

THIRD WORLD *Economics*

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Investor-state arbitration system criticized

A prominent international lawyer has called for a “complete overhaul” of the international arbitration system that adjudicates on disputes between investors and host-country governments, pointing to serious flaws in the workings of the system. Among the deficiencies highlighted were the perceived bias against state parties in disputes, arbitrary and exorbitant claims and awards against states, and the lack of a credible standard of conduct for arbitrators.

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Trends & Analysis

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Investor-state arbitration system needs "complete overhaul"

A leading international lawyer has pointed out serious flaws in the current process for arbitrating disputes between investors and host-country governments.

by Fauwaz Abdul Aziz

KUALA LUMPUR: A prominent international lawyer has launched a scathing critique of the international arbitration system that deals with investor-state disputes, calling for its "complete overhaul".

The investor-state arbitration system features strongly in bilateral investment treaties and recent bilateral and plurilateral trade agreements such as the controversial Trans-Pacific Partnership Agreement.

Delivering the keynote address to the Eighth Annual Juris Investment Treaty Arbitration Conference held in Washington, DC on 28 March, George Kahale III – who has been lead counsel in several of the world's largest international arbitration cases, including a pending claim against Venezuela – also listed the top 10 of what he viewed as the most troubling aspects of investor-state arbitration.

The chairman of the Curtis, Mallet-Prevost, Colt & Mosle law firm has also acted as lead counsel in some of the world's largest and most publicized transactions and infrastructure projects in the international petroleum industry, representing energy ministries and national oil corporations in many oil and gas-producing countries.

At the conference, themed around the question "New Developments in Investment Treaty Arbitration: A Return to Fundamentals?", Kahale said the pace and scope of change in the area of international trade and investment agreements, in particular, had overtaken the ability of governments to grasp the seriousness of the challenge, significance and impacts they posed.

This is in addition to the serious flaws of the current international arbitration system, such as its biasness and partiality in favour of foreign investors as against states, the use of private commercial arbitration law principles and practices to decide on matters traditionally deliberated on the basis of public international law, and the susceptibility to abuse of substantial provisions in in-

ternational investment treaties, such as the Most Favoured Nation and Fair and Equitable Treatment standards.

Kahale also decried the preference in international arbitration for "speed" and finality" as opposed to due process and justice, the arbitrary and exorbitant claims and awards against states that often exceed the GDP of developing countries, the lack of a credible and uniform standard of conduct for arbitrators, and the recent phenomenon of third-party funding.

"Weapons of legal destruction"

The first of the "top ten" concerns Kahale has with current international arbitration is the fact that many governments are jumping on to the bandwagon of investment treaties – which he described as "weapons of legal destruction" – often without scrutinizing the serious implications and significance of the obligations contained therein.

Governments also often overlook the changing nature of investment treaties – which are expanding in breadth and ambiguity – in favour of investors with the corresponding effect that more and more types of state acts, gestures or statements are becoming liable to challenge and compensation by foreign investors, said Kahale.

Secondly, a "club of international arbitrators" and a new body of international law are being built up through the international arbitration system, but arbitrators are seldom trained in international law and often have "other interests not necessarily consistent with their functions as arbitrators" nor their independence as supposedly impartial 'judges' between parties to international disputes.

In such an environment, said Kahale, "arbitrators are actually encouraged to trade points as if they are bargaining in a Turkish bazaar, acting more like party representatives negotiating a settlement than arbitrators deciding a momentous legal controversy".

Emphasizing that the issue lies beyond the mere choice of which arbitrators are picked by parties to a dispute – and acknowledging that “quite a few” arbitrators are competent and professional – Kahale stressed that the system itself of international arbitration is unsuitable for investor-state disputes.

Abuse-prone standards

The third criticism Kahale raised was that the provisions contained in bilateral investment treaties (BITs) and other international trade and investment agreements, such as Most Favoured Nation (MFN) and Fair and Equitable Treatment (FET) standards, are themselves “susceptible to abuse”.

“Most of us intuitively sense that the drafters of these 3,000 treaties had little or no idea that FET meant anything other than the minimum standard of treatment under customary international law”, for example, whereas MFN is “a dangerous provision to be avoided by treaty drafters whenever possible” and has been used as if it was a “magic wand” to impose obligations on governments to give protections “never imagined for virtually an entire world of investors”, said Kahale.

Fourthly, rather than “the proper administration of justice”, the premium placed in the international arbitration process on “speed and finality” has turned justice and due process into the main casualties of the system.

He cited the example of the refusal of the International Centre for Settlement of Investment Dispute (ICSID)’s Annulment Committee in 2007 to overturn an earlier ICSID award of \$133 million against Argentina despite finding “manifest errors” in the original decision that “could have a decisive impact on the operative part of the award”. The Annulment Committee felt that it could not annul the award because it exercised jurisdiction under what it thought was a “narrow and limited mandate conferred by Article 52 of the ICSID Convention”.

“How is Argentina supposed to feel when it loses a case that the Annulment Committee says was a product of manifest errors of law?” Kahale asked.

“Mega cases”

The fifth criticism of international arbitration relates to the increasing normalization of \$50-100 million awards as well as the increasing frequency of bil-

lion-dollar “mega cases” and other claims exceeding the GDP of many nations. Such claims are being brought against states in the same “cavalier” manner as if they were the same as a “small demurrage claim under a charter party”, said Kahale.

The case of Occidental (oil corporation) versus Ecuador has seen not only a foreign investor being awarded \$1.8 billion plus interest – which Kahale said is “the largest known award in investment treaty arbitration’s history” – and is currently the subject of annulment proceedings, but raises questions as to how the tribunal arrived at the decision to reduce the compensation by 25%.

“Did the arbitrators just throw darts? Did they sit around negotiating percentages? ‘How about 30, or maybe 40? No, that’s too high, let’s make it 25,’” he quipped.

Kahale also noted that the decision that had given rise to the Occidental versus Ecuador dispute in the first place – Ecuador’s termination of a contract with Occidental – was itself precipitated by Occidental’s violation of the prohibition against assigning an interest in the project to a third party without ministerial approval, on which point Occidental had actually lost.

“I can only assume that Ecuador was and remains puzzled as to how it is that it can win the underlying issue giving rise to the case and still lose the largest award in ICSID history. Can you imagine what the US Congress would have done if a multi-billion-dollar award had been rendered against the United States for exercising its right to terminate an oil lease for breach of its terms?” he asked rhetorically.

“A comedy of errors”

On the controversial decision of ConocoPhillips versus Venezuela, Kahale cited the dissenting arbitrator’s description of the majority’s findings as “a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration, but of the very idea of adjudication”.

Kahale said that many objections registered against the conduct of arbitrators have been serious, but they did not succeed simply because the rules of the international arbitration system ensure that arbitrator conduct is not held to the same standards as those of domestic judicial systems.

“We have to acknowledge,” said Kahale, “that conduct wholly unacceptable for a federal judge in the United States is commonplace in investor-state arbitration.”

“Why should that be so if, in fact, investor-state arbitration often involves issues of international law having an impact far beyond the individual case, and matters of the highest public order and national security for the states involved? Under these circumstances, what possible excuse is there for not holding arbitrators to the highest, rather than the lowest, conflict standards?”

The lack of a credible standard of conduct is compounded by the finality of arbitrators’ decisions as well as the related matter of issue conflicts, Kahale said further. In most judicial systems around the world, he stressed, even if a judge were to have displayed his/her bias for or against certain issues, that judge would still be bound to follow the interpretation of a higher judicial authority, or otherwise risk reversal of his/her decision.

“But in the world of investor-state arbitration, where arbitrators feel free to follow their preferred school of thought or even to invent law without fear of appellate review, issue conflict has to be taken more seriously.”

Related to the above criticism, Kahale contended, is that many cases can be predicted by experienced practitioners on the basis of the composition of the tribunal.

While this explains why it can take a long time for parties to agree on the tribunal of arbitrators for their dispute, the more significant question is how such a state of affairs can be squared with the notion of impartiality, which Kahale said is universally agreed to be the bare minimum qualification for arbitrators.

“The fact is that true impartiality is almost impossible to achieve on issues, and that’s a dangerous thing when combined with other features of the current system, including the manner of appointing arbitrators and the sovereignty of each tribunal.”

Claimants have also demonstrated the tendency to grossly exaggerate claims: when ExxonMobil started its litigation against Venezuela’s state oil firm PDVSA, it had initially sought \$12 billion (the tribunal awarded Exxon 5% of that amount); ConocoPhillips began its case against Venezuela claiming over \$30 billion plus interest.

