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TRENDS & ANALYSIS

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Proposed trade pact poses threat to public services – report

Negotiations are ongoing among some 50 countries to draw up a Trade in Services Agreement (TISA). The "highly ambitious" liberalization commitments envisaged for this treaty could end up harming the provision of public services and protection of public interest, according to a report released by an international public sector trade union federation.

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Public services under serious threat from TISA, warns PSI

The Trade in Services Agreement (TISA) being negotiated by some 50 countries threatens to undermine provision of public services in favour of an aggressive privatization and liberalization agenda, cautions an international federation of public sector trade unions.

by Kanaga Raja

GENEVA: The Trade in Services Agreement (TISA), under negotiation among a group of countries, poses considerable risks to safeguarding public services and vital public interests, including privacy rights, Internet freedom, environmental regulation and consumer protection, according to a new report by Public Services International (PSI), the global public sector trade union federation.

The report outlines some of the proposed deregulatory disciplines that would lock in privatizations of public services and prevent reversal of national policy, extend national treatment and market access commitments to the Internet, and prohibit "forced localization" and requirements that service providers store data they collect within the country.

The report, titled "TISA versus Public Services" and released on 28 April, says: "Legitimate treaties to promote international trade must fully preserve the ability of governments to restore, revitalize or expand public services. On many levels, the TISA fails this critical test. Indeed, the TISA's very ethos – extreme secrecy, aggressiveness, hyper-liberalization, and excessive corporate influence – contradicts public service values."

The report was released just as the TISA negotiations resumed behind closed doors in Geneva among some 50 countries grouped under the "Really Good Friends of Services". They include Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the European Union, Hong Kong-China, Iceland, Israel, Japan, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, South Korea, Switzerland, Turkey and the United States.

The PSI report was authored by Scott Sinclair with the Canadian Centre for Policy Alternatives, and Hadrian Mertins-Kirkwood of the Institute of Political Economy, Carleton University.

Referring to the TISA, Rosa Pavanelli, General Secretary of PSI, said in a media release: "This is an attempt to secretly extend the most damaging parts of the infamous GATS agreement [the WTO's General Agreement on Trade in Services] that previously sparked global protests. The aim of public services should not be to make profits for large multinational corporations. Ensuring that failed privatizations can never be reversed is free market ideology gone mad."

Jan Willem Goudrian, Deputy General Secretary of the European Federation of Public Service Unions (EPSU), said: "This agreement will bind future governments, regardless of who wins elections and what the courts say. If the European Commission has nothing to hide, they must immediately release full details of these negotiations."

According to the media release, PSI and civil society organizations have mobilized to protest against the secret TISA negotiations, with actions being taken in Switzerland, Australia, the United Kingdom, Japan, India, the Netherlands, Austria, Belgium, Brazil, Canada, the United States, Colombia, Mexico, Panama and Costa Rica.

"Truly radical liberalization"

The PSI report notes that governments around the globe are currently engaged in the biggest flurry of trade and investment treaty negotiations since the "roaring nineties", when the belief in the virtues of liberalized market forces was at its peak. Official enthusiasm for more intrusive, "21st century" treaties is at a level not seen since the creation of the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA) in the mid-1990s.

"The negative impacts on public services include: confining public services within existing boundaries by raising the costs of expanding existing public services or creating new ones; increasing the bargaining power of corporations to block initiatives when new public services are proposed or implemented; and locking in future privatization by making it legally irreversible."

According to the report, early in the new millennium, campaigns to stop the GATS expansion mobilized public and

political pressure to counter excessive demands for the liberalization of public services. "Today, however, the secretive negotiation of a new, aggressive successor to the GATS poses an even more serious threat to public services."

The report further said that TISA negotiators are mandated to achieve "highly ambitious" liberalization of trade in services, and that most of the nations involved have already undertaken far-reaching services liberalization and are already bound by a dense web of services liberalization agreements.

Pushing this agenda even further, as the TISA mandate dictates, would involve "truly radical liberalization, exerting strong pressure on the few remaining excluded sectors and surviving exemptions for key programmes and policies", said the report.

"Most observers, however, agree that the real intent of the TISA is not just radically deeper liberalization among the current participants. Ultimately, the goal is to broaden participation by including the key emerging economies – China, Brazil, India and South Africa – and smaller developing countries under the agreement."

Breaking away from the WTO

The report noted that while the TISA negotiations are taking place in Geneva, home of the WTO, they are being conducted entirely outside the framework of the WTO.

"The TISA is clearly being driven by developed countries and multinational services corporations frustrated with the WTO's Doha Development Agenda, launched in 2001," it said.

Despite gaining agreement on a limited package of reforms at the ninth WTO ministerial meeting in Bali in December 2013, the Doha Round negotiations remain stalled, and this impasse has more to do with the inflexibility of the US and the EU on agricultural and development issues than with developing countries' resistance to deeper services liberalization, said the authors of the PSI report.

Nonetheless, they added, the TISA group of countries, headed by the US and the EU, has broken away to focus exclusively on achieving their key offensive interests in services. This decision "to take their ball and go home" signals that, despite official assurances to the contrary, rich countries are fully prepared to turn their backs on the Doha Round if they don't get their way.

The TISA negotiating sessions are not open to all WTO members – even as observers – while the negotiating texts are kept secret, the report underscored, citing, for example, that US negotiating proposals are stamped classified for "five years from entry into force of the TISA agreement or, if no agreement enters into force, five years from the close of the negotiations".

"It is hard to imagine why developing countries that have been so undiplomatically excluded from the TISA negotiating process would willingly accept its results," said the authors, adding that developed countries' high-stakes pressure tactics also call into question the future viability of the WTO as a negotiating forum.

The report also underlined that the TISA negotiations are fundamentally different from previous plurilateral negotiations in the WTO context because key participants, particularly the US, are unwilling to automatically extend the results to all other WTO members on an MFN (Most Favoured Nation) basis.

"Instead, the whole point of the TISA is to pressure major developing countries into joining the agreement on terms dictated by the Really Good Friends group."

Under WTO rules, said the report, there are only two legitimate options for refusing to extend the results of a plurilateral negotiation to all members on an MFN basis.

The first is to conclude a "plurilateral trade agreement" within the meaning of Article II:3 of the WTO Agreement. An example of this is the WTO Agreement on Government Procurement, which, while not compulsory, is open to all WTO member governments.

"Adding any such agreement to the WTO, however, would require the unanimous consent of all WTO member governments. Given the continued objections to TISA by South Africa, India and other key WTO member governments, this option is not politically feasible."

According to the report, the second option is to classify the TISA as an economic integration agreement or preferential trade agreement under the terms of Article V of the GATS. Before this could happen, the WTO would have to be notified and the agreement would be subject to review by the WTO Committee on Regional Trade Agreements.

A number of conditions must be met for an agreement to qualify, including that it have "substantial sectoral coverage". This coverage is defined in terms of the number of services sectors, volume of trade affected and modes of supply.

GATS Article V further stipulates that within this broad sectoral coverage, the agreement must "provide for the elimination of substantially all discrimination" through the "elimination of existing discriminatory measures" and/or the "prohibition of new or more discriminatory measures".

The authors said that due to the rancour surrounding the breakaway TISA talks, this option can also be expected to face a rough ride in the obligatory WTO review process. In the past, the WTO has received notification of many economic integration agreements covering services with little fanfare. The TISA would differ in that it only covers services and is not part of a wider economic integration pact.

"Even if the TISA passes such a review, its legality could ultimately be decided by the WTO Dispute Settlement Body. This could occur if a WTO member government that was not party to the TISA insisted that its services and service providers were entitled, on an MFN basis, to the same treatment as TISA participants."

According to the report, dispute settlement is another area of potential dissonance between the TISA and the WTO. As a standalone agreement, the TISA would require a separate settlement mechanism and bureaucracy. This creates the messy prospect of TISA interpretations of GATS provisions that diverge from those of the WTO Dispute Settlement Body.

"Clearly, there are grave legal uncertainties surrounding the TISA and its relationship to the WTO. These obstacles raise serious doubts about the claims by the European Commission and some other TISA participants that their goal is to multilateralize the TISA and ultimately to incorporate the agreement into the WTO system," the report stressed.

"Given the potential adverse repercussions for the Doha Round and even the WTO itself, why would TISA participants engage in such a high-stakes gamble?" the report asks. The most straightforward answer, it said, is that key TISA governments, led by the US, are responding to strong corporate pressure.

