appeals level.

(3) Experiences of developing countries with existing permanent dispute settlement institutions

At the WTO, the Dispute Settlement Understanding has a diversity requirement and Appellate Body members are supposed to be broadly representative of the membership. Yet, panellists are overwhelmingly from developed member states. So are more than half the Appellate Body. This has been a longstanding problem that reflects a development asymmetry in the institutional design and operation of the WTO's dispute settlement system.

While developing countries value greater diversity of arbitrators, there is no guarantee that a formal commitment to diversity built into the statute of a permanent body can break the dominance of the arbitral elite. Indeed, this dominance can even become more problematic if appointments are for long terms.

Diversity aims to ensure that appropriate understandings of law and culture are brought to the matters under dispute, and that arbitrators can interpret core legal concepts through a development lens. Although it is a prerequisite to doing justice, it should not become an end in itself.

Furthermore, too much power vested in an unaccountable secretariat of a new permanent body can create additional problems of its own. For example, in the WTO, the secretariat recommends the panellists and disputing states can only object for compelling reasons. Recent academic research shows the secretariat has more influence over reports than panellists, influencing the role of precedent and limiting dissents.

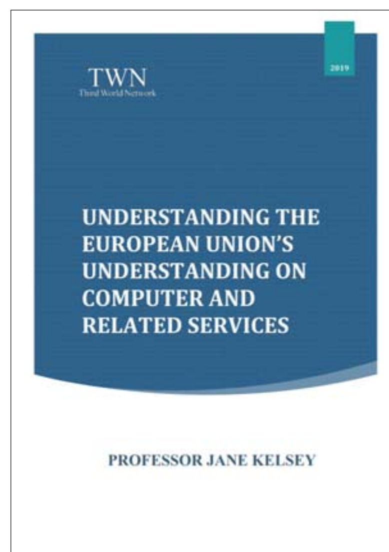
While developing countries have been calling for fixing problems of the WTO dispute settlement system for years, reform has proven impossible.

These experiences require from developing countries a proper reflection on how such problems that arose in the context of the WTO, which is supposed to be a member-controlled institution, would play out in the context of a new permanent investment court or investment appellate mechanism, despite the many promises made during the WGIII discussions. (*SUNS9056*)

This article was written with contribution from Professor Jane Kelsey on section 3.

Understanding the European Union's Understanding on Computer and Related Services

by Professor Jane Kelsey



We live in a digital era that encompasses everything, from Internet banking, online retailing and multimodal logistics to automated mining and food production, additive manufacturing (3D printing), smart products and the Internet of Things. Alongside digitisation has come 'servicification' - everything in the production and distribution supply chain, except the final commodity, is being redefined as a service.

Most services are now driven by digital technologies that operate through an ecosystem that functions like a human body: data, computer systems, software and algorithms are the brain; telecommunications act as the nerve system; and finance is the blood supply. Those who control the digital brain will wield significant power over the future global economy, society and governance.

Old development asymmetries are embedded in this transformation. If first-mover countries and companies continue to dominate the digital domain, and make the global rules in their interest, then the digital divide among countries will widen even further. That's why the European Union's Understanding on Computer and Related Services matters.

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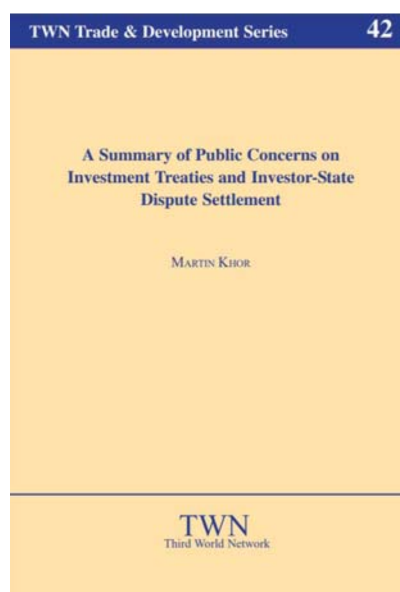
A Summary of Public Concerns on Investment Treaties and Investor-State Dispute Settlement

by Martin Khor



International investment agreements, specifically bilateral investment treaties and the investment chapters in free trade agreements, have come under the spotlight for what are seen as skewed provisions that grant excessive rights to foreign investors and foreign companies at the expense of national policymaking flexibility. Of particular concern is the investor-state dispute settlement framework embedded in many of these treaties, which enables foreign investors to sue host-country governments in opaque international tribunals.The serious risks involved have prompted a rethink of investment pacts in developing and developed countries alike. In place of the current lopsided system, calls are growing for agreements which would balance legitimate investor rights with the rights of the state to regulate investment and formulate policies in the public interest.

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Third World ECONOMICS No. 692, 1 -15 February 2020

Inequality, stagnation and instability – the new normal for finance capitalism

At the centre of the sluggish growth and rapid debt build-up plaguing much of the global economy lies inequality, explains *Yilmaz Akyüz*.