“Now, we’ve all heard the stories

about multi-million-dollar claims based on coffee spills. Gross exaggeration of a claim is nothing new, but with investor-state arbitration, it reaches a new level, first because of the amounts involved and second, because there is a greater chance that some tribunal will actually take such a claim seriously than there is in a national court which is subject to more checks and balances."

The next "disturbing phenomenon" connected to international arbitration, said Kahale, is that of third-party funding, whereby commercial companies offer to pay some or all of a claimant's legal fees and expenses in exchange for payment of the claimant's direct costs and a share of the sum recovered by the claimant in the arbitration (typically between 15% and 50%).

"One can wax eloquent about the positive role played by funders in getting justice that would otherwise be denied," said Kahale, "but I think we should all be frank enough to admit that that isn't the kind of investment BITs were meant to protect."

"Bias against states"

Kahale's final criticism was on "the perceived bias against states" in the investment arbitration system, which is a result of the features discussed above as well as many others that have not been mentioned.

While such bias does not mean that states never win cases, that tribunals are always tilted in favour of investors, or that states never do wrong, Kahale said figures cited by proponents of the current international arbitration system showing that states win more than 50% of cases are "meaningless, if that figure happens to represent the percentage of cases that never should have seen the light of day or that would never survive a motion to dismiss in a national court".

"It is also cold comfort if 20 or 30 percent of those cases involve manifest errors, especially if some of those are mega cases."

In conclusion, Kahale said there are some quarters who believe the criticisms against the current international arbitration system are merely isolated, fixable "mistakes" and exceptions to the general efficacy and efficiency of the system.

"But I can assure you," Kahale pointed out, "there is a very large segment of the international community, including states, international law schol-

ars, and even students trying to make heads or tails out of these decisions, that believe otherwise. And if that's the case, as it undoubtedly is, it calls into question the legitimacy of the entire system."

While not purporting to have any one panacea for all the problems of the system, they do call for immediate recognition and attention, particularly since they are "serious problems that don't often get sufficient air time".

"After all, the first step in solving a problem is always becoming aware of its

existence," Kahale stressed.

According to a Curtis report on the 28 March speech, it was not the first time that Kahale has spoken out against investor-state arbitration. In New York in 2012, he argued that ICSID suffered from a legitimacy problem, and that the institution had strayed from its original ambit.

His essay on the same subject, "Is Investor-state Arbitration Broken?", won the Burton Award last year for distinguished legal writing. (SUNS7801) □

Developing-country TNC investments hit \$460 billion

Last year saw a record flow of investments abroad from developing countries, figures released by a UN agency show.

by Kanaga Raja

GENEVA: Investments undertaken abroad by transnational corporations (TNCs) from developing countries increased by 4% in 2013, reaching a record level of \$460 billion, the UN Conference on Trade and Development (UNCTAD) has said.

In its latest *Global Investment Trends Monitor* (No. 16) released recently, UNCTAD said that if investments from TNCs from the transition economies, amounting to \$100 billion, were also included, they would now account for 39% of global foreign direct investment (FDI) outflows.

In contrast, investments by TNCs from the developed countries were unchanged from 2012, amounting to \$858 billion in 2013; their share in global FDI outflows reached a historically low level of 61%.

Looking to 2014 and 2015, UNCTAD said that with improved global economic prospects and reduced business risks, investments by TNCs are estimated to rise in these two years.

"The financial market rally and increased corporate profits in 2013 might support their confidence to invest. Strong cross-border M&A [mergers and acquisitions] activity in the first quarter of 2014 suggests that at least equity investment – part of FDI flows – will rise in 2014, especially from developed country TNCs."

However, cautioned UNCTAD, "the economic recovery is still uneven, with improving economic prospects in the

United States and Japan on the one hand, and weaker growth in the EU and some emerging markets on the other. In addition, risks persist, related in particular to policy uncertainties and regional conflict."

According to UNCTAD, investors from developing and transition economies continued their expansion abroad last year, due to faster economic growth and investment liberalization, as well as rising income streams from the high level of commodity prices.

In 2013, they accounted for 39% of world outflows, while 15 years ago that share was only 12%, said UNCTAD. TNCs from the North, in contrast, continued their wait-and-see approach, with investments remaining at a similar low level of 2012.

"Almost half of FDI from developing and transition economy TNCs was in equity, while developed country TNCs continued to hold large amounts of cash reserves in their foreign affiliates in the form of retained earnings, which constitutes part of reinvested earnings, one of the components of FDI flows. This component was at a record level of 67%."

With respect to developed-country TNCs, UNCTAD said that investments from the largest investor – the United States – dropped by 8% to \$338 billion, despite the growing level of reinvested earnings abroad.

On the other hand, FDI outflows from the European Union rose by 6% to \$252 billion, while those from Europe as

a whole increased by 10% to \$330 billion.

Switzerland became the largest outward investor in Europe, recording \$60 billion, this due to a doubling of reinvested earnings abroad.

Countries that recorded a large decline in 2012, including Italy, the Netherlands and Spain, saw their outflows rebound sharply.

In contrast, said UNCTAD, investments by TNCs from France, Germany and the United Kingdom saw a substantial decline, falling by \$40 billion (to -\$2.6 billion), \$22 billion (to \$58 billion) and \$16 billion (to \$19 billion) respectively. TNCs from France and the United Kingdom undertook significant equity divestment abroad.

"Despite the substantial depreciation of the currency, investments from Japanese TNCs continued to expand, rising by over 10% (or by almost 40% in local currency terms) to a record \$135 billion. This growth is largely accounted for by increases in equity." On the other hand, UNCTAD said that reinvested earnings of Japanese TNCs were relatively small (14% of the total) and actually declined in 2013.

Investment from the South

Turning to investments by TNCs from developing countries, UNCTAD reported that investment activity by TNCs from the South increased by 4% in 2013, advancing to a record level of \$460 billion.

Among developing regions, Asian and African TNCs increased their investment abroad, while those from Latin America and the Caribbean reduced theirs, said UNCTAD.

Asian TNCs remained a large source of FDI, accounting for more than one-fifth of the world's total.

In 2013, investment flows from developing Asia rose by 7% to \$327 billion, with diverging trends among sub-regions: East and South-East Asian TNCs experienced growth of 7% and 2% respectively; investment from West Asia surged by almost two-thirds; and TNC activities from South Asia slid by nearly three-quarters.

In East Asia, said UNCTAD, investment from Chinese TNCs climbed by 15% to an estimated \$101 billion due to a surge of cross-border M&As. Examples cited by UNCTAD include the \$19 billion CNOOC-Nexen deal in Canada and the \$5 billion Shuanghui-Smithfield

Foods deal in the United States.

Investors from Hong Kong-China saw a growth of 4% to reach \$92 billion. The Republic of Korea and Taiwan Province of China, the two other important sources in East Asia, witnessed contrasting trends. Investments by TNCs from the former declined by 7% to \$31 billion, while investments by TNCs from the latter rose by 9% to reach \$14 billion, said UNCTAD.

Investments by South-East Asian TNCs increased by 2% in 2013, with the doubling of investment from Singapore – the sub-region's leading investor – offset by declines of investments from Malaysia (-21% to \$14 billion) and Thailand (-49% to \$7 billion).

In South Asia, Indian TNCs reduced their activities by three-quarters to \$2 billion (back at levels last seen in 2002).

UNCTAD said that investments from Africa leapt by 57% in 2013, mainly on the back of investment flows from South Africa and Nigeria.

South African TNCs invested in telecommunications, mining and retail while those from Nigeria focused largely on financial services. Intra-African investments rose significantly during the year, it added.

"TNCs from Latin America and the Caribbean decreased their investments abroad in 2013 by 10% to \$112 billion, mainly on account of a 36% drop in investments from Central and South America."

According to UNCTAD, the fall of investment from this sub-region was largely attributable to a decline in cross-border M&As and a strong increase in loan repayments to parent companies by Brazilian and Chilean foreign affiliates abroad.

In contrast, Colombian TNCs bucked the region's declining trend and more than doubled their cross-border M&As in industries such as energy, food, banks and cement.

"Investments from TNCs registered in Caribbean countries – mainly in two offshore financial centres, the British Virgin Islands and Cayman Islands – increased by 5% in 2013, constituting about three-quarters of the region's total investments abroad."

With respect to the transition economies, UNCTAD said that investments by TNCs based in these economies increased by 85% in 2013, reaching \$100 billion.

Most FDI projects, as in the past

years, were carried out by Russian TNCs followed by those from Kazakhstan and Azerbaijan.

