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WTO members contest agenda in run-up to MC11

The outcome of the WTO's eleventh Ministerial Conference (MC11), to take place in Buenos Aires this December, is still up in the air, with the often diverging priorities and interests of WTO member states jostling for a place on the agenda. At stake is the unfinished business of the Doha Round talks and whether it will be jettisoned in favour of new issues potentially detrimental to development prospects.

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131 Jalan Macalister
10400 Penang, Malaysia
Tel: (60-4) 2266728/2266159
Fax: (60-4) 2264505
Email: twn@twnetwork.org
Website: www.twn.my

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State of play in the WTO towards the 11th Ministerial in Argentina

The ongoing battle to shape the outcome of the WTO Ministerial Conference this December will go a long way towards charting the WTO's future course: whether it will serve large corporate interests or promote genuine development. *Deborah James* lays out the issues at stake.

The 11th Ministerial Conference of the World Trade Organization (WTO) will be held in Buenos Aires, Argentina, on 10-13 December. After years of languishing while other "free trade" agreements were negotiated, the WTO is once again a focus of big business, particularly among the high-tech sector that now includes five of the seven largest corporations globally. They are determined to achieve in the WTO what they have yet to secure in any other deal: new rules that will lock in profit-making opportunities in the digitalized economy of the future.

The prize they seek in Argentina is a mandate for new negotiations under the rubric of "e-commerce", but the reality is that these new rules will further constrain the ability of governments to promote prosperity and reduce inequality, even as they suffer the political consequences of the revolts of communities that have been left behind.

There was hope early on that US President Donald Trump might not be as interested in fronting the interests of the "big tech" industry as the previous administration. As it turns out though, members of his trade team have begun referring to e-commerce as a priority for the US moving forward, including "harvesting" the chapter on e-commerce from the Trans-Pacific Partnership (TPP) for other agreements.

In addition to e-commerce, negotiations are heating up on several key areas related to trade in services that would limit the ability of governments to constrain corporate behaviour in the public interest. Talk of likely outcomes from Buenos Aires also includes new rules to discipline fish subsidies that are contributing to a global overfishing crisis – but these new rules may be a hidden vehicle for helping big fleets at small fisherfolk's expense.

Unfortunately, negotiators are not paying as much attention to what should be the core agenda: transforming the global agriculture rules that restrict developing countries from ensuring food security for their populations while allowing big agribusiness nearly limitless public subsidies; and increasing flexibilities for developing countries to use trade for their own development.

Danger ahead: Locking in corporate rights and locking out public oversight

Starting with a US proposal in July 2016, nearly a dozen e-commerce proposals have now circulated in the WTO, many with overlapping proposed provisions. They are designed around a borderless, digitized global economy in which major technology, financial, logistics and other corporations like Amazon, FedEx, Visa and Google can move labour, capital, inputs and data seamlessly across time and space without restriction. They also want to force open new markets, while limiting obligations on corporations to ensure that workers, communities or countries benefit from their activities.

Proponents disguise their proposals in the Trojan horse of being necessary to unleash development though the power of small- and medium-sized enterprises (SMEs) using e-commerce. But SMEs are the least likely to be able to compete with giant transnational corporations, which enjoy the benefits of scale, historic subsidies, technological advances, strong state-sponsored infrastructure and a system of trade rules written by their lawyers.

Key provisions of the proposals include prohibiting requirements to hold data locally or even have a local presence in the country, plus no border taxes on digital products. But there is no economic rationale as to why digitally traded goods should not have to contribute to the national tax base, while traditionally traded goods usually do. And data is now the most valuable resource; that's why markets highly value companies that give away their services to consumers for "free." Locking in rules in the

WTO to allow corporations to transfer data around the world without restrictions would forever deny the right of countries to benefit from their own data and intelligence in the future. It also has serious implications for both data privacy and consumer protection. What WTO proponents call "localization barriers" are actually the tools that countries use to ensure that they benefit from the presence of transnational corporations to advance their own development.

We already know the hallmarks of Uber and Amazon include dislocation in labour markets and precariousness of work. That would accelerate if their proposals were accepted in the WTO. Tech giants would consolidate their monopoly power. Their infamous tax evasion would be facilitated by a binding international treaty, and it would be nearly impossible to rein in the resulting financial instability.