The failure of large-scale bailout operations, historically low interest rates and rapid injection of liquidity to bring about a strong recovery from the 2008-09 financial crisis and recession created a widespread concern that advanced economies suffered from a chronic demand gap and faced the spectre of stagnation.

The subsequent growth experience has reinforced these concerns. Since the crisis, the US has sustained the longest economic expansion in history, but it is also one of the slowest in terms of income, investment and job creation, lagging other postwar recoveries despite exceptionally favourable monetary policy.

Recovery has been slower and more erratic in Europe. Recently advanced economies have slowed further and global growth in 2019 was the lowest since the financial crisis, intensifying the fear of another recession.

Sluggish investment and growth, rising inequality, low inflation and interest rates, and rapid debt accumulation have become common features of major advanced economies and indeed much of the global economy at large.

These are all interrelated.

At the centre of this state of affairs lies inequality – wage suppression and concentration of wealth. It is the main reason for the chronic demand gap, exceptionally low inflation and interest rates, and rapid build-up of debt.

Income and wealth disparity

In sharp contrast with a longstanding belief that income shares stay relatively stable in the course of economic growth, there has been a secular downward trend in wage shares in all major advanced economies, with real wages falling or lagging behind productivity growth.

In most countries this started in the 1980s and continued unabated in the new millennium, both before and after the 2008-09 crisis. In China too, the wage share started to decline in the 1990s. Although this was reversed after 2010 as a result of efforts to establish a buoyant domestic consumer market, the wage share in China remains significantly lower than that in major advanced economies.

Wage suppression has been accompanied almost everywhere by growing concentration of wealth, resulting also in greater inequality in the distribution of incomes from assets.

Three factors have played an important role in growing inequality. First, liberal policies have led to the erosion of labour market institutions, weakening labour while consolidating the power of large corporations.

Second, the increased size, scope and influence of finance (financialization) has widened inequality and the demand gap as well as reducing growth potential by diverting resources to unproductive uses.

Finally, globalization has shifted the balance between labour and capital with the integration of China, India and the countries that constituted the Soviet Union into the global economy.

The erosion of labour market institutions and financialization have gone further in the Anglo-American world, and this explains why inequality is greater in the US and the UK than in other major economies.

The growing gap between labour productivity and wages means declines of the purchasing power of workers over the goods and services they produce. This, together with the increasing concentration of wealth and asset incomes, results in under-consumption.

Although sustained declines in wages would reduce the cost of production and increase the surplus in the hands of the capitalist class, they would also limit the extent of the market since wages are the most important component of aggregate demand.

Wage suppression thus creates the classical-Marxian problem of monetary realization of the surplus – a reason why Keynes also rejected declines in wages as a recipe for unemployment. It adversely affects demand and profit expectations and hinders investment regardless of how low the cost of borrowing is.

Exports can provide a way out. Until the 2008-09 crisis, China, Germany and Japan all relied on foreign markets in different degrees to fill the demand gap, using macroeconomic, labour market and exchange rate policies. Gross domestic product (GDP) grew faster than domestic demand in all three economies thanks to strong growth in exports.

After the crisis, China's exports plummeted and the country first moved to a debt-driven investment bubble and then sought to boost consumption to close the demand gap while moving to a significantly lower growth path. Germany replaced China as a major surplus country and Japan also increased its reliance on exports to address the demand gap.

However, this solution is not feasible for major under-consumption economies taken together — it faces fallacy of composition and breeds trade conflicts.

The Global South outside China is not big enough to provide an adequate market for the US, Europe, Japan and China. They would need to run trade deficits in the order of several percentage points of their GDP for each percentage point trade surplus needed to avoid stagnation in the under-consumption economies.

They cannot rely on international capital flows to sustain such deficits. The alternative is debt-driven expansion.

Credit and asset bubbles

Sluggish wages reduce price pressures and allow and encourage central banks to create credit and asset bubbles to overcome stagnation without fear of inflation. There is indeed a remarkable correlation between the declining wage share and declining interest rates.

In the US over the past three cycles the Federal Reserve has been quite restrained in raising policy rates at times of expansion while cutting them drastically during contractions, creating a downward bias in interest rates.

This policy stance creates destabilizing interfaces between debt and interest rates. Lower wages and subdued inflation lead to lower interest rates which, together with financial deregulation, encourage debt accumulation and asset bubbles. This, in turn, makes it difficult for central banks to raise policy interest rates without causing disruptions in financial markets, thereby making low interest rates self-reinforcing.

Indeed, the downward bias in interest rates in the G7 major economies has been associated with a strong upward bias in debt since the mid-1980s, suggesting that ultra-easy monetary policies made possible by wage suppression and low inflation have led to a debt trap.

Financial boom-bust cycles generated by attempts to re-ignite growth by monetary easing and financial deregulation exacerbate the stagnation problem by creating waste and distortions on the supply side and reducing potential growth.

During booms, the financial sector crowds out real economic activity and cheap credit entails massive capital misallocation, diverting resources to low-productivity sectors such as construction and real estate. Misallocations created by the booms are exposed during the ensuing crises when the economy would have to make a shift back to viable sectors and companies, but this is often impeded by credit crunch and deflation.