M&A activity

In 2013, UNCTAD said, the value of cross-border M&A purchases increased marginally by 5% to \$349 billion largely on the back of increased investment flows from developing and transition economies, whose TNCs captured a 56% share of global acquisitions.

"During 2013, investors from developed countries retreated from extractive industries and reduced M&A purchases in trade, hotels, restaurants, transport services and in all manufacturing industries," said UNCTAD.

The developed-country TNCs increased their purchases only in select industries such as the telecommunication and information sector, and business services.

In this context, UNCTAD highlighted the Japanese telecom company Softbank's acquisition of US-based Sprint Nextel for over \$21 billion as illustrating that confidence remains strong in the telecommunications industry.

In contrast, said UNCTAD, TNCs based in developing and transition economies were drawn to consumer sectors, in particular, food and beverages, building materials, utilities, hotels and restaurants, business services and finance services, in which they continued to scale up their investments.

The UNCTAD report also found that more than two-thirds of gross cross-border M&As by South TNCs were directed to developing and transition economies, and that half of these investments involved developed-country foreign affiliates in developing and transition economies.

"This led to a change of ownership of foreign affiliates operating in developing and transition economies into the hands of developing country TNCs," said UNCTAD.

This trend was particularly marked in the extractive industry, where the value of transactions involving developed-country TNCs' sales to developing counterparts represented over 80% of South-based TNCs' gross acquisitions in the sector and in Africa as a whole (74% of purchases on the continent), it added.

The leading acquirers in South-South deals were China, followed by Thailand, Hong Kong-China, Mexico and India, said UNCTAD. (SUNS7804)□

South stress on development, agriculture as key issues

Developing countries have emphasized the need to produce a development-oriented outcome in the Doha Round trade talks, one that delivers tangible results for the poorest and in the agriculture sector.

by Kanaga Raja

GENEVA: The centrality of development and the importance of the issue of agriculture were underscored by developing countries at a meeting of the General Council of the World Trade Organization (WTO) on 12 May.

These views came in their statements under the agenda item of the report by the Chairman of the Trade Negotiations Committee (TNC).

For example, the Dominican Republic, speaking for the informal group of developing countries, stressed on the centrality of development in the Doha process, and that agriculture will be the benchmark for the level of ambition in the other areas of the negotiations.

It also stressed that the principle of the single undertaking should be adhered to and that this is the way to ensure a negotiated outcome that is consistent with the development mandate being at the core.

The African Group said that the issue of development must not be left to the tail-end of the process.

Remaining focused

Earlier, in his statement under this agenda item, WTO Director-General Roberto Azevedo, in his capacity as TNC Chair, recalled that from the last TNC meeting on 7 April, he had suggested that members take the work into a new phase, focused on resolving the problems that they had been outlining, testing what went wrong and putting forward potential solutions.

In a brief update on developments in this new phase since that TNC meeting, the D-G said that the messages he heard continue to be positive, in that members remain focused on the two priorities of implementing the Bali package and meeting the December deadline for preparing a work programme to conclude the Doha Development Agenda (DDA).

On the work programme, Azevedo welcomed the positive commitment that he has been hearing to further progress,

and said he thinks that members remain committed to the parameters that have helped frame discussions so far, particularly: keeping development at the heart of the efforts; focusing on what is doable; and being open-minded.

"In addition, I think there is broad recognition that the core issues of Agriculture, NAMA [non-agricultural market access] and Services need to be addressed promptly and that they need to be tackled in an integrated manner," Azevedo said.

"We all know that the [Doha] Round is broader than these three areas alone, but I believe we will have to make progress here, and quickly, if there is to be any chance of advancing elsewhere," he added.

On agriculture, the D-G reported that the Chair of the Special Session has been continuing his consultations with a range of members, including group coordinators, and that these consultations have shown a general willingness to work constructively.

"A start has been made on identifying key concerns, but there is a pressing need to intensify and deepen engagement among delegations and move to consideration of possible approaches to deal with contested areas."

While respecting different views on the status of existing drafts, the Chair has urged delegations to proceed without prejudice, "so that we can at least explore different perspectives on these issues to see where that leads us", said Azevedo.

Azevedo endorsed this call, saying that "otherwise, progress will be extremely difficult".

On NAMA, the D-G said that the Chair of the negotiations has held a number of meetings with members and group coordinators since the last TNC meeting, and intends to pursue these consultations.

The objective of the consultations was to delve more deeply into the question he had raised, which was "how and under what circumstances could each Member contribute to a meaningful

NAMA result taking into consideration past experience, present realities and possible instruments at hand".

On services, Azevedo reported that the Chair of the Special Session has continued his consultations among delegations, and that overall, the signals received from members remain the same: willingness to engage; ambition commensurate with other market access pillars; balance within the various services topics; and the importance of the development dimension.

"In the Chair's view, there is a pressing need to accelerate the process of moving from principles to specific elements of the Work Programme. He will continue his efforts in that direction."

Building on previous work

"A regular feature of my conversations," said the D-G, "and those of the Chairs, has been how to build on the work done so far, particularly as it is captured in the 2008 texts." While "we could not agree on those texts in the past, and while it is clear that we cannot agree on them now, I believe members do agree that they provide important guidance on how to move forward."

"However, it is still unclear in my view how far these texts can help us in building the bridges we need to close some critical gaps in terms of level of ambition and negotiating architecture in areas where convergence has continuously eluded us," said Azevedo.

On the positive side, the D-G said that first, "we could not expect to be much further than where we are now. These uncertainties are natural and we will see the path ahead more clearly as we deepen our dialogue and get into a more focused and detailed conversation about substance."

Second, he said, "we have learned a lot with the past stalemates. We have to use that experience. I have personally been involved in these negotiations since 2001, so if there is anybody who doesn't want to see all that work go to waste, it's me."

The D-G also stressed that this is, and will remain, a bottom-up process, adding, "I can assure you there are no pre-cooked outcomes or approaches being prepared."

"We should be completely open-minded to any approach that shows promise. I hope that this will be the case in this second phase of our conversations – and I will be there to facilitate your dialogue whenever necessary," the D-G told

the members.

"Finally, I think we should accept that this is not the round to end all rounds. It's not an isolated, self-contained or definitive task – rather it is part of a process. It's just a step in the continuous process of trade liberalization. Let's take a step that is commensurate with the size of our legs," said Azevedo.

He added that the WTO's Bali Ministerial Conference last December was successful "because we were realistic. We should be in a position to make some progress in most – or all – areas of the DDA negotiations. Let's put everything on the table and see how far we can go in each area of the negotiations."

"But what's essential is that we keep making progress – even if it's not perfect. Let's focus on what's doable," he said, adding that nothing he'd seen or heard so far suggests that "we can't do it. But we will need to redouble our efforts. We need to engage in a deeper way, and we need to do it now."

Be prepared to have some tough conversations, he further said. "I will be here to push you – and ask some difficult questions, such as: in 2008 you said you were prepared to do this – is this still the case today? You said you needed that – is this still the case? What are you prepared to put on the table to enable this trade-off?"

"Or, if you want a high level of ambition in agriculture, are you ready to give ground in NAMA and services? And vice-versa – if you are willing to have a high level of ambition in NAMA and services, are you ready to give ground in agriculture? You have to answer those questions," the D-G told the members.

"In a month or two, after having these discussions, that's when we will know whether we are back in 2008, or whether this is something which shows promise and can happen," he said, adding that his intention is that by the summer break "we will have had some very serious conversations along these lines."

Pointing out that he will be traveling to important meetings outside Geneva over the next 10 days, including APEC in China and a meeting of multi-lateral agencies in Berlin, the D-G said that when he gets back, "we will all need to be prepared for a busy June and July."

"I will be in Geneva for most of that period, so you will be seeing me constantly and I will be inviting you – indi-

vidually or in groups – for some difficult and frank conversations. So get ready – it's time to start putting our Work Programme together," he concluded.

Centrality of development

Several delegations spoke following the report by the TNC Chair.

According to trade officials, the Dominican Republic (on behalf of the informal group of developing countries – but not Chile, Hong Kong-China, Mexico and Singapore who were still waiting for instructions from their capitals and were thus not included) stressed on the centrality of development in the Doha process.

Tangible results for the poorest are important and tangible results in agriculture will be a way to measure this, the statement by the Dominican Republic said, adding that agriculture represents 60% of the economies of many developing countries as well as a sizable percentage of the employment in these countries.

Agriculture will be the benchmark for the level of ambition that is to be found in the other areas of the negotiations, said the Dominican Republic.