It noted that the TISA appears to have been the brainchild of the US Coalition of Service Industries (CSI), specifically its past president Robert Vastine, who, it said, was one of the first to suggest, as early as 2009, that plurilateral negotiations on services should be conducted outside the framework of the WTO.

Working through the Global Services Coalition (GSC), a multinational services lobby group, the CSI then garnered the support of other corporate lobbyists for the TISA initiative, it said, add-

ing that the TISA is a political project for this corporate lobby group.

"Rather than moderate their demands for radical services liberalization in response to legitimate concerns, the GSC is pushing the WTO and the Doha Round to the brink. The group also appears to be largely indifferent to whether or how the TISA fits into the WTO or the existing multilateral system."

Instead, says the report, the strategy is to attain a sufficient critical mass of participants in the TISA so that multilateralization becomes a fait accompli.

"Indeed, the CSI's preferred outcome is not to extend the results of the TISA on an MFN basis, but to secure a highly ambitious agreement among like-minded core participants." In this regard, the TISA would "form a template for the next generation of multilateral rules and levels of market access".

"Developing and emerging market economies would then be targeted one-by-one to join the agreement as political conditions permit – that is, when neo-liberal or more compliant governments are in power. Sadly, such a crude strategy could actually succeed," said the authors.

Threatening provisions

According to the report, negotiators are reportedly agreed on a core part of the TISA text that conforms fairly closely to the GATS, one major difference being that the TISA adopts a "negative list" approach to national treatment.

Under the TISA, national treatment obligations would automatically apply to all measures and sectors unless these are explicitly excluded. For example, under the TISA, like the GATS, national treatment would apply to subsidies, meaning that any financial support for public services would have to be explicitly exempted or be made equally available to private, for-profit services suppliers.

"This 'list it or lose it' approach greatly increases the risk to public services and other public interest regulations now and in the future. Any public policy that a government neglects to protect, even inadvertently, is exposed to challenge and any country-specific exemption becomes a target for elimination in subsequent negotiations," said the report.

The report also noted that TISA negotiators are working on GATS-plus rules and restrictions that could push trade treaty restrictions into new, uncharted territory. It went on to outline some of these "new and enhanced disciplines".

Firstly, it said that among the TISA's most threatening characteristics are its obligatory standstill and ratchet provisions.

The standstill obligation would freeze existing levels of liberalization across the board, although some parties will undoubtedly try to negotiate limited exemptions in sensitive sectors. The ratchet clause requires that "any changes or amendments to a domestic services-related measure that currently does not conform to the agreement's obligations (market access, national treatment, most favoured nation treatment) be made in the direction of greater conformity with the agreement, not less". According to the report, this ratchet provision, which has reportedly already been agreed to, would expressly lock in future liberalization, which could then never be reversed.

In addition, the TISA will obligate governments to automatically cover all "new services", meaning those that do not even exist yet.

"Under such far-reaching rules, current neo-liberal governments can lock in a privatization scheme for all future generations. These are precisely the types of constitutional-style restrictions that must be avoided if democratic authority over public services is to be safeguarded."

Secondly, the report noted that one of the key pieces of unfinished business under the GATS concerns domestic regulation. GATS Article VI:4 called for further negotiations to ensure that "qualification requirements and procedures, technical standards and licensing requirements" do not constitute "unnecessary" barriers to trade in services.

With the WTO process stagnated, TISA participants intend to come up with their own domestic regulation text. Binding domestic regulation rules in the TISA would provide corporations with a means to challenge new or costly regulations, even those that treat domestic and foreign services and service providers even-handedly, said the report.

The proposed restrictions on domestic regulatory authority would expressly apply to non-discriminatory government measures affecting services. In other words, the new "disciplines" would restrict domestic laws and regulations – such as worker safety requirements, environmental regulations, consumer protection rules and universal service obligations – even when these regulations treat foreign services or services suppliers no differently than their domestic counterparts.

The report said it is highly probable that the TISA will contain restrictions on domestic regulation that are even more intrusive than those under discussion in the GATS process, adding that a core group of TISA countries including Chile, Hong Kong, Mexico, New Zealand, South Korea and Switzerland continue to push for the TISA to apply a necessity test to regulations affecting services.

Thirdly, concerning the movement of natural persons (Mode 4 of services supply under the GATS), the report said that the TISA, like the GATS, would prohibit so-called economic needs tests, including labour market tests, unless these measures are expressly exempted in a country's schedule of commitments.

In most countries, before hiring temporary foreign workers, a prospective employer is obliged to demonstrate that there is a shortage of suitably trained local workers. But under Mode 4 commitments, such economics needs tests are forbidden. Governments could not require, for example, that foreign companies conduct labour market surveys to first ensure that no local workers are available to perform the necessary work before engaging temporary foreign workers.

Fourthly, the report points out that TISA negotiators are also developing "new and enhanced disciplines" that relate to the Internet, electronic commerce and cross-border data flows. The "data" in question includes personal user information, financial information, cloud computing services and digital goods.

US industry lobbyists argue that the free exchange of data is "necessary for global business operations" and that governments have imposed too many "arbitrary and excessive measures" designed to constrain US firms. The US Trade Representative has also stated that data protections in many countries are "overbroad" and inhibit the possibility of "truly global service".

According to the report, if US negotiators achieve their goals, the TISA will contain provisions that extend market access and national treatment commitments to the Internet and prohibit "forced localization" – the requirement that foreign companies store any data they collect within the country they are operating in.

The report noted that the EU currently enforces rules that prevent companies from transferring data outside of the 28 member states, with some exceptions; in contrast, the US has very lax privacy laws. In the US, corporations can collect extensive personal information about their users which can then be sold or used for commercial purposes with almost no restrictions. The EU is only willing to open up data flows in the TISA if the US can demonstrate stricter domestic privacy controls.

"However, it is difficult to imagine the US making a compelling case for privacy in the wake of recent revelations of extensive spying by its National Security

Agency, exposed by whistleblower Edward Snowden," said the authors.

They also said that the TISA will apply to the Internet as it does to other service sectors, forcing liberalization in a way that disproportionately benefits the industry's established major players. These massive corporations are almost exclusively American.

"If the US gets its way, the TISA will also undermine user privacy by permitting the uninhibited collection and transfer of personal data."

Sectoral agreements

Fifthly, the report said that one of the most wide open aspects of the TISA negotiations is the blanket authority for negotiators to develop rules "on any other issues that fall within the scope of Article XVIII of the GATS".

Article XVIII was the basis for the 1996 Telecoms Reference Paper and the 1997 Understanding on Financial Services Commitments, which were driven by developed countries dissatisfied with the level of commitments and regulatory restrictions in these sectors under the original GATS, it added.

TISA negotiators are currently working on new sectoral agreements covering the regulation of financial services, telecommunications, electronic commerce, maritime transport, air transport, road transport, professional services, energy-related services and postal and courier services.

These talks are aimed at developing binding, "pro-competitive" regulatory templates for a wide range of services sectors in order to facilitate the entry of foreign commercial providers and to privilege multinational corporate interests, said the report.

For example, it said, such rules generally acknowledge the right of governments to apply universal service obligations in privatized sectors. Yet even these vestiges of public service values are subjected to necessity tests and other pro-market requirements biased towards global service providers.

"The TISA is also explicitly designed as a 'living agreement' that will mandate trade negotiators to develop new regulatory templates for additional sectors far into the future."

The scope of such highly customized sectoral agreements is limited only by the imagination of services negotiators and corporate lobbyists, and made even more worrisome by the near-total secrecy surrounding such negotiations.

"Needless to say, this is totally unacceptable. Services negotiators have a core mandate to increase foreign trade and commerce. They should not be permitted to develop prescriptive regulatory frameworks that would restrict and potentially override public interest regulations that protect consumers, workers or the environment," said the report.

Among its conclusions, the report said that within those countries already participating in the TISA, governments must be pressed for full consultation and disclosure. Governments that are not participating in the TISA must be lobbied not to join and to resist pressure to do so.

"Non-TISA governments should also be encouraged to speak out against the corrosive impact of these negotiations on multilateralism, and to block any efforts by TISA parties to access WTO institutional resources or the Dispute Settlement Body," it said. *(SUNS7794)* ❐

PUTTING FOOD FIRST

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by Hira Jhamtani

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Recognizing the multidimensional nature of the problem, the author puts forward a set of short-and long-term policy recommendations aimed at attaining food security within a broader national framework of sustainable development. Realization of this goal will entail a shift from the existing industrial, monoculture-oriented farming system to a community-based and ecologically sound agriculture which indeed "puts food first".