Second, boom-bust cycles also aggravate the demand gap by increasing inequality. In the US, for instance, the crisis impoverished the poor, particularly those subject to foreclosures, while policy interventions benefited the rich. In the recovery, the top 1% captured almost 60% of total growth.

From 2008 onwards, real hourly wages stayed behind hourly labour productivity and the share of wages fell during both the contraction and the subsequent recovery. Two-thirds of households in 25 advanced economies were in income segments whose market incomes did not advance or were lower in 2014 than they had been in 2005.

These imply that when credit and asset bubbles burst and the economy contracts, an even bigger bubble may be needed for recovery and growth.

In the US, the bursting of the Savings and Loans bubble of the 1980s was followed by a bigger technology (dot-com) bubble in the 1990s which ended at the turn of the century, followed by an even bigger sub-prime bubble and bust, leading to more aggressive interest rate cuts and liquidity expansion.

The past 10 years have been relatively calm and stable. Several instances of heightened market volatility including during the "taper tantrum" of May 2013 and on the eve of the first rise in US policy rates in December 2015 did not lead to lasting turbulence. However, this period of tranquility has encouraged excessive risk taking and a rapid build-up of debt, thereby sowing the seeds of future instability, very much as during the so-called Great Moderation preceding the Great Recession.

Permanently low interest rates and massive injection of liquidity have led to a search for yield in high-risk, high-return assets globally. Starting with the US, major stock markets have reached record highs and global debt has shot up to exceed $255 trillion or 320% of world GDP in 2019. Emerging economies, in particular, have seen a rapid build-up of private debt in reserve currencies and increased penetration of their markets by international capital and firms, heightening their external vulnerabilities and entailing large transfers of resources to advanced economies through financial channels.

As recognized by the World Bank, despite exceptionally low interest rates, this wave of debt accumulation could follow the historical pattern and eventually end in financial crises.

In the next global economic downturn, an important part of the debt accumulated in the past 10 years could become unpayable, leading to debt deflation and asset price declines. The central banks would no doubt try to respond in the same way as they did during the 2008-09 crisis. But the scope for cuts in interest rates is now limited because they are at very low levels and there is already plenty of cheap money in the system. These may severely compromise their ability to stabilize the economy.

A countercyclical Keynesian fiscal reflation may save the day, but much more would be needed to address the structural demand gap and its underlying causes: a permanently bigger government financed by progressive income and wealth taxes and money printing; greater state ownership of productive assets and control over economic activity; income redistribution through the budget; a level playing field between labour and capital; a shift to wage-led growth; and taming financial capital. (*IPS*)

Yilmaz Akyüz *is former Director at the United Nations Conference on Trade and Development (UNCTAD) and former Chief Economist at the South Centre in Geneva.*

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Third World ECONOMICS No. 692, 1 -15 February 2020

Billionaires in the spotlight

Anis Chowdhury and *Jomo Kwame Sundaram* warn of the pernicious effects of extreme wealth concentration in the hands of the super-rich.

The latest November 2019 UBS/PwC Billionaires Report counted 2,101 billionaires globally, or 589 more than five years before.

Earlier, columnist Farhad Manjoo had seriously recommended, "Abolish Billionaires", presenting a moral case against the super-rich as they have and get far, far more than what they might reasonably claim to deserve.

Manjoo also argues that unless billionaires' economic and political power is cut, and their legitimacy cast in doubt, they will continue to abuse power to further augment their fortunes and influence, in ways detrimental to the economic, social and public good.

In defence of billionaires, Josef Stadler, head of ultra-high net worth at UBS Global Wealth Management, argued that their wealth "has also translated into their philanthropy, as billionaires seek new ways to engineer far-reaching environmental and social change".

Philanthropic ethics expert Chiara Cordelli notes that philanthropy and donations have diverted social responsibility from governments and created other problems by bypassing democratic political processes and accountability. "The philanthropist should not get to decide – in virtue of her or his disproportionate influence – which world we should live in."

An ostensibly benign "billionaire effect" cannot offset the adverse impacts of billionaires' wealth accumulation, tax avoidance and abuse of power to corrupt political processes and policymaking. Rather, "every billionaire should be regarded as a policy failure". To create fairer societies, we need to end extreme wealth concentration and its problematic consequences.

Dubious sources

Robert Reich has shown that a significant share of billionaires' wealth is undeserved and does not bear any reasonable connection to their ability, intelligence or contribution, as expected in a society supposedly based on meritocracy and fair competition.

Oxfam estimates that about a third of billionaire wealth is inherited. There is no real economic case for inherited wealth as it undermines social mobility, economic progress and meritocracy, the main basis of legitimation in modern society.

Other work finds that about 43% of billionaire wealth comes from crony connections to governments and monopolies, e.g., when billionaires use such connections and corruption to secure government concessions and contracts. In developing countries, this share was even higher at 56%, according to a 2015 Oxfam study. *The Economist*'s crony capitalism index also suggests that corruption and crony connections to governments are behind much billionaire wealth.