It said that the issue of trade-distorting domestic support in agriculture is extremely important for developing countries. There needs to be special and differential treatment (S&D) and the flexibilities for developing countries that are to be found in Rev.4 (December 2008 draft agriculture modalities text) should be preserved, it said.

The single undertaking should be adhered to and this is the way to ensure a negotiated outcome that is consistent with the mandate of development being at the core, it said.

While the world has changed since 2001, what has not changed is the fact that the problems particularly with respect to agriculture remain unresolved.

The architecture of the 2001 Doha Round in general needs to be preserved, the Dominican Republic said, adding that developing countries are open and constructive but there needs to be an understanding that in agriculture and in other areas of the negotiations, there must be something that emerges that is of interest to developing countries.

They would like to see a transparent and inclusive process through a bottom-up approach and one that ensures

that for the least developed countries (LDCs) and developing countries generally, they can participate fully in the growth of world trade.

Guatemala (on behalf of the Small and Vulnerable Economies) said that SVEs' participation in world trade is negligible and as a result, their appeals for S&D are completely justified.

There is a need to ensure that development is included in the negotiations in line with the Doha mandate, it said, adding that the economic crisis and natural disasters have made the situation worse for many small and emerging countries.

It said that it needs the policy space and the flexibilities that are included in the Rev.4 agriculture text and the Rev.3 NAMA text.

On services, it would like to have flexibilities for developing countries. It also highlighted the importance of the issue of fisheries subsidies for SVEs, saying that overfishing and overcapacity is one of the reasons for the depletion of fish stocks. Disciplines should include S&D for developing countries because fishing is a key source of income for many SVEs, especially those in the Pacific.

Bolivia supported the Dominican Republic and Guatemala, and said that the Bali outcome was unbalanced and that future work should be done in a way that is more oriented towards developing-country interests.

The issue of agriculture is absolutely crucial for the Doha Round and under existing rules, the agricultural disciplines are of benefit only to certain members, it said, adding that the Rev.4 text is a reference point, and represents a collective effort, that even though things have changed, no one can be convinced that the markets are not being distorted by industrial-country subsidies.

While the world has changed, what has not changed is that there are still no solutions to problems that have been of concern for decades, Bolivia said.

Lesotho (on behalf of the African Group) said that the development paradigm must be the first parameter to shape the discourse among members. One key question that must be posed to members is what they are prepared to contribute to the development dimension. This is an issue that must not be left to the tail-end of the process, it added. Transparency in the process will

be indispensable, it also said.

Barbados voiced agreement with the statement by Guatemala on behalf of the SVEs. It said that it will be very important to define the level of ambition in agriculture as well as other areas. The concerns of the SVEs and LDCs must be addressed, it said, adding that there must be adequate flexibilities for these countries.

Jordan (on behalf of the Arab Group) said that there must be a balanced approach across the three issues of agriculture, NAMA and services. The single undertaking is still relevant to ensure there is a right balance and that the outcomes will be in line with the Doha Ministerial Declaration. There must be full participation, transparency and inclusiveness, it said, adding that no new issues should be introduced.

Agriculture has a central role, and the Rev.3 NAMA text and Rev.4 agriculture text should be the basis for future work, it said.

According to trade officials, the United States, in welcoming the new ambassadors, said that it wished it could be welcoming them to an environment that was more optimistic, but listening to the interventions, it said it had heard nothing new at all. Listening to these interventions was like watching a dog chasing its tail. A lot of energy is being expended and no one is going anywhere.

It said that it hears people acknowledging that markets are being distorted by trade-distorting domestic support. It also hears people acknowledging that the world has changed, and said that one way in which the world has changed from 2004-05 is who is providing subsidies.

According to trade officials, the US said that there are some developing countries that are able to subsidize their agriculture. Why, it asked, is it okay if developing countries provide trade-distorting support? Why is it assumed that these subsidies don't distort markets? Why are we not admitting that some subsidies are simply substituting for other kinds of subsidies? Why is there no understanding that these are being offset?

The US said that it has asked for more data for months but what it gets is "radio silence". "If we're going to have a conversation, let's have it; if not, why do we keep convening? We have to have a real conversation which represents the

reality of the world today," it said.

Cuba supported what the Dominican Republic and Guatemala had said earlier. It said that the US has been waiting for four months for answers, but the developing countries have been waiting for 12 years for responses to the Doha Declaration.

It said that in practice, nothing has been achieved. It would like to ask the US to respond to questions that have been outstanding for 12 years.

The European Union said that there is a need to find what is doable and the need to factor in recent developments. Outside of agriculture, NAMA and services, it would also like to see discussions on industrial subsidies, non-tariff barriers and geographical indications.

It said that the development issue must be central to the Doha Development Agenda, and there may be a need to simplify the approach that members are taking on the core issues. But this should not be construed as in any way an attempt to put at risk the development dimension.

Striking a balance

China, noting that members have entered into the second phase in drafting the post-Bali work programme, said that "the general momentum is being created through our common efforts", and that the interactive discussions are getting more substantive in various negotiating bodies.

"To better advance our discussion in the second phase, we have to put things in perspective and strike a right balance. We should look at challenges and difficulties squarely, while fully capitalizing the positive momentum that we have built. We need to show not only what we want, but also what we can offer and contribute. We can declare the red lines of ourselves, while understanding and respecting the red lines of others," it said.

According to China, the post-Bali work programme is an integral part of the DDA. Through substantive discussion, "we could build up mutual trust among ourselves. The spirit of bottom-up, member-driven, inclusiveness and transparency should be preserved throughout the negotiations."

Only by so doing, said China, "can we lay a sound foundation for drafting the Work Programme, which would pave the way for the final conclusion of the DDA in the nearest future." □

Referring to the talk about the changes in the world since 2008, China stressed, however, that from the development perspective, many key concerns of the developing members remain unresolved, and that due to the global financial crisis, some developing members' situation is even getting worse.

In this sense, it said that the 2008 text is not only a reflection of history, but also a reflection of today's reality.

"The DDA development objective and negotiation mandate should in no case be changed and the principle of special and differential treatment and less than full reciprocity as well as the consensus of addressing the overall trade-distorting subsidies and tariff peaks and escalations etc. that are recorded in the result achieved in 2008 should be strictly preserved."

In cases where all members collectively decide to keep the ambition as reflected by the results of 2008, China said that it would "get along". In cases where members collectively decide to lower the ambition as compared with the 2008 benchmark, China is ready to move in the same direction.

"However, any proposal that requires a few members to contribute beyond the benchmark while allowing some major players to do less will only lead the negotiations to nowhere," it underlined.

"After years of negotiation, we all know each other's red lines well. For example, in the case of domestic support in agriculture, China made contributions on the basis of Uruguay Round, resulting in no AMS, no Development Box and a *de minimis* of 8.5%, lower than other developing members," it said.

China also noted that its domestic support is mainly targeted to the subsistence and small-scale agriculture production mainly in staple food for the food security purposes of 1.37 billion people.

"So it is understandable that the *de minimis* of 8.5% is our red line. Likewise, for NAMA, there should be no change to the voluntary nature of Sectorals," it said.

According to trade officials, the DG then said that he had heard nothing new, and the only new thing that he had heard in the meeting was perhaps when Barbados mentioned that there was going to be a meeting of small and vulnerable island states on 20 June. (SUNS7803) □

A few steps forward, a few steps back on SDGs

A UN working group remains some way from agreeing a set of Sustainable Development Goals for the international community, as divides among its member states persist.

by *Bhumika Muchhala*

NEW YORK: With two more sessions to go, work at the United Nations on the Sustainable Development Goals (SDGs) faces continuing challenges.

On 9 May, the Co-Chairs of the Open Working Group (OWG) on Sustainable Development Goals produced a narrative "chapeau" of two pages that will accompany the framework of the goals, sent to all member states.

The 11th session of the OWG took place on 5-9 May at UN headquarters in New York. The Co-Chairs are Ambassadors Macharia Kamau of Kenya and Csaba Korosi of Hungary.

Since the OWG started holding intergovernmental discussions in March 2013, developing countries in the Group of 77 (G77) and China have consistently called for a narrative to accompany the SDG framework.

The specific call was to extract the language of the narrative primarily from the outcome document of the 2012 Rio+20 sustainable development summit, titled "The Future We Want". This would prevent the risk of opening to renegotiation the very language and principles that were agreed to less than two years ago in Rio.

Developing countries stressed that the narrative must reflect strong and comprehensive means of implementation, the global partnership for development, and explicit inclusion of the principle of "common but differentiated responsibilities" (CBDR) of the 1992 Rio Declaration on Environment and Development.