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The right to policy space under the WTO's TRIPS Agreement

A German research institute has sought to clarify the extent of regulatory discretion the WTO's intellectual property treaty affords signatory states to ensure the efficient functioning of the patent system as an innovation policy tool.

by Kanaga Raja

GENEVA: "Sovereign states should retain the discretion to adopt a patent system that best suits their technological capabilities as well as their social, cultural and economic needs and priorities," the German-based Max Planck Institute for Innovation and Competition has said.

This recommendation came in a document titled "Declaration on Patent Protection: Regulatory Sovereignty under TRIPS", which was released recently by the Institute and comprises a 12-page detailed preface and the five-page Declaration itself.

According to the Institute, the purpose of the Declaration is to "clarify the policy space that the 'Agreement on Trade-Related Aspects of Intellectual Property Rights' (TRIPS Agreement) leaves to national legislators and judicial authorities with regard to the implementation and administration of their patent systems".

Changed circumstances

The preface to the Declaration stressed that in order to ensure an efficient functionality of the patent system as an innovation policy tool, "patent rights ought to be defined, justified and continually reconsidered by reference to their socio-economic benefits and costs".

It said: "Sovereign states should retain the discretion to adopt a patent system that best suits their technological capabilities as well as their social, cultural and economic needs and priorities, with the proviso that the exercise of such discretion must remain within the boundaries of international law."

The preface emphasized four key premises with regard to accommodating the law to changed circumstances.

First, states are faced with historically unprecedented numbers of patent filings and grants, it said, adding that besides creating backlogs at patent offices, this phenomenon leads to patent thickets, legal interdependencies, market entry barriers, royalty stacking and increased litigation, all of which ultimately generate impediments to research and commercial applications.

"As a result, the costs of monitoring patents rise, legal certainty decreases, and the economic freedom of market participants becomes unduly limited. This affects consumer welfare and distorts competition. Furthermore, the overall social benefits of innovation are reduced while an imbalance emerges between those able to cope with the resulting insecurities and related costs, such as multinational enterprises with their own patent departments, and those who cannot, such as small and medium sized enterprises or individual inventors."

Second, it said, new technologies and business practices challenge the traditional paradigm of patent protection developed during the industrial revolution. Biotechnology, business methods and computer science, as well as standard-setting, strategic patenting and non-practising entities all affect the functioning of the patent system as a regulatory institution.

"Third, the role of patents in corporate management has changed. Patents are increasingly used as strategic assets to influence the conditions of competition rather than as a defensive means to protect research and development outcomes."

Fourth, in many jurisdictions, in particular in those of industrialized states with highly developed economies and advanced technological infrastructures, there has been a gradual shift of balance in the patent regime towards right holders both by reducing the burdens for patent applicants (expanded scope of patentable subject matter, lower eligibility standards, reduced fees) and by extending the rights of patent holders (longer patent term, harsher sanctions for infringements, strengthened modalities of private and public enforcement), it said.

"In turn, countervailing rights aimed at protecting the public interest in free competition and third parties' freedom to operate are rarely introduced or extended," it added, noting that two further developments have complicated this evolution.

"On the one hand, issues of global governance arise as patent offices reinforce international cooperation. On the other hand, the patent system faces increasing friction with ancillary public policy goals, such as protecting the environment, preserving biodiversity or ensuring affordable access to medicines."

When the world's major patent systems first developed into their present form, nation states were able to engage in the regulatory design process under conditions of high sovereign autonomy; but today, "states face a legal and institutional regime consisting of multilateral, regional and bilateral agreements, which are becoming increasingly complex and set more and more limits to their regulatory freedom".

"As a result, the ability of states to maintain a proper balance between the need for protection of knowledge goods in global markets, the freedom to regulate national or regional innovation markets, and the policy space for pursuing diverse public interest goals risks becoming unduly constrained," said the Institute.

In this context, it underlined that the Declaration seeks to clarify some of the regulatory options states still retain under international law, in particular the TRIPS Agreement.

Innovation opportunities

Under general principles, the preface said that patents as such "do not create innovation incentives", but that they respond to incentives that result from market opportunities, which patentees may or may not capture by virtue of their exclusive rights.

"Patent protection must not interfere with dynamic competition as a decentralized discovery procedure for innovation opportunities, and as a price-setting mechanism for innovation rewards."

It further said that the establishment of, and limitations to, patent protection are thus two sides of the same coin, both committed to promoting competition in innovation while at the same time ensuring that other socio-economic interests are duly safeguarded.

As integral elements of patent governance, "limitations are crucial to the

overall balance of the system of protection – not merely an option that may be used ad libitum".

Articles 7 and 8 of the TRIPS Agreement recognize that the patent system is embedded in a framework of policy controls. Within the ambit of these provisions, states should possess a high degree of discretion in regulating domestic innovation markets while pursuing public interest goals.

On the issue of differentiation, the preface said that since it is not the patent but the market that creates innovation opportunities and provides for innovation rewards, patent protection must be neutral in its effects on competition.

"Every technology is more or less unique with regard to its exposure to market failure, its susceptibility to patent protection, and its socio-economic implications. It follows that the demand for legal protection, and the effects of that protection on both the operation of competition and the attainment of other public policy goals, may differ according to the technology at issue. The need to grant protection and the modalities of such protection may also differ accordingly."

Measures to accommodate these differences cannot be considered contrary to Article 27(1) of the TRIPS Agreement. While that provision prohibits discrimination as to the field of technology, it does not prevent states from treating different situations differently, it added.

"Differentiation that serves to level the actual conditions of competition across all fields of technology is not discriminatory but rather the opposite. It constitutes a necessary response to the diversity of technologies and, consequently, a conditio sine qua non for an intrinsically balanced system of protection that remains neutral in its effects on competition."

Limitations of protection

The preface said that with specific regard to limitations of protection as set out in Articles 30 and 31 of the TRIPS Agreement, the non-discrimination principle does not apply at all.

"When designing exceptions and compulsory licences, states thus remain free to discriminate with regard to the field of technology, provided that such action is reasonable in the light of other public policy goals."

The preface further said that Article 27 of the TRIPS Agreement does not prevent states from differentiating and even discriminating between industries or fields of technology with regard to the scope of exhaustion.

"This approach can be of particular relevance with regard to the issue of international exhaustion. Some industries may be more prone to parallel imports than others; and some may depend more on price differentiation than others. States remain free to apply the concept of exhaustion that they expect to be most favourable for the development of the industry in the field of technology concerned."

On the use of compulsory licences, the preface to the Declaration said that the discretion of states to make use of compulsory licences as regulatory instruments is ensured by the fact that neither Article 31 of the TRIPS Agreement nor Article 5A of the Paris Convention contains any restriction with regard to the grounds on which a compulsory licence may be issued.

On government use, the preface underscored that the rationale behind government or Crown use lies in the responsibility of the state towards its citizenry and its obligation to step in where the market alone becomes incapable of providing essential public goods.

"It is the state that grants patent protection in the first place, so it is up to the state to eventually limit that protection if it turns out to conflict with the attainment of other public policy goals."

On undisclosed information, it said that despite the strict disclosure requirements in Article 29 of the TRIPS Agreement, the information actually contained in a patent alone is often insufficient to enable others to practise the invention.

Third parties thus depend on additional know-how that only the patent holder possesses. This is of particular importance when the third party has no contractual relationship with the patent holder that entitles it to a transfer of know-how, as in the case of a compulsory licence.

"In such cases, authorities may impose an obligation on the patent holder to provide the licensee – where appropriate in exchange for an adequate compensation – with know-how that is needed to exploit the protected invention. Access to such know-how may only be denied if the balance of hardships tips towards the patent holder as a result of overriding confidentiality reasons within the purview of Article 39 of the TRIPS Agreement."

The preface also said that Article 39 of the TRIPS Agreement may prohibit the disclosure of clinical test data to third parties, including the generic company, but it does not prevent these parties from relying on that data in order to demonstrate the safety and efficacy of a bioequivalent generic. Consequently, authorities may process market approval applications for generic drugs even before the expiry of the originator's patents.