Another source of billionaire wealth is abuse of monopoly privileges granted by patent laws. While intellectual property has been justified as necessary for innovation, recent research, summarized by *The Economist*, disputes the supposed link between patent rights and innovation, and deems the patent system a dysfunctional way to reward innovation or new ideas.

Since the 1980s, patent rights have been extended well beyond what may be considered necessary to incentivize innovation. For Richard Posner, a respected US judge, "such extensions offer almost no incentive for creating additional intellectual property".

Insider trading – taking advantage of privileged information not yet made public – has been significantly abused for "unfair" advantage in markets. *The New York Times* has found, "Some of the most prominent cases of illegal insider dealings have involved very wealthy people."

Growing wealth concentration

A large and growing share of the global economy is controlled by a few large transnational corporations (TNCs). Decades of mergers, acquisitions and ineffectual anti-trust legislation have seen market power concentrated despite claims to the contrary.

Such TNCs, cartels, other monopolies and oligopolies extract lucrative rents, enabling them to secure super-profits, accelerating wealth accumulation and concentration at the expense of petty producers, workers and consumers.

The way wealth is used by the super-rich confirms their own "social disutility". They accumulate more quickly by paying as little tax as possible, making good use of tax advisers and havens. A study found that the super-rich pay as much as 30% less tax than they should, denying governments billions in lost tax revenue.

The extremely wealthy also get the best investment and tax avoidance advice, enabling billionaire wealth to increase by an average of 11% annually since 2009, far more than average investors and ordinary savers get.

The secretive Society of Trust and Estate Practitioners (STEP), representing over 20,000 wealth managers, has successfully lobbied many governments to reduce taxes on the richest. STEP has spent billions to "buy" legal impunity, politicians and the media to lower taxes on its clientele. Such lobbying has accelerated wealth concentration and accumulation.

Such "dark" money is used to influence elections and public policy the world over. An Oxfam study has shown how politicians have been "bought" by Latin America's super-rich, e.g., with substantial financial backing for ethno-populist, racist and religiously intolerant leaders.

Over a century ago, monopoly power was seen as a major threat to the US economy and society. Anti-trust legislation and action, especially by President Theodore Roosevelt, broke up cartels and monopolies. Years later, his cousin, President Franklin Delano Roosevelt, warned that "government by organized money is just as dangerous as government by organized mob".

However, in recent decades, neoliberal economists have taken a much more benign view of oligopolies and monopolies, distinguishing them from classical liberal economists committed to market competition.

Conversely, insisting on competition in small developing economies has effectively prevented domestic firms from becoming internationally competitive by building on economies of scale and scope.

• Please see page 16

Third World ECONOMICS No. 692, 1 -15 February 2020

Touching a nerve

How a peoples' campaign at the United Nations is challenging corporate rule

Backed by affected communities and social movements, negotiations are taking place at the UN to draw up a binding treaty that would confront corporate violations of human rights and the regime of impunity giving these free rein.

by Brid Brennan and Gonzalo Berrón

Since 2015, there has been an annual negotiation at the United Nations' Palais des Nations in Geneva that touches the very nerve centre of corporate capitalism. This event stems from the June 2014 United Nations Human Rights Council (UNHRC) Resolution 26/9 that set up an intergovernmental working group to elaborate a legally binding instrument to regulate transnational corporations (TNCs). It was a historic initiative as it demonstrated that corporate rule – which many still see as unquestionable – can be challenged and confronted.

It is, unsurprisingly, a negotiation that has been contested every step of the way, revealing the often conflicting – but sometimes coinciding – interests among the three major actors: states, corporations, and the affected communities, social movements and civil society organizations (CSOs).

This trajectory sees the convergence of diverse paths. For states – assuming a new historic responsibility to put a binding treaty in place that addresses the acknowledged gap in human rights law, the architecture of corporate power and impunity, and access to justice. For corporations, the repeated defence of the status quo – legitimizing corporate violations of human rights and profits before peoples' rights. And for affected communities and social movements – persistent resistance, building law from below and sustaining pressure on governments.

Addressing systemic corporate impunity

Ever since transnational corporations became major global actors, affected communities, factory workers and social movements have resisted this corporate economic model.

By 2000, communities and workers worldwide had protested against TNC crimes – including such iconic cases as the Union Carbide pesticide plant's poisonous gas leak in Bhopal in 1984; Shell's ruptured pipeline in Bodo, Nigeria (2008-09); Chevron/Texaco's dumping of crude oil in Ecuador (1964-92); European (fossil fuels/energy, agriculture and manufacturing) corporations' blocking of significant reductions in carbon emissions; and BP's Deepwater Horizon explosion in the Gulf of Mexico (2010).