The draft chapeau distributed to member states makes mention of several fundamental concepts, frameworks and principles.

The Rio Declaration is reaffirmed, including Principle 7 on CBDR. The UN Charter, and its international laws and principles, are reaffirmed, including the Universal Declaration of Human Rights, the right to development, the right to food, gender equality, women's empowerment and the overall commitment to just and democratic societies.

According to many key developing countries, the reference to CBDR in the chapeau is positive, but it is not enough. There needs to be clear differentiation between developed and developing countries at the level of goals and targets in the SDG document, which so far has been absent. It is also problematic to merely insert the term "CBDR" into the goals and targets without genuine realization of the principle in meaning.

Affirmation is provided as to the different approaches, visions, models and tools available to each country, in accordance with its national circumstances and priorities, to achieve sustainable development in its three dimensions (environment, social and economic).

Although universal applicability of the SDGs is highlighted, a clear differentiation of roles and responsibilities with specific regard to the obligations under the means of implementation is absent from the chapeau.

Instead, mention is made as to how the SDG targets and indicators will take into account different national realities, capacities and levels of development with respect to national policies and priorities. This is not the same as differentiation. Roles and responsibilities denote actual commitments and actions, whereas merely "taking into account" and "respecting" do not refer to differentiation of deliverables.

The only mention made of means of implementation (the most fundamental aspect of the SDGs to developing countries) is that of additional resources and the need for significant mobilization of resources from a variety of sources. The agreed established language on means of implementation encompasses new and additional financial resources, technological development and transfer, and capacity-building.

Although the commitment to international cooperation is reaffirmed, it is not framed within the established multilateral context of cooperation between sovereign states. Instead, international cooperation is couched within a broad

alliance of people, governments, civil society and the private sector.

This explicit reframing of international cooperation should sound alarm bells, as the global partnership for development, reflected in Goal 8 of the Millennium Development Goals (MDGs), has been distorted into partnerships in the plural. This has paved the way for corporate-led or corporate-dominated initiatives, undermining the imperative of multilateral cooperation between states.

Adequate references are made to reaffirming commitments from international conferences and outcome documents, including the Rio Declaration on Environment and Development, Agenda 21 and the Johannesburg Plan of Implementation, among others.

The Monterrey Consensus of the International Conference on Financing for Development and the Doha Declaration on Financing for Development are highlighted as indispensable for achieving the full and effective translation of sustainable development commitments into tangible sustainable development outcomes.

Equity and inclusivity are highlighted in the chapeau, as is the recognition that poverty eradication, changing unsustainable and promoting sustainable patterns of consumption and production, and protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for sustainable development.

Co-Chairs' decisions on process and content

At the conclusion of the 11th OWG session, Co-Chair Ambassador Kamau announced several key decisions on both content and process.

On process, he will open the first informal consultations with all member states, to be held on 9-11 June, preceding the 12th session of the OWG, which will be held on 16-20 June.

This marks the first time the OWG will meet on an informal basis, where all UN member states can engage in candid and thorough discussions on specific issues in the SDG document prepared by the Co-Chairs. A second week of informal consultations will take place before the final scheduled OWG session in July.

This shift was a direct and positive response to the G77 Chair, Bolivia, who had at the outset of the 11th session

called for a more direct method of deliberation in which all member states, not only those of the OWG, can interact and discuss more thoroughly to improve the content of the draft report for SDGs. The G77 stressed that shifting the process toward informal negotiations would ensure a member state-driven process.

(The Rio+20 outcome document which mandated the OWG's establishment restricted its membership to 30 countries. Due to the overwhelming interest of member states, it was finally agreed that some seats will be represented by two or three countries, usually with these countries coming from the same region. There are thus 70 members in total, with some countries taking turns to be in the official 30 seats.)

(In the inaugural session of the OWG on 14-15 March 2013, all UN member states were invited to attend and this continues to be the procedure. The informal consultations will provide opportunities to all member states to voice their views and provide inputs.)

Ambassador Kamau also stated that addressing inequality will be reinstated as a standalone SDG goal.

Inequality had been a standalone goal in the second version of the SDG document, but in the third version it was removed and inserted as a secondary aspect within the targets of two other goals, i.e., poverty eradication and industrialization. Many member states, including the G77 and China, protested against this alteration.

However, the 16th goal of "peaceful and inclusive societies, rule of law and capable institutions" will be maintained due to the sharp split among member states.

Many developing countries are against the inclusion of this goal area in the SDG document, stating a multitude of concerns, including that this theme shifts the focus of the SDGs away from the three dimensions of sustainable development, and includes security issues that are under the purview of the UN Security Council.

Developing countries have called for moving certain elements under this 16th goal to other goals, and for integrating those elements that cannot be relocated into the narrative of the chapeau document.

Brazil, in particular, has stressed that this area of peace and rule of law includes a conceptual confusion between violence and conflict. Specifically, there is a prevailing notion that violence and

organized crime should be singled out as important impediments to development, and that they are a problem only in developing countries.

Furthermore, rule of law should be an enabler to sustainable development, not an objective per se. Difficulties are also perceived in measuring the targets and defining the standards under this goal area, particularly in terms of what is the 'right', 'correct' or 'ideal' model of rule of law that could represent a yardstick for all countries.

Climate change is another contentious area of the SDG document.

Ambassador Kamau stated that due to the house (OWG) being split again, the goal on climate change will be retained, at least for the time being.

However, he acknowledged that a deeper conversation on this complex topic is still pending, as both sides of the fence are emphatic about either maintaining or removing climate change as a goal area. He noted that in response to the strong requests of developing countries, there will be a proactive attempt to streamline climate change into other goals in a manner that is acceptable.

Many developing countries have repeatedly argued that climate change should not be a focus area; it should be substantively integrated into all the other goal areas. In the 10th OWG session, developing countries stated that the SDGs cannot preempt or prejudge the outcomes of the UN Framework Convention on Climate Change (UNFCCC).

As such, the SDGs must adhere to the principles and provisions of the UNFCCC, in particular the principles of equity and CBDR, and ensure that the ongoing discussions under the UNFCCC are not prejudiced or prejudged. The risk of including climate change as a goal is that it may unduly interfere with an ongoing negotiating process that is extraneous to the SDG process.

On the crux of the SDG document, which is the area of means of implementation (MoI), Ambassador Kamau said that there are a lot of good conversations and ideas that are emerging, and yet there is a lack of clarity and a lack of direction, especially in consistency. He said that there is a huge wave of ideas rather than clear direction, and thus the consolidation of MoI will require a lot more work from member states.

It was also stated that the most complex part of the SDG document is that of the targets. Currently, there are about 149-150 targets, and given the way the

negotiations are proceeding, there are going to be many more targets, precisely because member states have expressed very direct terms on what MoI they seek.

Due to this, the scope of the SDG targets will be expanded, in that there will be additional space created to accommodate the targets specified by various member states. The various proposals will be reflected, he said, so that all member states can get a sense that there is inclusion of their specific demands.

This implies the danger of an incoherent SDG document and framework, one that contains all the shades in between.

This may enable development agencies, international financial institutions and donors on the one hand, and national governments and multilateral processes on the other hand, to selectively choose which targets and points to address and prioritize in their dealings.

One key concern of some observers is that the SDG targets may contradict each other, especially if universality is not made a priority and developing-country actions without adequate MoI from developed countries biases the SDGs.

G77 and China assessment of the third version of the SDG document

At the outset of the 11th OWG session, the G77 and China, the largest group of developing countries in the UN, addressed a number of concerns. Their most urgent priority was to stress that the notion of differentiation is absent from the SDG document.

They argue that it is necessary to reflect the different capacities, development stages and circumstances of member states. It is also of crucial importance that developed countries take the lead in sustainable development and, in particular, sustainable consumption and production, while also supporting developing countries in achieving both economic growth and sustainable development.

As such, the G77 and China underscored that a truly universal agenda requires tangible deliverables and commitments for developed countries at the forefront.

They highlighted that the CBDR principle does not appear in any of the 16 goals of the SDG document, which is mandated by UN convention to follow the outcome of the Rio+20 outcome document, which reaffirms at the outset the CBDR principle. (SUNS7807) □

Public procurement and the right to food

Government procurement programmes should support attainment of the right to adequate food, a UN rights expert has urged.

by Kanaga Raja

GENEVA: States should align their public procurement policies and schemes with their duty to progressively realize the right to adequate food, the UN Special Rapporteur on the right to food, Olivier De Schutter, has recommended.

In his final publication as Special Rapporteur, De Schutter, who is being replaced by Hilal Elver of Turkey, described why public procurement is important for food and nutrition security strategies and identified five key principles that should be integrated into public procurement schemes and modalities.