On the question of goods in transit, the preface said that patent rights should not create barriers to legitimate trade, and that goods in transit cannot be deemed to infringe any of the exclusive rights that a patent normally confers if those goods are not destined for the market of the country where transit occurs.

"Customs authorities and courts of the country of transit usually lack competence to determine whether goods in transit are infringing in the countries of origin or destination and cannot decide to grant preliminary or permanent injunctions in their respect."

It further said that the detention of goods by customs authorities based on claims of infringement can also violate the principle of freedom of transit enshrined in Article V of the General Agreement on Tariffs and Trade (GATT).

Serving the public good

The five-page Declaration on Patent Protection contains a preamble as well as sections on general principles; differentiation; patentability, disclosure; scope of protection; exhaustion; exceptions to scope of protection; compulsory licence; government use; undisclosed information; enforcement; transit; and criminal measures.

The preamble to the Declaration observes that states have often not taken full advantage of the regulatory discretion available under international law, notably the TRIPS Agreement, and perceives an increasing limitation of national regulatory sovereignty in the field of patent law as a result of obligations arising from multilateral, regional and bilateral agreements.

It recalls that the patent system should ultimately serve the public good by fostering economic growth and technological progress for the benefit of society as a whole, and stresses the need for legal certainty regarding the obligations that international law imposes on states, and the policy space that it leaves to them, in formulating and administering their domestic patent systems.

Under general principles, the Declaration states that the TRIPS Agreement preserves the right of states to determine

the goals of their own patent systems, and to adopt measures ensuring that competition is not restricted beyond what is necessary and sufficient to prevent market failure; and the pursuit of other equally or more important public policies is not unduly encumbered.

In particular, states are not prevented from taking measures to: maintain a proper balance between patent protection and principles of competition, including measures against abuses of patent rights or other inappropriate conduct by patent holders and applicants; and provide their population with essential public goods, such as environmental protection, biological diversity, health care, nutrition, food security, technological and scientific progress, education and security.

"Such measures are consistent with the TRIPS Agreement – within the meaning of Article 8(1) and (2) of that Agreement – to the extent that they are necessary and reasonable in the light of the objectives pursued and the interests involved."

On differentiation, the Declaration states that Article 27 of the TRIPS Agreement does not prevent states from reasonably differentiating between fields of technology according to the characteristics inherent in the technology at issue, and the state's public policies pertaining to the sector at issue.

On patentability and disclosure, the Declaration stresses that states have latitude to define what constitutes patentable inventions. Article 27 of the TRIPS Agreement does not require states to provide patent protection for subject matter that they classify as discoveries rather than as inventions or do not consider to be technical in nature.

Further, states have latitude to determine how the patentability requirements are interpreted and applied. In particular, Article 27 of the TRIPS Agreement does not prevent states from denying patent protection for new uses of known products or substances, derivatives of known products or substances, selection inventions, or inventions otherwise lacking novelty and/or an inventive step.

"States are not required to provide patent protection for inventions that have not been sufficiently disclosed and expressly claimed in the patent application," it said. "States are not prevented from making the grant of a patent subject to revealing the origin of claimed biological material and associated traditional knowledge."

On scope of protection, the Declaration said that Articles 27 and 28 of the TRIPS Agreement do not prevent states from limiting the protection conferred by a patent to products or processes in relation only to the specific function(s) of the invention expressly claimed in the patent.

Exceptions

On exceptions to the scope of protection, the Declaration states that the non-discrimination principle set out in Article 27 of the TRIPS Agreement does not apply to exceptions otherwise permissible under Article 30. Article 30 of the TRIPS Agreement constitutes an indivisible entirety, and the "three steps" are to be considered together and as a whole in a comprehensive overall assessment.

The preface to the Declaration explained the "three-step test", saying that Article 30 establishes three criteria that must be met in order for an exception to be consistent with the TRIPS Agreement: the exception must be limited; it must not unreasonably conflict with a normal exploitation of the patent; and it must not unreasonably prejudice the legitimate interests of the patent holder, taking account of the legitimate interests of third parties.

According to the Declaration, Article 30 does not: limit the grounds for introducing exceptions to the exclusive rights conferred by a patent; prevent legislatures from introducing open-ended general exceptions, as long as the scope of such exceptions is reasonably foreseeable; prevent courts from applying existing statutory exceptions to similar factual circumstances mutatis mutandis; require exceptions to be interpreted narrowly – they are to be interpreted according to their objectives and purposes.

The Article does not require states to take account of patent holders' interests that exceed the purpose of preventing market failure. Legitimate interests of third parties include those of follow-on innovation; competitors and other market actors; scientific research; consumers; and the public at large.

On compulsory licensing, the Declaration states that Article 31 of the TRIPS Agreement does not limit the grounds on which a compulsory licence can be granted, and the non-discrimination principle in Article 27 of the TRIPS Agreement does not apply to compulsory licences otherwise permissible under Article 31.

"In particular, Article 27 of the TRIPS Agreement does not prevent states from granting a compulsory licence if the patented product is not manufactured or the process is not used within the territory of protection, subject to the requirements of Article 5A of the Paris Convention."

Article 31 of the TRIPS Agreement does not require the limitation of a compulsory licence to a degree that would unduly impede reasonable and good-faith investments of the licensee. In appropriate cases, states are not prevented from determining the scope of a compulsory licence beyond what is specifically required to eliminate the circumstances which led to it; or ordering the continuance of a compulsory licence even though the circumstances which led to it have ceased to exist and are unlikely to recur.

Article 31 of the TRIPS Agreement does not prevent states from granting a compulsory licence as a remedy against the abuse of patent rights or for practices that unreasonably restrain trade or adversely affect the international transfer of technology, even when the proposed licensee has not made prior efforts to obtain authorization from the patent holder, and the use is authorized predominantly for the supply of foreign markets.

On government use, the Declaration states that Article 31 of the TRIPS Agreement does not limit the grounds on which government use of patents can be authorized. In implementing the government use of a patent, Article 31 does not require any third party, such as a subcontractor, acting under the authority of the government, to operate on a non-profit basis.

On undisclosed information, the Declaration states that Articles 31 and 39 of the TRIPS Agreement do not prevent the authority granting a compulsory licence from requiring the patent holder, in appropriate cases, to provide the compulsory licensee with knowledge that is necessary, in the light of the purpose for which the licence was granted, to effectively work the patent, provided that legitimate confidentiality interests of the patent holder are sufficiently taken into consideration.

It said that Article 39 of the TRIPS Agreement does not prevent states from authorizing a third party, including a compulsory licensee, to rely on or use clinical data submitted by originator companies necessary to obtain marketing approval of a product, when needed,

and that Articles 28 and 39 of the TRIPS Agreement do not prevent states from relying on clinical data submitted by originator companies in order to process market approval applications for generic products prior to the expiry of the relevant patent.

On enforcement, the Declaration states that Articles 44 and 50 of the TRIPS Agreement do not require the authority finding an infringement to grant injunctive relief. An injunction may be inappropriate when: the legitimate interests of parties may be adversely affected; it is contrary to the public interest; the legitimate interests of the patent holder can be protected by other means, such as damages or security; and in the case of preliminary relief, the patent holder is unlikely to prevail in establishing validity or infringement.

The Declaration also said that Article 61 of the TRIPS Agreement does not require states to apply criminal procedures and penalties to cases other than those of wilful trademark counterfeiting and copyright piracy on a commercial scale.

The full text of the document can be found at www.ip.mpg.de. *(SUNS7790)*❐

Legal review of Trade Facilitation Agreement completed

by Kanaga Raja

GENEVA: Member states of the World Trade Organization (WTO) have completed the legal review of the text of the Agreement on Trade Facilitation, following meetings of the Preparatory Committee on Trade Facilitation in the week of 28 April.

According to trade officials, members are now ready to move on to the task of drawing up a Protocol of Amendment to insert the Agreement into Annex 1A of the WTO Agreement.

The Trade Facilitation (TF) Agreement was adopted by ministers at the ninth session of the WTO Ministerial Conference held in Bali, Indonesia, last December.

The Ministerial Conference, by its Decision of 7 December 2013, concluded the negotiation of the TF Agreement "subject to legal review for rectifications of a purely formal character that do not affect the substance of the Agreement."

The Preparatory Committee, which was established by the Ministerial Conference, was tasked, among others, with drawing up the Protocol of Amendment for the TF Agreement to be inserted into Annex 1A of the WTO Agreement.