WTO members do not currently have a mandate to write new global rules on e-commerce, and they should not obtain one in Buenos Aires. Even without new WTO rules on e-commerce, e-commerce is flourishing and SMEs can already sell their products online. Of course, e-commerce can be a force for job creation and development, and certainly has the power to expand innovation, increase consumer choice, connect remote producers and consumers, and increase global connectedness. But this is not the same as having binding global rules written by Google for its own benefit.

Threats to public interest regulation

A similar corporate agenda is behind the effort to have new rules limiting domestic regulation of services. In order to provide a service, there must be an individual, in some cases a trained professional, who often has professional qualifications they must satisfy. There is usually a company, which is often required to be licensed to provide the service. Finally there is the method of delivering the service, and generally governments have technical standards (such as anti-earthquake provisions in construction) to which service providers must adhere.

Unfortunately the focus of proposed rules on "domestic regulation" in the WTO is not to increase the social value or accessibility of the service, but rather to ensure that three kinds of regulation – the qualification requirements and procedures, the licensing requirements and procedures, and the technical standards – are "reasonable", "objective", "transparent" and "not more burdensome than necessary to ensure the quality of the service", and further that the technical standards should be developed in an "open and transparent process."

These are open-ended terms. How they are interpreted in the WTO could severely undermine the regulatory sovereignty of countries, putting the interests of foreign services providers above the government obligations to ensure that services are operated in the public interest. Who decides whether the administration of labour, tax, environmental or safety laws affecting foreign services firms is "reasonable"? Would a local zoning commission agreeing with local objections to the placement of a big box store near a historical site be "objective"? If a state decided to accept an environmental review's recommendation to ban fracking as a method of mining gas, would that be considered "too burdensome"? Trade panels rather than local governments could be in charge of deciding community issues that are inherently subjective because they involve important judgment calls.

And note – this is for domestic regulation; the proposed rules would not only apply in the arena of traded services, which is where the WTO's remit should end. Members did agree years ago to develop any necessary disciplines on these measures – but most developing countries, and even the US, are doubtful as to whether such rules are "necessary."

Fishing: Subsidizing the poor or the rich?

The other big "deliverable" being pushed for Buenos Aires is a way to tackle the problem of overfishing by negotiating limits to the subsidies that governments provide to fisheries. There is a clear path to a pro-development and pro-environment outcome, if industrial fleets that are given subsidies to increase capacity to overfish are disciplined, while artisanal fisherfolk who provide nutrition and livelihoods are further supported to grow in a sustainable way.

Unfortunately, some of the WTO proposals appear to place extra burdens on developing countries with limited regulatory capacity, while exempting fossil fuel subsidies to large fleets – which would lead to increasing market share of the big fishing operators. It would be better to wait until all countries are able to assess the possible ramifications of various types of disciplines before ending up harming the smallest producers.

Room for improvement: Fixing bad existing rules, not expanding them

Both e-commerce rules and domestic regulation disciplines would amount to an expansion of the WTO. But most WTO members have argued that existing unfair and damaging rules must be fixed before the WTO can be expanded. This fight was at the heart of the last Ministerial Conference, which concluded with ambiguous language acknowledging that some countries wanted to bring in new issues while others wanted to continue with the unfinished development agenda in the Doha Round.

Agricultural rules must prioritize food security

Top priority for a genuine development agenda would be transforming the current rules on agriculture. There are two key aspects: making the rules more flexible so that countries can feed their people, and reining in the subsidies for products entering the global marketplace.

Unbelievably, it is the rich countries, not the poor, which are currently allowed to subsidize agriculture under WTO rules – even in ways that distort trade and harm other countries' domestic producers – because countries are still allowed to subsidize at the levels they were giving when they entered the WTO. For the US and the EU, that means $19.1 billion and €72.2 billion a year, respectively. These subsidies encourage overproduction and artificially depress world prices, wiping out farmers' livelihoods in countries that should be benefitting from global agricultural trade. Thus, a major aspect of the current negotiations – and hopefully an outcome in Buenos Aires – would be to reduce the amount of subsidies under the "domestic support" negotiations.