While the resistance of affected communities has been a constant challenge to the operations of TNCs and their human rights violations, it was the joint convening by the Hemispheric Social Alliance and Enlazando Alternativas of the Permanent People's Tribunal (PPT) sessions on European corporations in Latin America (2004-10) that kickstarted a new process of bringing the different movements together and developing a shared analysis of the corporate violations of human rights. In the process of sharing experiences of 46 cases, the three sessions not only pointed to specific corporate violations but also identified their systemic character.

The verdicts identified an "architecture of impunity", generated by different trade and investment agreements and the global institutions of the World Trade Organization (WTO), the International Monetary Fund (IMF) and the World Bank, that legitimized and prioritized protections and privileges to corporations over the human rights of communities and workers.

This notably includes the investor-state dispute settlement system (ISDS) whereby TNCs can unilaterally sue states for actions that affect their profits. The PPT judgement in Madrid in May 2010 concluded that the human rights of people in Latin America and Europe faced an impenetrable wall of impunity and denial of justice in relation to TNCs' operations. It noted that global corporate rule had become entrenched – privileging profits above peoples' rights and the protection of the planet.

The PPT judgement was a watershed in the movement towards an international binding regulatory framework for TNCs' operations, calling for the UNHRC to draw up a compulsory code of conduct for TNCs and for affected communities and social movements to develop a mandatory legal framework in the context of international law – envisaged as "one of the first steps on the path to creating a different world order".

The Global Campaign to Reclaim People's Sovereignty, Dismantle Corporate Power and Stop Impunity (Global Campaign) was established in 2012 following extensive consultation on how to develop a strategy addressing corporate impunity. It also initiated the development of a Peoples' Treaty on Transnational Corporations.

The campaign had two main pillars – a judicial pillar preparing detailed proposals for a binding international regulatory framework for TNCs, and an alternatives pillar advocating a more people-centred economy that would reclaim democracy and peoples' sovereignty.

Overcoming the voluntary approach

By 2012, decades of attempts to regulate TNCs at the international level had been defeated. The main initial challenge was to overcome the international consensus in favour of a voluntary approach to corporate violations of human rights, which was embodied in the UN Guiding Principles on Business and Human Rights (UNGPs) developed by Professor John Ruggie and promoted as the mechanism for advancing human rights in relation to corporate violations and abuse. These were formally adopted at the UN in 2011 and claimed as the upper limit of human rights protection.

However, the track record of TNCs' operations on the ground and the denial of justice to those affected by them gave little reason to expect anything different as a result of the UNGPs. Communities dealing with the devastating operations of TNCs insisted that self-regulation was not enough and that only binding regulation could address the glaring gap in international human rights law in relation to TNCs.

While Ruggie, and particularly governments in the North, continued to insist that the UNGPs were the only deal in town, some governments in the South continued to call for binding

regulation. Kept alive by resistance by affected communities and social movements, this demand resurged in September 2013 when Ecuador and South Africa (supported by at least 85 governments) submitted a joint statement to the 24th regular session of the UNHRC indicating the intention to reopen the agenda of a legally binding regulatory framework for TNCs.

The UNGPs have failed to stop corporate impunity

Since 2011, affected communities and movements have repeatedly noted the inability of voluntary codes to address corporate violations of human rights and damage to ecosystems.

Analysis of the world's 101 largest corporations in sectors known to pose a threat to human rights confirms this failure to implement the UNGPs:

- 40% of TNCs could not certify the application of due diligence measures on human rights.
- Virtually none could prove that they met the commitment to pay living wages in their own operations or in their supply chains.
- In 70% of the cases studied, TNCs in the textile and agribusiness sectors had no measures in place to ensure respect for women's rights in their own operations or in those of their suppliers.
- Less than 10% of companies had some policy of protecting human rights defenders.
- 50% of companies in the textile and agribusiness sectors failed to meet their commitments to prevent child labour in supply chains.

Source: "Corporate Human Rights Benchmark, 2018 Key Findings – Apparel, Agricultural Products and Extractives Companies"

Converging forces at the UN in June 2014

Ecuador and South Africa's move was immediately backed by organizations of the Global Campaign, which voiced strong support. Soon afterwards, the Treaty Alliance was launched when members of the Global Campaign joined with several other human rights networks and organizations in Geneva to set up a broad coalition to work for a binding treaty.

The result was the historic vote in support of Resolution 26/9, which established an open-ended intergovernmental working group (OEIGWG) "on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises..."

• Continued from page 14

Significantly, even the International Monetary Fund (IMF), which imposed neoliberal policies for nearly four decades as a condition for credit support, now accepts that neoliberalism was "oversold", while the World Bank acknowledges disappointing growth after neoliberal reform.

Deregulation, liberalization, privatization and globalization have strengthened the market power of corporations, reduced the progressivity of tax systems, reduced public provisioning, increased the frequency and intensity of financial crises, and slowed growth and development. (*IPS*)

***Anis Chowdhury**, Adjunct Professor at Western Sydney University and the University of New South Wales (Australia), held senior United Nations positions in New York and Bangkok.*
***Jomo Kwame Sundaram**, a former economics professor, was Assistant Director-General for Economic and Social Development at the UN Food and Agriculture Organization, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007.*

The resolution was carried by a small majority at the UNHRC – supported by governments of the Global South and opposed by each EU member state in the UNHRC as well as by states in which major TNCs are based such as Japan, South Korea and the United States. The vote thus made clear the geopolitical struggle that would mark every step of the way in the process towards a binding treaty.