According to the Ministerial Decision, the WTO General Council is to meet no later than 31 July 2014 to annex to the Agreement notifications of Category A commitments, to adopt the Protocol drawn up by the Preparatory Committee, and to open the Protocol for acceptance until 31 July 2015.

The Protocol is to come into force upon acceptance by two-thirds of the members.

(Category A contains provisions that a developing-country or least-developed-country member designates for implementation upon entry into force of the TF Agreement or, in the case of a least-developed-country member, within one year after entry into force.)

Legal review

According to trade officials, the week of intense legal review by the Preparatory Committee was with respect to the TF Agreement's text in English.

Trade officials said that after the translations are completed, the text will be going to the capitals of both Spanish- and French-speaking countries, where it will be assessed as to whether the inconsistencies that were corrected in the English text also apply to the text in these two other official languages of the WTO.

According to the Bali Ministerial Decision, rectifications are to be of "a purely formal character" that does not affect the substance of the Agreement.

Trade officials said that in the instance where disagreements arise over proposed changes, the Bali text would be final. The majority of the requested changes did not garner consensus, trade officials added.

The Chair of the Preparatory Committee, Ambassador Esteban B. Conejos Jr of the Philippines, expressed happiness that members had kept to the agreed "absolute deadline" of 2 May for the conclusion of the exercise.

According to trade officials, the Chair said that he would convene a special meeting of the Committee in the next couple of weeks, in order to adopt the TF text in the three official languages.

Work will then commence on the Protocol of Amendment at the next regular meeting of the Preparatory Committee. *(SUNS7798)* ❐

Derailing the high-speed trading bullet train before it crashes the economy

High-frequency traders can potentially create havoc in the financial markets; one way to keep them in check is to introduce a financial transaction tax.

by Sarah Anderson

On the afternoon of 6 May 2010, the Dow Jones Industrial Average suffered its fastest nosedive ever. Within minutes, a trillion dollars in wealth went "poof".

What happened?

What actually set it off remains in dispute. Yet we do know that high-frequency traders, relying on computers programmed to make trades at speeds measured in the millionths of seconds, accelerated the freefall by withdrawing from the market en masse.

Four years after they caused the "Flash Crash", those speed demons still rule our financial markets.

The Dow did rebound by the end of the day from that unnerving plunge. So why worry about the fact that regulators have done little to rein in these warp-speed traders in the years since the crash?

First off, we got lucky with the Flash Crash. According to many financial regulators and researchers, the timing helped us dodge a bullet. Global contagion effects would've been far worse if the freefall had happened in the morning, when EU markets were open, or just before the closing bell without time for a rebound before trading started in Asia. Will we be so lucky the next time?

Another concern is that high-frequency traders have rigged the markets in their favour. In his best-selling new book *Flash Boys*, Michael Lewis tells the gripping tale of one savvy banker who

comes to realize that even he's being cheated by the speed traders.

One of their tricks is to pay for the privilege of locating their computer servers as close as possible to market exchanges. That way, they get trading information a split-second ahead of the rest of us. A split-second is long enough to get an edge on manipulating prices.

Speed demons add no value to the real economy. They're not interested in helping promising companies raise capital to innovate or create jobs. They simply exploit fleeting, microscopic price discrepancies. And they have no idea what assets they're even buying and selling.

In a recent survey of financial professionals, 70% said US financial markets aren't fair for everyone. More than half said high-frequency trading is harmful. And that's among people actually working in the industry.

Tax proposal

One way to spoil the Flash Boys' party would be to impose a small tax on each Wall Street trade. This idea is starting to take off.

Eleven European countries are negotiating what will be the world's first regional financial transaction tax. The proposal on the table is a tax of 0.1% on stock and bond trades and 0.01% on derivative transactions. The European Commission expects this tiny tax to raise an estimated $42 billion per year while it discourages purely speculative – and potentially dangerous – short-term trading.

The cost would be negligible for ordinary investors. But it would undercut the profitability of trading strategies based on picking up pennies on thousands, if not millions, of trades per day.

When asked about this, European Tax Commissioner Algirdas Semeta has coolly suggested that high-frequency traders find a different business model. Such frank talk is rare in the United States, where Wall Street has a tight grip on the political system.

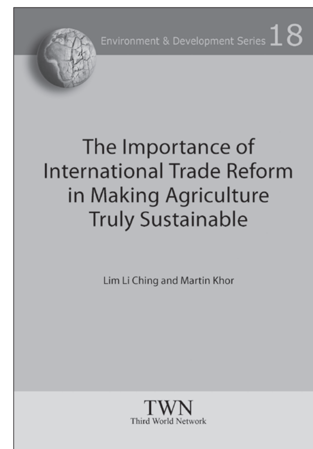
And unfortunately, the Obama administration isn't on board yet.

With the spike in concern over high-frequency trading, a petite tax that could encourage longer-term productive investment may just have a chance. It's not too late to learn lessons from the Flash Crash. ❒

Sarah Anderson directs the Global Economy Project at the Washington-based Institute for Policy Studies. This article is reproduced from OtherWords.org under a Creative Commons licence.

The Importance of International Trade Reform in Making Agriculture Truly Sustainable

Lim Li Ching and Martin Khor



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Reforms of the international trade regime require a significant reduction or removal of harmful subsidies currently provided mainly by developed countries, while at the same time allowing special treatment and safeguard mechanisms for developing countries in order to promote their smallholder farmers' livelihoods. Such reforms, coupled with policies in support of sustainable small-scale agriculture in developing countries, would improve local production for enhancing food security.
There is also a need for regulatory measures aimed at reorganizing the prevailing market structure of the agricultural value chain, which is dominated by a few multinational corporations and marginalizes smallholder farmers and sustainable production systems. Policies that increase the choices of smallholders to sell their products on local or global markets at a decent price would complement efforts to rectify the imbalances. In addition, a shift to more sustainable and ecological agricultural practices would benefit smallholder farmers by increasing productivity while strengthening their resilience to shocks, such as climate change, and reducing the adverse impacts of conventional agricultural practices on the environment and health. The trade policy framework should therefore support such a shift.

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Seeking solutions to a taxing problem

Corporate tax dodging is depriving poor economies of billions in revenues for funding development. In light of this, an initiative is now underway to reform international tax rules so that corporations will have to pay their fair share of taxes. However, this project stands little chance of success, contends an Oxfam briefing paper extracted below, if business interests hold undue sway over the process and most developing countries are left out of the decision-making.

Introduction

In 2009, in response to the financial recklessness and murky tax rules that plunged the world into financial crisis, leaders of the G20 major economies declared an end to banking secrecy and vowed to clean up the international tax system. It is only now, five years on, that meaningful action against secrecy and corporate tax abuse is beginning.

A number of high-profile companies, including Apple, Starbucks and others, have been exposed for dodging their taxes and cheating the system. They have indulged in artificial tax schemes and "profit shifting", registering losses in countries with high tax rates, and profits in tax havens with low tax rates.

In response to public anger and gaps in national budgets, G20 governments commissioned the Organization for Economic Co-operation and Development (OECD) to propose action to curb profit shifting and other tricks exploited by multinational corporations (MNCs) that erode governments' tax bases. The current system of dysfunctional international rules and treaties allows many MNCs to pay minimal tax bills relative to their real profits, and avoid paying their fair share. But, if designed appropriately, the OECD's Action Plan on Base Erosion and Profit Shifting (BEPS), released in 2013, could provide a much-needed opportunity to modernize the international tax system and make it fit for purpose. However, unless urgent action is taken, the initiative looks likely to replicate the same defects that have afflicted the current international tax system.

This article shows how big businesses, by escaping their tax liabilities, constrain the ability of governments to tackle inequality – particularly that of developing countries. Importantly, it also shows how tax rules are rigged in favour of MNCs, and how the G20's current approach to tax reform is at risk of being dominated by a legion of corporate lobbyists and is therefore likely to create a new international system that does little to benefit ordinary people.

Fiscal justice: the fair approach to reducing inequality

In many countries, economic inequality has reached extreme levels and continues to grow. If left unchecked, it will weaken global efforts to eradicate poverty. Fair tax regimes are vital to finance well-functioning states and enable governments to fulfil their obligations to uphold citizens' rights to basic services, such as healthcare and education.