According to the Special Rapporteur, food procurement schemes should: (1) source preferentially from small-scale food producers and actively empower them to access tenders; (2) guarantee living wages as well as fair and remunerative prices along the food supply chain; (3) set specific requirements for adequate food diets; (4) source locally and demand from their suppliers that they produce food according to sustainable methods; and (5) increase participation and accountability in the food system.

"The effectiveness of such public procurement policies and programmes would be maximized by fully integrating them under right to food national strategies and framework laws, and by coordinating them with other food security policies," said the rights expert.

The report, titled "The Power of Procurement: Public Purchasing in the Service of Realizing the Right to Food", also addressed the potential constraints found in the World Trade Organization (WTO)'s Government Procurement Agreement (GPA).

It underscored that countries that are signatories of the GPA are not systematically prevented from establishing public procurement schemes that contribute to the realization of the right to adequate food, as illustrated by many countries which reformed their school feeding programmes in recent years, but the GPA does impose restrictions on schemes that result in a discrimination between suppliers on the basis of their geographic location.

De Schutter noted that the vast majority of GPA signatories are OECD (Organization for Economic Cooperation and Development) countries. Developing countries are not bound and therefore they are free to put in place procurement schemes that further food security by supporting local or regional farmers.

According to De Schutter, countries that have not signed and/or ratified the GPA have greater discretion with respect to the public procurement schemes that they may lawfully establish, and this discretion can and should be used to advance the right to adequate food.

"The World Trade Organization (WTO) Committee on Government Procurement should integrate the protection and realization of all human rights, including the right to food, in the objectives to be pursued by 'sustainable procurement'."

De Schutter said that the integration of the five principles identified in his report "should be fully integrated in the future work of the GPA, in particular in the Work Programme on Sustainable Procurement as specified in the revision of the GPA (GPA/112, Annex 7, para 1)."

Scope of food procurement

In his report, the Special Rapporteur, highlighting that the public sector is an extremely important purchaser of goods and services, said that governments spend on average 12% of their GDP on public procurement in OECD countries, and slightly less in developing countries, with varying estimates.

All over the world, public authorities award contracts for food provision and food-related services for cafeterias in civil service buildings, hospitals, prisons, schools, universities, as well as social programmes such as in-kind transfers or social restaurants.

For instance, said the report, the public catering sector in the UK represents some £2 billion per year (approximately \$3 billion or €3.16 billion). It pointed out that school feeding programmes exist in almost all high- and

middle-income countries, as well as in 70 out of the 108 low- and middle-income countries, with support from the World Food Programme (WFP).

However, other procurement schemes hold even greater economic significance, especially for in-kind food aid programmes managed by public authorities, it said. For example, in 2010-11, federal food subsidies in India (in-kind transfers of grain for the most part) accounted for 0.9% of India's GDP, while federal and state food subsidies accounted for 2.7% of total annual expenditure incurred by Indian federal and state governments.

"In some countries, public procurement of food has rapidly expanded over recent years. Brazil, for instance, increased its budget on its National School Feeding Programme fourfold between 2003 and 2011."

Supporting small-scale producers

The procurement of local food products is receiving more support than at any time since the mid-2000s, generally for the benefit of small-scale farmers whose ability to sell their produce at remunerative prices is otherwise limited, said De Schutter.

While governments have the option to procure food by disregarding social imperatives and sourcing indiscriminately from global markets in the search for the cheapest opportunities, the Special Rapporteur said that in doing so, they would risk exacerbating the prevailing dynamics of global food systems, whereby commodities produced by industrial operators can be imported cheaply in bulk – often creating a 'dumping' effect for domestic small-scale producers and adding to the numbers of those who will be in need of eventual state support, including publicly procured food aid.

"But public procurement can be used instead to support small-scale food producers, who are among the most marginalized in many developing countries, to improve their access to markets. This may have powerful impacts on the reduction of rural poverty."

The strategic use of public procurement can kickstart a process of agricultural transformation in developing countries, said De Schutter, advocating, in this context, the use of social protection programmes (like school feeding) to drive a demand-assisted agricultural growth strategy.

"The improved access to markets that results from such an approach makes it easier, less costly and less risky for small-scale food producers to engage with input and output markets," he added.

He also underlined that localizing (or re-localizing) economic activities, including food production and consumption, is now increasingly seen as an important component of sustainable development strategies.

"The social, economic and environmental benefits of localized public procurement strategies to farmers, citizens and consumers include a reduction of 'food miles', access to fresh and nutritious food, and allowing small-scale producers to sell their products, since large-scale producers and commodity buyers dominate the global food chains and are more competitive on larger markets."

The Special Rapporteur, however, stressed that a series of obstacles need to be overcome in order to make public procurement work for small-scale food producers. Some frequently noted obstacles include limited access to suitable storage and post-harvest handling infrastructure, which results in increased post-harvest loss and spoilage; shortcomings in the ability of farmers' organizations to help farmers improve productivity, pool marketable volumes, improve quality, identify markets and negotiate sales; and lack of access to markets, credit and information about market dynamics.

According to De Schutter, procurement schemes should include clear procurement modalities favouring small-scale food producers (e.g., selection or award criteria favouring certain types of producers, decentralized small-scale procurement processes, purchase quotas or exclusivity for small-scale food producers, choice of products mostly grown by small-scale farmers such as specific local types and varieties etc).

"States should therefore pay particular regard to the plight of small-scale food producers, including smallholders, pastoralists and herders, small-scale fishers and forest dwellers who together make up a significant share of food-insecure people."

Public procurement schemes can contribute to the realization of the right to food, providing they not only establish measures to source preferentially from small-scale food producers but also establish support measures to actively

empower small-scale food producers to access tenders, said the report, noting that different formulas have been used to ensure appropriate targeting of small-scale food producers.

Amongst others, it cited Brazil's Act No. 11,947 of 16 June 2009 which provides that a minimum of 30% of the financial resources transferred by the federal government to states and municipalities in order to implement the National School Feeding Programme (PNAE), now covering more than 49 million children, must be used to buy food sourced from family-based farms.

In 2010, public authorities indicated that 1,576 municipalities were buying products from local family-based farms.

"The quota system established by Brazil in 2009, as part of the Zero Hunger strategy, is the first example of an innovative policy and a powerful tool for supporting family-based farms and specific vulnerable groups. By ensuring that public procurement schemes support family farms, it makes a significant contribution to the reduction of rural poverty, as well as to improved diets for children," said the report.

Another example cited by De Schutter is India's Public Distribution System (PDS), which, although an important component of India's national food security strategy, does not integrate modalities to source preferentially from small-scale food producers.

The PDS is the main vehicle of the procurement of subsidized food to millions of food-insecure households. It procures, stores, rations and subsidizes the retailing of major staple food grains through an important network of government warehouses and food retail outlets. In 2012, more than 85 million tonnes of rice and wheat were held in stock.

"While failing to target small-scale farmers, the PDS has nonetheless made efforts to decentralize its procurement policy in a way that prepares the ground for more ambitious geographical and social targeting on the purchasing side," said De Schutter.

Public procurement schemes could have greater impacts on the incomes of depressed farming areas, and by extension on alleviating food insecurity, by sourcing agricultural products not only from breadbasket regions – such as Punjab in the case of India – but from all regions of a country, said De Schutter, adding that this represents a significant break from past practice.

The report also cited India's National Food Security Act, No. 20 of 2013, which provides that the central government, the state governments and the local authorities shall advance food and nutritional security by striving to progressively realize certain objectives, including the revitalization of agriculture and improvements in procurement, storage and movement-related interventions in the management of food stocks.

The revitalization of agriculture includes "ensuring livelihood security to farmers by way of remunerative prices, access to inputs, credit, irrigation, power, crop insurance, etc."; and reforms in procurement include "incentivizing decentralized procurement including procurement of coarse grains" and "geographical diversification of procurement operations".

"Though the new legislation is still in the first phase of implementation, these are important and welcome organizing principles that illustrate a desire to use food aid as a tool to contribute to rural development and to supporting the incomes of small-scale farmers," said the rights expert.

Fair prices

The Special Rapporteur's report also said that school feeding programmes, social restaurants and in-kind social support programmes may improve food accessibility for all citizens or targeted vulnerable groups.

"However, the focus of these policies on the beneficiaries of food services should not obscure the importance of sustainable food systems ensuring living wages to all workers along the supply chain, as well as fair and remunerative prices to food producers, in order to guarantee that they are also in a position to purchase adequate food," said De Schutter.