Feminists for a Binding Treaty

In 2015, civil society engagement in support of a binding treaty was further expanded with the setting up of Feminists for a Binding Treaty. This network mobilizes women and highlights gender perspectives in the advocacy for a binding treaty.

They focus on three key proposals:
(1) mandatory gender impact assessments of business activities;
(2) gender-sensitive justice and remedy mechanisms; and
(3) ensuring respect, protection and an enabling environment for women human rights defenders.

Source: AWID et al. (2017), "Integrating a gender perspective into the legally binding instrument on transnational corporations and other business enterprises", statement

Binding treaty process – a site of constant contestation

Since its launch in 2014, the UNHRC process has revealed the conflicts of interest and contradictions among the three main protagonists: states, TNCs and civil society.

This has seen TNCs ally with governments, predominantly from countries that host the largest transnational corporations, while social movements ally with some supportive governments from the Global South at the same time as urging governments of the Global North to participate actively and constructively in the process.

TNCs assert their interests and influence through their associations and as "civil society" organizations with ECOSOC (UN Economic and Social Council) status at the UNHRC, where they are represented through the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE), which is also represented in the tripartite International Labour Organization (ILO).

Both organizations present their perspectives in the panels and conferences of the OEIGWG meetings, and also take the floor during the sessions and submit written positions in the formal process. They have consistently claimed that the proposed treaty will have a negative impact on investment in developing countries – a position also reflected by pro-corporate lawyers and academics at the UNHRC.

There has been a longstanding debate on why the ICC and IOE are classified as CSOs with ECOSOC status, especially given their conflict of interest with an agenda focused on human rights and corporate accountability. By comparison, the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) excludes tobacco corporations in the bodies implementing the FCTC as a result of campaigns exposing corporate funding of so-called "independent" research.

In tandem with their direct interventions, TNCs present themselves as models of "good practice" in relation to human rights at the Annual Forum on Business and Human Rights at the UNHRC in Geneva. The aim of this event is to show that voluntary self-regulation works and that binding treaty obligations are an unnecessary burden, which is belied by its members' practices.

The Brazilian mining company Vale, for instance, attended several Annual Forums despite its disregard for safety standards resulting in two dam collapses – releasing millions of tonnes of toxic waste and mud from mining operations at Mariana (November 2015) and Brumadinho (January 2019) in the state of Minas Gerais. It is estimated that hundreds of people died as a result of the devastation, and the poisoning of rivers and land is among Brazil's worst environmental disasters.

The influence and success of the corporate lobby is evident in the way its discourse is echoed by the US, EU member states and other Northern states, with the backing of states from other regions, particularly the current right-wing governments in Chile, Colombia and Guatemala. Their shared discourse, approach and tactics towards the binding treaty process are to do everything possible to either block it or render it meaningless.

Even if the full implications of corporate capture at the UN remain obscure, many concerns have been raised on how this plays out in relation to the UN mechanisms on human rights. For instance, an agreement between Microsoft and the UN High Commissioner for Human Rights in 2015 was seen as a classic case of a non-transparent corporate donation. Coming as it did in the first year of the OEIGWG process – a highly sensitive time in relations between TNCs and affected communities – the absence of full disclosure on its purpose was questioned.

The obstructive tactics of the corporations-states nexus range from rhetorical to procedural and political.

The rhetorical approach has been most evident in the introduction of the Global Compact and the UNGPs. The adoption of the UNGPs in 2011 has been treated as a basis for rejecting other approaches until the UNGPs have been properly implemented. The UNGPs are also claimed to be more "legitimate" since they were adopted by consensus whereas a binding treaty will require a voting process. It is also asserted that they are more legitimate than a process led by states that have their own shortcomings in respecting human rights.

One key discursive battle concerns the scope of a potential treaty, with the EU pushing from the beginning to include "all business enterprises". At first sight, this looks reasonable: many states and CSOs believe that the treaty provisions should also be applied to small and medium-sized enterprises (SMEs). That said, SMEs are covered under national legislation, whereas there is a major legal gap in international law that legitimates and protects the impunity of TNCs. Because of strong legal protection of their "rights and privileges" through trade and investment agreements, and their mobility, vast economic power and increasing political influence, TNCs continue to operate with impunity.

The major asymmetry of power and structure between TNCs and SMEs requires a different approach. This concern has been frequently raised by Southern states that have no national flagship TNCs and whose economies are mainly led by SMEs which are subject to domestic laws and which – unlike "mobile" TNCs – cannot escape accountability. For this reason, many interpret the EU's position as a tactic to derail the process.