The International Monetary Fund (IMF) has recently made a strong case for the effectiveness of redistributive fiscal policies in decreasing or offsetting the effect of growing inequality, particularly in economies where tax accounts for a higher ratio to gross domestic product (GDP).

Oxfam supports the use of progressive taxation and spending to reduce inequality. Taxing companies, particularly successful multinationals, is one of the most progressive forms of taxation. All companies must pay their fair share of taxes, according to their means. They should not be allowed to escape their obligations to the societies in which they operate and where they generate their profits.

Multinational companies escaping tax liabilities: a growing problem with global impacts

It is impossible to calculate the true extent of the financial losses that all countries sustain because multinationals do not pay taxes proportionate to their real profits. Nevertheless, conservative estimates for potential tax losses are in the billions.

What is clear is that in all OECD countries the rates of return to private capital have soared since the 1980s. This has resulted in a worldwide trend of rising corporate profits as a share of the economy. However, while corporate profits have risen, their increase has not been matched by a rising trend in income tax contributions. In fact, on average, the opposite is happening. The OECD has also found that, on average, MNCs pay 5% in corporate tax, while small companies pay around 30%.

This situation can mostly be explained by two phenomena: multinational business shifting profits or otherwise structuring cross-border transactions to avoid their tax liabilities; and companies securing tax incentives from governments bidding to attract foreign investment. The tax gap for developing countries – the amount of unpaid tax liability faced by companies – is estimated at $104 billion every year (including profits shifted in and out of tax havens). Governments in these countries then give away an estimated $138 billion each year in statutory corporate income tax exemptions. These losses combined could pay twice over the $120 billion needed to meet the Millennium Development Goals (MDGs) related to poverty, education and health.

Governments are being starved of vital resources on a momentous scale. As tax returns from capital fall, they are left with two options: to cut back on the essential spending needed to reduce inequality and deprivation; or to make up the shortfall by levying higher taxes on other, less wealthy sections of society. Consequently, wealth is redistributed upwards, and the inequality gap grows.

Aggressive tax planning and profit shifting: how it happens

Over recent years, several factors have combined to undermine the integrity of corporate income tax worldwide. First, the process of globalization (and with it, financial, investment and trade liberalization) has changed the way companies operate. For MNCs, national borders no longer exist, yet tax sys-

tems remain under national government administrations or jurisdictions. Each jurisdiction is characterized by different legislative structures and policy objectives that often contradict or compete with each other.

Some countries attempt to attract MNCs and rich individuals who want to pay as little tax as possible by cutting tax rates; by offering tax loopholes and special incentives; by offering financial secrecy to facilitate tax evasion; and they impede scrutiny of tax avoidance or are deliberately lax about tax enforcement. This gives rise to tax "competition", which companies can abuse to minimize their tax liabilities.

MNCs that adopt aggressive tax-planning strategies rely on the mismatches and gaps that exist between the tax rules of different jurisdictions. They minimize corporate tax contributions by making taxable profits 'disappear' by shifting profits to low-tax operations where there may be little or no genuine economic or profit-making activity. They can artificially attribute the ownership of assets or the locations of transactions to paper subsidiaries in secret jurisdictions with zero or low nominal tax rates, known as "tax havens".

Tax havens operate through 'empty' structures that often have no connection to the location or substance of the company's economic activity. By doing this, they minimize taxation of business profits at the source (where the real income is generated) and destination (where the MNC's head office is "tax-resident"). Another typical tax-abuse strategy is transfer mispricing: the practice of deliberate over-pricing of imports or under-pricing of exports of goods and services between the subsidiaries of the same companies. While deliberate transfer mispricing in theory constitutes unlawful tax evasion, in practice current tax rules allow companies to set the prices of many company-specific goods and services more or less arbitrarily, making them nearly impossible for developing-country tax authorities to challenge.

A number of successful, world-renowned branded companies have found themselves in the spotlight recently accused of tax dodging. They include Apple, Amazon, Google, Vodafone, Ikea, eBay, Zara and Starbucks. In his speech to global leaders at the World Economic Forum in Davos, UK Prime Minister David Cameron said, in an apparent swipe at Starbucks, "Companies need to wake up and smell the coffee, because the customers who buy from them have had enough of businesses that think they can carry on dodging their fair share of taxes or that they can keep on selling to the UK and setting up ever more complex tax arrangements abroad to squeeze their tax bill right down."

French President François Hollande said, ahead of his recent visit to the US to meet President Barack Obama, "When I go to the US in a few days, we have agreed with President Obama to make this effort on tax harmonization." The French government has recently clashed with Internet giant Google over its tax planning in France. The French government is seeking €1 billion in tax from Google. "This is not acceptable and that is why, at both the European and the global level, we must ensure that tax optimization ... can be called into question."

Political leaders have started to publicly declare their intention to tackle corporate tax dodging, but it remains to be seen whether their words will be followed with action.

Developing countries harmed most by corporate tax abuse

In 2013, former UN Secretary-General Kofi Annan said that for richer nations "if a company avoids tax or transfers the money to offshore accounts what they lose is revenues; here on our continent [Africa], it affects the life of women and children – in effect in some situations it is like taking food off the table for the poor."

Revenue loss from businesses dodging their tax payments harms poorer economies most, as corporate tax revenues comprise a higher proportion of their national income. Examples of corporate tax dodging and its impact can be found on every continent.

The problem for African countries is enormous. According to the Africa Progress Panel, an average of $38.4 billion was lost to African countries annually through trade mispricing between 2008 and 2010, representing billions of dollars in lost tax revenues. In Bangladesh, each year the government loses around $310 million in tax revenues. An audit by Peru's tax administration of only 27 cases of transfer pricing in 2013 revealed undeclared earnings of $350 million, representing evaded taxes estimated at $105 million.

Corporate income tax is enormously important to developing countries. It comprises a significant share of total tax receipts – around 18% – in low-income and lower-middle-income countries. More frequently promoted sources of tax revenue, such as value-added tax (VAT), are often more regressive and therefore would increase inequality. Increasing revenues from personal income tax collection, even using a progressive approach to taxation, is still challenging because tax administrations are often too under-resourced to collect from a more diverse tax base. To illustrate this point, it has been calculated that more than 650,000 additional tax officials would need to be employed in sub-Saharan African countries for the region to have the same ratio of tax officials to population as the OECD average.

These examples make a clear case that tackling corporate tax dodging is essential to give developing countries a fair chance of meeting people's rights to public services and tackling poverty and inequality. That is why the G20 and OECD processes would be irresponsible to ignore the need to clamp down on the corporate tax dodging that sucks billions out of developing countries every year, and these countries' right to participate on an equal footing in the decision-making process.

Competition to offer low-tax environments for multinational companies

Low-taxation growth models are the cornerstone of many governments' growth strategies. Some governments strive to offer the most preferable tax regimes through tax incentives, exemptions, opaque financial facilities and low or no tax rates (as discussed above), the theory being that a low-tax economy attracts businesses to invest or operate in the country. This pits many economies against each other as to who can offer the most favourable tax environment to attract foreign direct investment (FDI).

This kind of "race to the bottom" often brings greater benefits to multinationals and their shareholders than to the citizens and governments of developing countries. Governments have sovereign power to set national policy related to attracting FDI, which is largely determined by their political and economic priorities. International tax rule reforms, such as the G20/OECD BEPS project, do not, regrettably, directly tackle the issue of tax incentives.

Despite this, many developing countries, desperate to attract FDI, often accept the unfair conditions imposed by power-

ful MNCs when negotiating contracts, for fear the companies will take their business elsewhere. Some developing countries offer special incentives and even tax holidays – incentives that are not available to domestic firms and so make it even harder for them to compete on an equal footing. Discretional tax incentives are a factor contributing to inequality. They create a double standard between international and domestic companies without adding any social value, and reap less revenue to invest in essential public services like health and education, which are critical to reducing economic inequality.

Take the case of Sierra Leone, where economic inequality is high. In 2011, the government lost more on tax incentives than it spent on its development priorities. In 2012, tax expenditure amounted to an astonishing 59% of the entire government budget. Put another way, government tax expenditure in 2012 amounted to more than eight times the health budget and seven times the education budget. If Ethiopia could capture just 10% of the money it loses each year through tax exemptions, it could enrol 1.4 million more children in school.