He stressed that procurement modalities targeting small-scale food producers, combined with capacity-building measures, can yield significant positive effects.

Public authorities should also ensure that independent small-scale food producers are paid fair and remunerative prices for their products, he further said, emphasizing that pricing mechanisms should be clear and transparent and show how prices incorporate production costs, risks and returns.

While a variety of price models ex-

ist (e.g., spot market-based pricing, split pricing, fixed prices and flexible price model), in the view of the Special Rapporteur, the ideal pricing mechanism is one replicating the formula used in fair trade schemes.

According to the report, the producer should be guaranteed a fixed minimum price based on the need to meet sustainable production costs and to ensure a living wage for all the workers concerned (including family members, where applicable), but the prices paid by the buyer should be higher if market prices increase.

The introduction of fair trade criteria in public tenders is another example of how procurement can contribute to fairer pricing, said De Schutter, adding that over 1,100 towns in 18 countries made commitments to increase their sourcing of fair trade products under the International Fair Trade Towns Campaign. For instance, Spain has passed a Law on Public Procurement allowing for the inclusion of fair trade criteria in public procurement, while in Italy, seven regions have adopted the practice.

Diversified diets

“Consistent with the duty to progressively realize the right to adequate food, public procurement schemes should promote diversified diets and facilitate access to nutritious, micro-nutrient-rich fresh foods, especially for vulnerable poor consumers; preferably by integrating targets in order to decrease consumption of fats, sugars, salt and animal proteins,” said the report, adding that this is especially urgent in countries with rising child obesity levels.

In India, the report noted, the Decentralized Procurement Scheme introduced in 1997-98, particularly for implementation of the National Mid-day Meal Programme (NMMP) – one of the largest school-feeding programmes in the world, providing one meal per school day to around 150 million children – included an objective to source from a wider variety of foods (such as millet, pulses, eggs, soy beans) in order to improve nutritional outcomes.

In September 2012, the inclusion of millet in the NMMP was mandated by the Agriculture Ministry in order to increase the demand for the cereal and, thereby, enhance farm incomes, while the 2013 National Food Security Act also has a provision to provide subsidized

millet along with wheat and rice.

In Brazil, the National School Feeding Programme, a major component of the Zero Hunger strategy, not only targets malnourishment, in particular in the North and North East, but also looks to address obesity through the composition of school meals.

Among wealthy countries, said the report, Scotland and Italy are considered pioneers in the “school food revolution” that includes strong food adequacy dimensions.

It stressed that public procurement schemes should discriminate in favour of sustainably sourced food, in line with the need to make the transition towards low-carbon and low-external-input modes of production, including agroecological practices, and that these schemes should also aim at supplying locally and seasonally, so as to reduce the ecological footprint of the food produced.

In the United States, more than 1,000 schools in 38 states, engaged in the Farm-to-School movement, aim to increase the role of fresh and local products in diets, while in France, similar initiatives have been promoted within the recent French National Food Programme.

De Schutter pointed out that many public purchasing programmes also target organic farming and seek to promote agroecological practices.

For example, Brazil’s Public Food Acquisition Programme (PAA) offers strong price incentives (an additional 30%) to organic farmers, and the federal government aims to procure “agroecological food products” from 25,000 small food producers by 2015.

Italy passed a law in 1999 explicitly promoting the use of organic, typical and traditional products in public procurement. The City of Rome took a leading role in improving its school service, which serves 150,000 children. In 2010, 14% of the food served in the city’s schools was certified as fair trade, 26% was local and 67.5% was organic.

According to the report, more than 50% of OECD countries reported in a survey conducted in 2007 that they had amended their legislation in order to introduce environmental criteria into public procurement.

“Public procurement schemes should go beyond merely imposing criteria upon contracting producers and consumers in a top-down fashion. Instead, they should aim at empowering a

range of actors who are commonly marginalized in market-oriented food chains, including elected representatives (decentralized local authorities such as municipal councils), school authorities, students, parents, local producers, and nutrition experts,” it said.

According to De Schutter, this can be achieved by increasing participation in the design, implementation and assessment of the procurement schemes, and by ensuring that relevant actors and institutions are held accountable to citizens.

Generating returns

He also said that particularly in times of economic downturn and attempts to reduce public debt, the costs anticipated are often seen as a major obstacle to making public procurement schemes more consistent with right-to-food strategies – contributing to improved food security and to better nutritional outcomes, while preserving the resource base.

“However, certain costs associated with public procurement should be treated as investments, rather than merely as expenses; and once their multiplier effects on the local economy and their positive social and environmental impacts are taken into account, they may in fact be seen as favourable to, rather than a liability for, healthy public budgets.”

For instance, the report found that the total incremental benefits of supplying 50 million primary school-age children in Africa with locally produced food could potentially amount to about \$1.6 billion per year in 2003 prices (€1.3 billion); of this total, 57% would accrue to consumers and 43% to producers.

In the United Kingdom, in programmes implemented in Nottinghamshire and Plymouth, it has been estimated that additional spending for sustainable and local procurement of school food generated a return of £3 for every £1 spent.

De Schutter acknowledged that procuring from farmers’ groups can indeed be more expensive than procuring from traders – up to an additional 17-18% in 2007 for millet in Mali, according to a study commissioned by the WFP.

“But such costs may be justified taking into account the full range of benefits, including higher incomes and improved market skills for small-scale food

producers, as well as against the multiplier effects on the local economy," he said.

"A commitment by States to link right to food goals to their procurement contracts could have profound transformative effects. By creating a demand for sustainable diets, governments have the power to set a positive trend and accelerate a transition towards sustainable food systems that respect the rights of

vulnerable groups, including small-scale food producers," said De Schutter.

He added that if states effectively implement the principles recommended in this report, "it will mean that private actors will have to comply with norms derived from the right to food in order to be eligible for government contracts, thereby developing practices which might spill over into corporations' other activities." (SUNS7806) □

Treaty on corporate rights abuse sees new momentum

Efforts are gathering pace to craft a binding international accord to deal with human rights violations by corporations.

by Carey L. Biron

WASHINGTON: Some 500 global groups are calling for action by governments to jumpstart the process of drafting an international treaty to address rights abuses by multinational corporations, following on a related proposal by Ecuador and others.

On 7 May, a global network of civil society groups known as the Treaty Alliance called on members of the UN Human Rights Council (HRC) to back a resolution in June to draw up a binding accord that would ensure both accountability and mechanisms for redress by victims of corporate rights abuse.

The council will hold its 26th session on 9-27 June in Geneva.

The Treaty Alliance's joint statement, signed by more than 150 organizations and representing hundreds more, underscores "the need to enhance the international legal framework, including international remedies, applicable to State action to protect rights in the context of business operations, and mindful of the urgent need to ensure access to justice and remedy and reparations for victims of corporate human rights abuse."

The statement also calls on member states to work towards a binding agreement that "affirms the applicability of human rights obligations to the operations of transnational corporations and other business enterprises" and requires states to "provide for legal liability for business enterprises for acts or omissions that infringe human rights".

The alliance is urging the creation of a supra-national body to oversee any eventual treaty's implementation.

"A system of binding rules to hold

corporations legally liable for violations of human rights is an idea whose time has come," David Pred, the managing director of Inclusive Development International, a watchdog group and member of the Treaty Alliance, told Inter Press Service (IPS).

"Transnational corporations have been literally getting away with murder for far too long, but rather than reining them in, our governments are ceding big businesses ever more power through free trade agreements and investment treaties. We have joined this call because we believe there is no greater threat to human rights and democracy in the world today than unchecked corporate power."

The Guiding Principles

For decades, calls have been made for a strengthened international framework on corporate rights obligations and their redress.

This movement has been partly successful, culminating in the 2011 endorsement by the UN HRC of what are known as the Guiding Principles on Business and Human Rights.

While seen as a major step forward by many, the Guiding Principles were hobbled from the beginning in that they are voluntary.

"Ultimately, there are no means to ensure enforcement of the Guiding Principles, and what we've seen since 2011 is that the implementation of the Guiding Principles has not worked as a barrier to human rights violations by transnational corporations," Gonzalo Berron, an associate fellow at the Transnational Institute and a Treaty Al-

liance organizer, told IPS.

"We're not saying that we don't want the Guiding Principles to be applied and promoted – this is a parallel process, but we think that the sooner we start discussing a binding code the better. And now we have an opportunity to move forward with that."

Conducive

Indeed, advocates of a binding treaty say the current environment, in the lead-up to the HRC's June session, is uniquely conducive.