At the procedural level, the most serious challenge has been to the position of the OEIGWG chair and the body's function as a state-led process. The EU in particular has also strongly argued for the chair to be occupied by an "expert", similar to the UNGP process. The EU delegation has also tried other diversionary tactics, such as delaying sessions by threatening not to adopt the plan of work or complaining about the lack of adequate consultation in drafting the texts.

At the political level, there has been explicit pressure applied on developing countries. Calls to embassies and meetings have been reported informally, including threats of cuts in investments or aid. Similarly, in 2015 at the Fifth Committee of the UN General Assembly (which approves the UN budget each December), EU member states threatened to block the approval of the budget for the functioning of the OEIGWG. The rapid mobilization and response of the G77 developing countries and the pressure of CSOs helped protect this essential budget allocation for 2016.

In the OEIGWG sessions, the European External Action Service (EEAS) – which represents the EU at the UNHRC – has repeatedly asserted a common EU position, ignoring several European Parliament (EP) resolutions that have been far more supportive of a binding treaty. For example, a 2018 EP resolution "warmly welcomes in this context the work initiated in the United Nations through the OEIGWG to create a binding UN instrument on transnational corporations and other business enterprises with respect to human rights, and considers this to be a necessary step forward in the promotion and protection of human rights".

Members of the EP (MEPs) together with some

parliamentarians from the South set up the Global Interparliamentarian Network (GIN), now comprising over 300 members. Its representatives have participated in all sessions of the OEIGWG process and have co-organized side-events.

Against the efforts of the corporations and their allied states, social movements and some Southern governments have mobilized actively to maintain momentum. CSOs have submitted dozens of written proposals and opinions during the OEIGWG sessions, and made many interventions from the floor linking specific situations with the need for a binding treaty and proposing specific changes to the official texts.

They have also consistently engaged representatives of all government missions at the UNHRC and the OEIGWG chair in advocacy meetings and side-events. Recently, a group of interested countries and organizations from the Global Campaign have begun a series of informal "policy dialogues" to explore common positions and strategies towards achieving a meaningful treaty.

The process has been continuously energized by resistance struggles on the ground – whether against oil and gas extraction and contamination, land and ocean grabs, mega dam collapses, poisoning of water and land, forest fires, or the fallout from the textile and pharma industries. Each experience showed the urgent need for an international instrument to protect the rights of affected peoples and direct victims. Meanwhile, the denial of justice in longstanding cases such as Union Carbide and Chevron, and also in the more recent cases of Rana Plaza, Lonmin and Vale, demonstrates that the existing system is not working.

Gaining traction at every session

The result of this mobilization has been that the process has moved forward despite countless attempts to derail it – not simply holding its ground but gaining traction, with 90-100 states participating in the 2018 and 2019 sessions.

By the third session (2017), the initial elements of a treaty began to be discussed. A "zero draft" led the talks at the fourth session (2018) and a revised first draft was thoroughly discussed during the fifth session (14-18 October 2019). The programme of work covered all 22 articles in a constructive dynamic that heard many substantive contributions from more than 30 states, as well as parliamentarians, experts, affected communities and civil society.

The 22 articles of the revised first draft include a basic set of framework provisions, several with potential to facilitate access to justice. The text proposes more effective mechanisms for mutual legal assistance among states as well as international cooperation, and a proposal that could open up new possibilities of "extraterritorial obligations" – that is, states' obligations in relation to crimes committed by their TNCs in another state's jurisdiction. There is also reference to the "legal liability" of enterprises although the proposal is unclear about whether this refers to administrative or civil liability.

In terms of prevention, the text mainly relies on the idea of "due diligence", in vogue since the adoption of the UNGPs. France has recently passed a "duty of vigilance" law, although its impact has yet to be seen. In October 2019, an important test case was launched against Total, the formerly French oil company, for violating the rights of communities in its operations in Uganda.

Likewise, the revised first draft's provisions on the rights of victims could be the basis for further development, especially if they are extended to include a broader definition of "affected communities or people", as the Movement of People Affected by Dams (MAB) in Brazil proposed from the outset.

A Conference of State Parties and a Treaty Body have been proposed to follow the adoption, implementation and improvement of the treaty. These are standard UN procedures and are often useful, so the question will be if these UN bodies can be used effectively to enforce the provisions of the proposed treaty in relation to TNCs.

The conclusion of the fifth session means that the debate is no longer about whether there is a need for such a treaty and legally binding instrument that addresses TNCs' evident impunity and decisively opens the door to justice for affected communities. For the first time, states and all other actors have to position themselves, study and explain the basis of their proposals based on content and address some hard questions: How do we define the obligations of states and of TNCs? What mechanisms and instruments are needed to enforce the treaty? How do we define TNCs and the implications for "all other businesses"? What role should the state play in implementing the treaty? And what are the rights of victims and affected communities to obtain justice?

The Achilles' heel in the draft treaty

From the perspective of affected communities and social movements, the main controversial articles appear in the first three sections of the revised draft. The first relates to the definition of TNCs and their supply chains and related "contractual relationships"; the second is the extension of the scope of the treaty to "all business enterprises"; and the third is the reiteration of the state-centred approach to responding to human rights violations – each of which could be an Achilles' heel in this 2019 draft.