A number of studies show that offering tax breaks to attract inward investment is a policy tool that has been over-promoted, without real evidence of any strong payoffs in development terms. Besides access to natural resources, the key determinants of a country's ability to attract FDI are political and macroeconomic stability, an educated workforce, good transport, electricity and telecommunications infrastructure, and large markets, or labour costs – most of which are financed through the payment of taxes. Empirical studies do not show the tax environment to be a key driver for foreign investment. Such tax incentives are, in effect, a government trade-off, designed to subsidize big (international) business to the detriment of citizens' social welfare and the provision of public goods. There is an urgent need for measures to reverse competition for FDI, which only serves to drive tax revenues downwards.

The need for rules that work for the interests of all

The interminable pursuit of short-term profit maximization through corporate tax dodging is now an integral component of companies' growth and profit strategies. Although such practices are highly questionable from an ethical standpoint, they are often not illegal. But quibbling over their legality misses the point. It is time to develop rules that are fair and work in the interests of all – particularly developing countries and citizens – rather than being captured to serve the interests of powerful corporates and advanced economies. Moreover, corporates that dodge their tax liabilities by utilizing tax haven jurisdictions in countries where they are not actually operating (or have tax obligations) are, in effect, "free riders". They benefit from public spending in their home country, or wherever they create taxable wealth and profits, yet avoid contributing to its financing.

The G20 action plan: a flawed exercise

The Action Plan on Base Erosion and Profit Shifting (BEPS) proposed by the OECD and approved by the G20 seeks to redefine international tax rules to curb the profit-shifting activity described above, and ensure companies pay taxes where the economic activity takes place and value is created. The action plan should be ready for implementation by the end of 2015. However, there are several reasons why this process, in its current state, will not deliver an outcome that leads to more progressive tax systems worldwide where multinational companies pay their fair share of tax or do so where the value is generated.

Firstly, the business lobby currently has a disproportionate influence on the process, which it uses to protect its interests. Correcting the rules that allow the tax-dodging practices of global giants like Google, Starbucks and others that lead to tax revenue losses in OECD countries will be difficult, given the size of the corporate lobby. But worse, perhaps, is that the interests of non-OECD/G20 countries are not represented at all in these negotiations. As Kofi Annan said in 2013, "... tax evasion, avoidance, secret bank accounts, are problems for the world … so we all need to work together, … to work to ensure we have a multilateral solution to this crisis."

Disproportionate influence of the business lobby

Oxfam acknowledges the efforts of the OECD to make these negotiations more transparent by organizing public online consultations and public meetings. This may not be enough, however, to counter the considerable private lobby set to resist change. A major concern is the unjustifiable and disproportionate influence that business interests have on the OECD and member governments' policy making, particularly compared with the lack of influence wielded by countries outside the G20/OECD BEPS process. Economic inequality is synonymous with political inequality. Too often, the interests of powerful governments and influential companies are over-represented in public policy making. Not only is this a threat to representative democracy, it also serves to entrench and increase inequality.

For example, at the end of 2013, the OECD opened consultations to "stakeholders" to comment on new draft rules on tax treaty abuse, hybrid mismatch arrangements, digital economy, and transfer pricing and country-by-country reporting (CBCR). Looking at CBCR and establishing a template for CBCR represents a positive initiative by the OECD towards greater transparency as it will oblige foreign companies to release information on where they work and have real economic activity, and how much tax they pay. However, CBCR will only be effective if the information is comprehensive, presented in an easily accessible form and publicly disclosed.

However, on just the CBCR consultation, almost 87% of the contributions have come from the business sector, none from developing countries' tax authorities, and the remaining 13% include contributions from non-governmental organizations (NGOs) (eight, including Oxfam), academics (seven), experts related to tax administrations (two) and one trade union. More strikingly, of 135 contributions in total, only five come from developing countries; 130 come from rich countries, with a large proportion (43%) coming from the UK and the US.

Unsurprisingly, the business sector is almost all opposed to the proposal. Only 6% of the private sector supported CBCR, and only two contributions were in favour of making this information public to improve accountability. Some of the companies that have objected to making this information public are the same companies that have been involved in recent tax scandals (though SABMiller, for example, unlike a number of multinationals, does now disclose the tax it pays on its website).

This shows a clear picture of who the OECD receives inputs from and it is no surprise that there is resistance to change from those who would benefit from the status quo.

The OECD recently announced following the 2013 consultation that critical reporting requirements will be dropped, including reporting on transactions relating to royalties, interests and service fees (at the centre of a number of profit-shifting scandals), and that data will not be made public. The global accountancy firm KPMG (Switzerland) reported this as "good news".

Private companies are, of course, entitled to put forward their views in this open and transparent process, but because representation is unbalanced, it is likely to lead to a biased outcome. Other stakeholders, especially from developing countries, have neither the capacity nor the level of information or access to decision makers that MNCs have. For example, one informal group of US digital firms, whose membership is not entirely known, has contributed to the OECD consultation on tax challenges of the digital economy (within BEPS) through the US law firm Baker & McKenzie. One of the signatories to the contribution was, until 2011, an OECD employee, where she had been playing a senior role in tax policies affecting global online and hi-tech groups.

The OECD recently announced that the new head of its Transfer Pricing Unit was until recently a partner at KPMG (London). It is reasonable and fair to recruit the best-qualified staff for a role, and their personal integrity should not be questioned. As a general principle, though, staff – in any area of public policy making – should not go back and forth from policy-making institution to private lobby firm if that firm has an interest in influencing a policy process in which there might be a conflict of interest. This revolving door between tax legislators and accountancy firms' advisers should be closed, the latter of whom often influence the design of government tax policies that contain the loopholes that they then sell to clients. The UK parliament's Public Accounts Committee highlighted one such case – that of an ex-Treasury adviser who returned to KPMG after advising the Treasury on establishing its "Patent Box" (tax relief on companies basing research and development initiatives in the UK). This is not to suggest that these advisers have done anything wrong. This practice does however allow for a conflict between commercial and public interests.

Equally concerning, the BEPS working group on digital economy is co-chaired by France and the US. The US has a particular vested interest in this group since it plays host to some of the world's largest global digital companies (including Google, Amazon, Facebook and Apple). These are companies which have been the subject of high-profile public scandals for aggressive tax planning. It is highly likely that the chair of a working group will heavily influence the group's outcomes.

Business interests will also directly influence the position of OECD members. For example, one of the action items under BEPS is the strengthening of controlled foreign company (CFC) rules, which are designed to limit companies' ability to avoid tax by using tax havens. These rules can reduce tax abuse in the country where the company's head office is registered and, when well-designed, can disincentivize those companies from shifting their profits out of other countries in which they operate – often developing countries – and into tax havens. This reduces their profits on paper in these countries, enabling them to pay less tax there.

In the UK in 2012, Treasury changes to CFC rules systematically removed these protections for other countries, and at the same time made it easier for MNCs to shift profits out of the UK. The new loopholes in the UK's CFC rules had been several years in the making, dating back to 2008. The government established a series of liaison groups, consisting of representatives solely from large multinational businesses. It is not unreasonable to assume that these business groups will be lobbying the UK government to resist any strengthening of the CFC rules in the UK or at the OECD.

Most countries do not have an equal say

While G20 action to address corporate profit shifting and base erosion is a step in the right direction, the BEPS Action Plan has an inherent and fundamental flaw: countries that are not members of the OECD and G20 are effectively barred from the process of deciding the new rules. Excluding at least four-fifths of the world's governments from the process of developing a new "*multilateral* instrument" (emphasis added) not only runs the risk of remaining mired in the same power dynamics that have produced the current unfair system, but is also deeply iniquitous. Despite strong evidence that profit shifting occurs *more* in non-OECD countries than in OECD countries, the former will not be represented at the negotiating table. As a result, any agreement will inevitably continue to serve the interests of the most powerful and engaged countries.

While global in reach, the final outcomes of the BEPS process will be agreed with non-OECD/G20 countries only being "consulted" along with other "stakeholders". Indeed, the OECD has initiated four regional consultations on BEPS: one in Seoul (for Asian countries), one in Bogota (for Latin America and the Caribbean), one in Pretoria (for African countries) and one in Paris (for African francophone countries). It is not clear how the conclusions from these consultations will be taken on board. Clearly, these regional consultations should not be one-off events. Moreover, these meetings were not representative enough: there were more participants from OECD/G20 countries than non-members at the consultation in Seoul. Poor participation was not due to lack of interest but limited capacity in terms of human and economic resources and limited budget for travel costs, for example. In a country such as El Salvador, the international tax department is still in its infancy and only has one full member of staff, who is fully occupied with administering new legislation on transfer pricing.