"Before we've generally seen mobilization among affected communities and specific NGOs, but for the first time you're now seeing this huge alliance of different campaigns – this is something new at the international level," Berron says.

This momentum can be traced to last September. At that time, during the HRC's 24th session, a group of 85 countries put out a joint statement noting that the Guiding Principles are "only a partial answer" and emphasizing "the necessity of moving forward towards a legally binding framework to regulate the work of transnational corporations".

Supporters note that the letter constitutes the first time in decades that the issue has been initiated directly by UN member states.

"This more recent momentum stems from the will of the representatives of many countries in many regions, not by UN entities, which has greater democratic meaning and significance inside and outside the United Nations," Dominic Renfrey, a programme officer with the International Network for Economic, Social and Cultural Rights, told IPS.

Member states sit on the HRC for three-year stints. Renfrey notes that the current composition of the 47-member council could be an advantage for supporters of a treaty push.

"At this moment a number of members of the Human Rights Council are states that understand better than most what the impact on their people is from poorly regulated development," he says.

"As such these states stand to benefit from an international system that better protects the human rights of their people, while ensuring a more sustainable and respectful form of investment."

Still, the idea of a treaty isn't being embraced by all parties, including strong supporters of strengthened corporate

rights obligations and mechanisms for accountability and redress.

"While we are closely following these developments, we remain focused on the critical gaps that exist in ensuring that governments live up to their duty to protect human rights," Amol Mehra, director of the International Corporate Accountability Roundtable, a global coalition, told IPS.

"Such gaps can be meaningfully addressed through regulation of corporations to prevent potential human rights violations both at home and abroad, and through strong remedial measures, including legal avenues of accountability, when harms do occur."

Further, the leading figure behind the UN Guiding Principles has been urging caution in the push towards a treaty.

In part, says John Ruggie, the UN's special rapporteur on business and human rights, the problem is that the issues involved in corporate rights obligations are too vast for a single treaty.

Likewise, Ruggie wrote in the week of 28 April, there are some 80,000 multinational corporations in existence and

millions of subsidiaries, and official reporting on these companies' adherence to the treaty would be well beyond the capacity of most governments.

Such concerns would be echoed for any supra-national body created to offer related oversight.

The fundamental problems of enforcement would be particularly exacerbated by governments' hesitancy to prosecute for abuses committed outside of their territories – a significant problem given that treaties are consensus documents.

"[T]o add value any new treaty enforcement provision would have to involve extraterritorial jurisdiction," Ruggie wrote.

"Some UN human rights treaty bodies have urged the home states of multinationals to provide greater extraterritorial protection against corporate-related human rights abuses ... But state conduct generally makes it clear that they do not regard this to be an acceptable means to address violations of the entire array of internationally recognized human rights." (IPS) □

increased their wealth last year by \$524 billion – more than the combined revenues of Denmark, Finland, Greece and Portugal. Just go to Wikipedia, click on National Budgets around the world, and see how many poor countries you can add, with their millions of people, to reach \$524 billion.

The same goes for Europe. We have similar statistics from Spain. Last year, 23 bankers received retirement entitlements of 22.7 million euros and salary increases of 27%, against a backdrop of deflation.

This is a trend which is happening everywhere in Europe, even in the Nordic countries, but also in Brazil, China, South Africa and any other part of the world.

Of course, this has come to be considered a normal trend in the "new economy", where work is now considered just a variable of production, and permanent unemployment is considered inevitable and structural.

What about the middle class?

Meanwhile, the United Nations claims that extreme poverty worldwide has been halved. The number of people living on less than \$1.25 a day fell from 47% in 1990 to 22% in 2010.

There are still 1.2 billion people living in extreme poverty, but a new middle class is emerging worldwide, even if the success in the numbers is due basically to Brazil, China and India.

So, the argument from the defenders of the present economic model is: "If there are a few super-rich, why do we ignore the enormous progress that has created 1 billion new middle-class citizens?"

This argument has three obvious problems. The first is that this kind of economic growth is already shrinking the middle class in rich countries, and this contraction is bound to have serious effects in the long term.

The consumption of the super-rich cannot substitute the consumption of a large number of middle-class citizens.

Production of cars is already greater than demand, and this is happening for many products. Global poverty is declining, but in country after country, inequality is on the increase.

The second problem is that the rich are not paying taxes as before, because of a large number of fiscal benefits that were introduced at the time of US Presi-

Inequality and democracy

Today's sky-high levels of inequality are bad for the economy and bad for democracy, writes *Roberto Savio*.

ROME: Not a day goes by without news on the growing inequality that is the telling indicator of the kind of economic model in which we have put ourselves, following the neoliberal binge unleashed by the Washington Consensus.

The idea that economic growth is "a rising tide lifting all boats", as the late Margaret Thatcher declared when she announced war on the welfare state, and its twin "capital will trickle down to everybody", are now totally discredited. Facts, as it has been said, are stubborn.

And the facts have been demonstrated in an extensive statistical analysis by French economist Thomas Piketty (author of *Capital in the Twenty-First Century*), who, on the basis of data from the last two centuries, proves that capital obtains a greater reward than work.

So, in any country, economic growth is distributed in an unequal way between salaries for all and what goes to the rich.

Over time, the capital of the rich will grow more than everything else, and finally, the very rich will see their capital grow continuously, much more than

general wealth; those who inherit capital will eventually have the largest part of growth: in other words, they will suck away from the general population its increase in wealth. And this means that we are going back to the times of Queen Victoria.

This is due, in fact, to a new reality: financial capitalism is doing much better than productive capitalism. The last issue of the US magazine *Alpha* lists the 25 best-paid hedge fund managers. Last year, these managers – all male – earned the staggering amount of over \$21 billion. This beats the combined national incomes in the same year of the African countries of Burundi, Central African Republic, Eritrea, Gambia, Guinea, Sao Tome, Seychelles, Sierra Leone, Niger and Zimbabwe.

To stay in the United States, Nobel Prize winner Paul Krugman writes that the 0.1% with the most income has gone back to the 19th century.

According to the Bloomberg Billionaires Index, a daily ranking of the world's 300 wealthiest individuals, they

dent Ronald Reagan – “wealth produces wealth, and poverty produces poverty”.

French President Francois Hollande discovered at his own expense that to-day you cannot tax capital because it is sacred.

There are at least \$300 billion in tax revenues which are being lost through a combination of corporate tax incentives and corporate tax dodging.

Today, there are estimates of \$4 trillion in fiscal paradises. And history is not abundant in examples of voluntary redistribution and solidarity by the rich and the super-rich.

And the third problem is very serious. It is redundant to quote here one of the innumerable examples of how politics has become subservient to economic interests. An ordinary citizen does not have the same power as a super-rich citizen.

It is ironic that the US Supreme Court has eliminated any limits to donations to parties because all men are equal. Now that elections for a US president are in the vicinity of \$2 billion, is an ordinary citizen really equal to a Sheldon Adelson, the US business magnate who has officially donated \$100 million to the Republican Party?

No big effort, his wealth increased last year by over \$14 billion!

So is this trend good for democracy? Are the super-rich not of concern? Well, this is what we are told, and this is what we are asked to believe... (IPS) □

Roberto Savio is founder and president emeritus of Inter Press Service (IPS).

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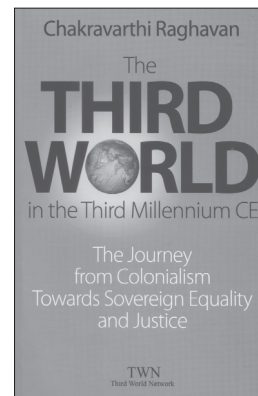
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The Third World in the Third Millennium CE The Journey from Colonialism Towards Sovereign Equality and Justice

By *Chakravarthi Raghavan*

The development path traversed by the countries of the Third World since emerging from the colonial era has been anything but smooth. Their efforts to attain effective economic sovereignty alongside political independence, even till the present day, face myriad obstacles thrown up on the global economic scene. This drive to improve the conditions of the developing world’s population has seen the countries of the South seek to forge cooperative links among themselves and engage with the North to restructure international relations on a more equitable basis – not always with success.

In this collection of contemporaneous articles written over a span of more than three decades, *Chakravarthi Raghavan* traces the course of dialogue, cooperation and confrontation on the global development front through the years. The respected journalist and longtime observer of international affairs brings his inimitable blend of reportage, critique and analysis to bear on such issues as South-South cooperation, corporate-led globalization, the international financial system, trade and the environment-development nexus. Together, these writings present a vivid picture of the Third World’s struggle, in the face of a less-than-conducive external environment, for a development rooted in equity and justice.



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