The state-centred approach implicitly negates the idea that TNCs have direct obligations and responsibilities related to human rights at international level. This has been a central demand of the Global Campaign as it would mean that an affected community or person could have recourse to international jurisdiction regarding violations derived from the operations of TNCs. In this scenario, a dedicated international court could, for instance, make a judgement against Chevron in the case of the Ecuadorian indigenous people and the contamination of their region by the oil company's operations.

This proposal is still strongly contested by TNCs and some states. Even if many see it as a necessary evolution of human rights in a globalized world, others feel it threatens well-established human rights doctrine. The latter sees the state as the only entity with obligations in the current international human rights framework, which is why many argue that only states – the duty bearers – "violate" human rights.

The international human rights regime may not yet be ready for the major changes demanded by a meaningful binding treaty on TNCs and so may explore other alternatives, such as stronger extraterritorial obligations or inter-jurisdictional cooperation. Although these are important measures that would shift the status quo, they would not respond to the positions advanced by affected communities.

The current text does not include other substantive elements

that have also been advocated by the Global Campaign and in official submissions, including: the clear supremacy of human rights over trade and investment agreements; the centrality of the rights of affected communities – including clear mechanisms for consultation, risk assessments and impacts, as well as for research and investigation of situations that could potentially involve violations before they happen; a stronger gender perspective; and extended penal liability of the company along its supply and value chains and its subsidiaries, including those responsible for decision-making and overall corporate management and policy.

Navigating the challenges ahead

In almost 50 years of international attempts to end TNC violations of human rights and environmental standards, this is the first time that affected peoples and civil society constituencies from six continents are actively engaged and in significant numbers.

This participation has been constant and growing since 2013, when the first joint statement by the Global Campaign was released. This marks a significant step forward from earlier important processes in the area of binding regulations on TNCs.

Not even the UNHRC Peasants' Rights Declaration process and debates generated the same traction and participation as the OEIGWG has achieved in the past five years. However, committed states are still too few, while powerful forces are working to derail and block the process.

But five years on, as the negotiations have resisted being undermined, ever more states, parliamentarians, experts, scholars – and of course, leaders and activists of affected communities, social movements and civil society – are engaging in the process. Even Ruggie recognized this at a recent Finnish government conference where he criticized the EU for not taking a supportive position on the binding treaty, which he said "is inevitable and desirable".

The process to establish a binding treaty on TNCs has gained momentum against all the odds and already changed minds – busting the myth that TNCs are "untouchable" and helping to dismantle corporate power in the current phase of capitalism. This is already a significant victory, moving into terrain beyond the self-regulation and UNGPs previously proposed by Ruggie. It moves us towards the central demand of affected communities, one that rejects corporate rule.

Whatever the eventual outcome, this joint effort of states and affected communities has articulated a key issue, the answer to which will define the coming decades for humanity and the planet. We are at the edge of a new epoch where new and radical transformation will be necessary to address the intensifying contradictions within the economy, politics and our relations with nature.

This binding treaty initiative is integral to a needed transformation and part of those ongoing struggles. The question is whether it will finally generate the convergence of forces and political will to address it.

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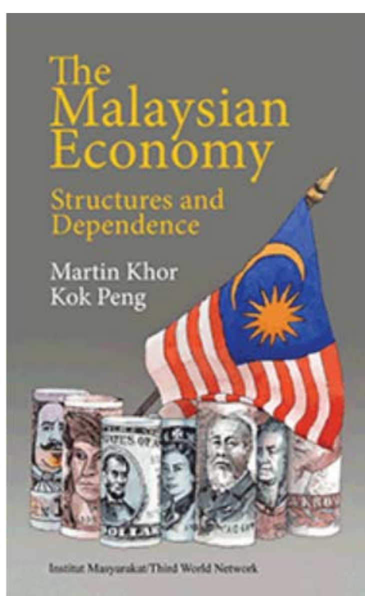
The above is one of the essays featured in the State of Power 2020: The Corporation *report published by TNI (www.tni.org/en/stateofpower2020).*



The Malaysian Economy

Structures and Dependence

By Martin Khor Kok Peng

This book provides an analysis of the structures of the Malayan and the Malaysian economies using the perspective of dependence. It analyses the structures of dependence in colonial Malaya established by the British, in foreign ownership of key sectors, in trade, finance, the public sector and technology. Estimates are provided on the amounts of surpluses transferred out of colonised Malaya under British rule.

The book then examines the post-colonial situation, as continuity as well as changes took place after Independence. It provides details on and changes in ownership and control of the Malaysian economy, and in trade, finance and technology-related issues. Methods by which economic surpluses have been transferred out of the economy and the large amounts are meticulously described.

The framework used in this book distinguishes it from other works on the performance and transformation of the Malaysian economy. The present economy has many elements of the structures and dynamics described. This book is thus essential reading for those interested in knowing how the Malaysian economy was shaped in the colonial and post-colonial periods, and many of the features that characterise the present economy.

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