The plan mostly addresses concerns of the major economic powers

A further flaw is that the Action Plan on BEPS is too narrow in scope and concentrates too heavily on rich-country interests. The Plan's principal objective is to reduce double non-taxation of MNCs. This is a positive response to help tackle some of the many dubious tax abuse practices employed by such household names as Apple, Starbucks, Microsoft, Amazon, Google and Vodafone. The Plan is, however, limited in scope because it does not question or change the underlying principles of the system; it only aims to make the existing rules of that system more effective for developed-country interests.

For example, the OECD's discussion draft on "Transfer Pricing Comparability Data and Developing Countries" is inadequate for developing countries. It does not address the near-total lack of price comparables that are agreed when subsidiaries from developing countries trade internally within the

multinational group.

A further critical issue for developing countries will be to ensure that taxes are paid where profits and value are really generated. They will not benefit from an outcome in the BEPS project that leads to increased tax revenues in the richer countries where MNCs are "resident", with no new revenues in the countries that provide the "source" for the profits.

Moreover, OECD members are particularly interested in finding solutions to base erosion and profit shifting in high-technology industries and the digitalized consumer market – which therefore defines a strong focus of the priorities for the overall Action Plan. Indeed, there is a specific action point (Action 1) and working group within the BEPS process on the digital economy.

Problematic sectors central to developing economies include agribusiness, telecommunications and extractives, to which the Action Plan on BEPS gives scant attention. There is no working group within the BEPS process finding solutions to improve tax collection from extractive industries, despite many developing countries relying heavily on that sector for public revenues. This sector is often heavily under-taxed because of tax exemptions or profit-shifting practices.

Finally, many of the solutions to these problems so far proposed by the BEPS process are very technical and require highly sophisticated and well-resourced legislative administrations, which puts less well-resourced governments at a disadvantage. For example, the discussion draft on "Preventing the Granting of Treaty Benefits in Inappropriate Circumstances" focused almost exclusively on complex anti-abuse clauses in tax treaties. These are often difficult even for wealthy countries' tax authorities to enforce against MNCs, while ignoring simpler fixes that would allow all countries, including developing countries, to counteract abuse by withholding taxes and other simpler measures.

Experience of other tax reforms

Other ongoing OECD-led tax reforms give reason to suggest that BEPS will not benefit developing countries. For example, outside the BEPS process, the G20 has approved an OECD multilateral standard for the reciprocal sharing of information automatically between tax authorities. While this is a positive step, there is a systemic problem with this standard: as it stands, it will only be used by richer countries. The automatic information exchange (AIE) standard will only benefit countries if they have the administrative capacity and legislative framework to share data with others and meet the requirements of the standard. OECD countries are not yet willing to share data with countries whose tax authorities cannot meet that standard. As a result, it will not benefit many developing countries, unless the OECD standard permits those countries to receive information without sending any in return until they develop sufficient administrative capacity to do so, for which they will need support.

To be truly effective, the multilateral standard must also include a robust definition of beneficial ownership, declaring the identity of the individual who ultimately benefits from the income or wealth of the company, bank account, trust or foundation – identities that are currently masked by the creation of "shell companies" or similar structures. It is essential to establish publicly accessible government registers of beneficial owners of all corporate vehicles, whose public nature will also help those countries which cannot participate in AIE.

Overall, donor countries and relevant international organizations need to commit to a long-term coordinated capacity-building programme to strengthen tax systems and administrations in developing countries. In 2011, the IMF, OECD, UN and World Bank presented a report entitled "Supporting the Development of More Effective Tax Systems" to the G20's Development Working Group. In it, they proposed a set of recommendations which, beyond capacity building, included a number of measures to increase tax collection. Sadly, momentum behind the report and its recommendations has since dissipated.

Conclusion and recommendations

The broken system that allows MNCs to escape their tax obligations, particularly in poorer countries, can no longer be ignored. It denies governments the vital revenues that are rightfully theirs to spend on essential services and on fulfilling human rights obligations to their citizens. Establishing a progressive tax system in which MNCs pay their fair share is essential to enable governments worldwide to reduce inequality. In the February 2014 G20 Finance Ministers Communiqué, world leaders committed to "engage with, and support low-income and developing countries so that they benefit from our work on tax". This commitment now needs to be translated into actions.

The G20/OECD BEPS project presents a unique opportunity to overhaul international corporate tax rules to deliver more equitable returns for all countries and companies. Currently, however, there is a huge risk that any proposed revisions to the rules will only serve the interests of wealthier and more powerful countries. This opportunity is too rare and important to be squandered. The process must allow sufficient time for the full and meaningful involvement of non-OECD/G20 countries to achieve a more level playing field.

The final goal is to deliver ambitious international tax reforms, where profit shifting will no longer be made possible and profits will be taxed where the substance of economic activity takes place, so that countries' tax base is no longer eroded.

Within the OECD Action Plan on BEPS, G20 and OECD members should:

- Open up negotiations to reform tax rules, so that all countries can participate in the decision-making process on an equal footing;
- Promote worldwide tax transparency by requiring MNCs to make country-by-country reports publicly available for each country in which they operate, including a breakdown of their employees, physical assets, sales, profits and taxes (due and paid), so that there can be an accurate assessment of whether they are paying their fair share of taxes;
- Address other key issues that contribute to tax base erosion and hit developing countries hardest, such as harmful tax competition, changes to the allocation of tax rights (source vs residence principle) and taxation of extractive industries.

As part of the G20 Presidency programme, G20 countries should:

- Request that the OECD report to be delivered in September 2014 to the G20 Development Working Group (on the impact of BEPS in developing countries) be made public and be considered within BEPS negotiations;
- Agree a programme to support the integration of de-

veloping countries to build effective tax systems and better coordinate the work between the "Finance Track" (the G20's coordination process for all financial and economic issues, composed of all G20 finance ministers and central bank governors) and the Development Working Group of the G20;

- Work with the IMF, World Bank, UN, African Tax Administration Forum, Inter-American Center of Tax Administrations and other relevant bodies to develop a coherent plan to help developing countries strengthen their fiscal administrations in order to tackle base erosion and profit shifting in the future;
- Implement a multilateral system for exchanging tax information on an automatic basis, which would include developing countries from the start with non-reciprocal commitments (i.e., no obligation to send information until they have established the capacity to do so).

Launch a more comprehensive international tax reform:

- All countries should promote a proposal to establish a World Tax Authority (WTA) to ensure tax systems deliver for the public interests of all countries. A WTA could independently follow global tax developments and gather statistics; be a forum for discussion on international issues related to tax policy; tackle tax competition by setting common minimum tax rates to prevent a "race to the bottom" on corporate taxation; exert peer pressure on countries/jurisdictions that enable companies to be free riders; and develop best practices and codes of conduct on tax-related issues.
- The World Bank and IMF should host a joint agencies' meeting to reanimate the 2010 G20 Seoul initiative that led to the joint agencies' recommendations on supporting the development of more effective tax systems, and agree on a plan to help developing countries build effective tax systems that will lead to better global governance of international taxation.
- The IMF should conduct research on possible alternatives to the OECD's Arm's Length Principle, such as unitary taxation, and their impact on base erosion and profit shifting in developing countries.
- All governments, but developed-country governments in particular, should give financial support to the UN Tax Committee to facilitate innovative discussions on topics including changes to the allocation taxation rights of companies, and explore alternatives to the Arm's Length Principle.
- All governments and tax policy-making bodies should introduce and abide by a code of conduct that ensures that businesses and accountancy firms, and their personnel, avoid any conflicts of interest when being paid or hired by decision makers to "provide intelligence and innovation", and ensure that commercial interests do not take precedence over the interests of the public. ❐

The above is extracted from "Business among friends: Why corporate tax dodgers are not yet losing sleep over global tax reform" (Oxfam, 2014, http://www.oxfam.org/sites/www.oxfam.org/files/bp185-business-among-friends-corporate-tax-reform-020514-en_1.pdf) with the permission of Oxfam GB, Oxfam House, John Smith Drive, Cowley, Oxford OX4 2JY, UK (www.oxfam.org.uk). Oxfam GB does not necessarily endorse any text or activities that accompany the materials, nor has it approved the adapted text.

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