By contrast, countries like India and most African countries are only allowed minuscule subsidies, because they were not subsidizing when the initial WTO rules were negotiated. However, the world has changed vastly since these rules were first put in place in 1995. The interim decades have brought several global food crises as a result of decreas-

ing domestic production in developing countries, volatile commodity markets, consolidation in the retail and production chains, and climate change, among other factors. Over the years, many developing countries found that the policy dictates of the International Monetary Fund and the World Bank – including abandoning investments in agriculture while opening their markets to imports – left them subject to growing import bills and food insecurity.

Now the pendulum is swinging back towards supporting domestic food production. The Sustainable Development Goals entreat countries to invest in increasing sustainable agriculture, while at the same time there is growing acceptance of the "right to food" as a human right. One of the international best practices for supporting farmers' livelihoods, ensuring food security and promoting rural development is the policy of "public stockholding", in which governments guarantee farmers a minimum price for their production and distribute that food to hungry people within their own borders. Amazingly, these programmes, implemented in about 20 developing countries, run afoul of WTO rules – even though the agriculture supported is not traded in global markets.

A coalition of nearly 50 developing countries in the WTO is advocating that public stockholding programmes should not be constrained by antiquated WTO rules. But the changes have been steadfastly blocked by the US, the EU, Australia and other big agribusiness exporters. The US is turning reality on its head by accusing China and India of being the "biggest subsidizers." But on a per capita basis, their payments per farmer remain minuscule – about $348 per farmer for China and $306 for India, as compared with $68,910 for the US.

WTO members agreed to find a permanent solution to the public stockholding programmes by December of this year. Unfortunately the positions of countries representing Cargill, Tyson, BRF and Monsanto have remained entrenched. Action from food security and food sovereignty activists could help tip the balance to ensure a positive outcome on this issue in Buenos Aires.

More flexibility for development policies

Along with transforming the global rules governing agricultural trade, developing countries have long advocated for other changes to the existing WTO rules to increase flexibility for developing countries to enable them to enact policies that would promote development.

In 2015, a group of 90 developing countries made concrete proposals for changes to existing WTO rules that would remove some WTO constraints on national pro-development policies. Many of them are updated versions of the "implementation agenda" that has formed the basis of developing-country critiques of the existing WTO since the time of its foundation. These include, for example, changes to allow developing countries to promote domestic manufacturing capabilities, stimulate the transfer of technology, promote access to affordable medicines, and safeguard regional integration. Many of these proposals parallel the civil society demands encompassed in the Turnaround Statement of the global Our World Is Not for Sale network, endorsed by hundreds of civil society groups from around the world.

Even in an area that all WTO members should be able to agree on – ensuring benefits for least developed countries (LDCs) – there is no consensus yet. Although it was a priority mandate, the small LDC package agreed in the WTO Ministerial Conference in Bali in 2013 is not yet operationalized. This includes ensuring 100% duty-free, quota-free market access for LDCs' exports; simplification of the rules of origin that define how much of the value of a product has to be produced in the country to qualify for reduced-tariff benefits; and providing actual binding commitments for the LDC services waiver (which allows developed countries to provide market access in services for LDCs without offering reciprocal access to other countries – a "flexibility" which has proven almost impossible to utilize). It also includes mandated reductions in the subsidies that the US and the EU provide to cotton producers – which enrich a few thousand there, but have unfairly decimated production of hundreds of thousands of cotton farmers in Africa.

Even worse, just one WTO member – the US – appears to be not only refusing to agree to the development proposals, but also working to ensure that the development mandate in the WTO is forever abandoned. If it succeeds, the world would be permanently locked into the existing inequalities and imbalances – at the behest of one member of the WTO, which claims to operate by consensus.

Much is at stake this December in Buenos Aires. Yet the outcome will depend on the pressure brought by various stakeholders on their governments as they shape policy positions in advance of the actual Ministerial. Some are even saying that a "mini-Ministerial" in October in Morocco will be the main decision-making moment.

Business interests are sure to weigh in with governments. Will civil society – trade unionists, environmentalists, public interest and development advocates – do the same? And most importantly, will governments, facing upheavals domestically and uprisings at the polls, follow their corporate masters or act in the interest of their citizens and change course at the WTO? ❐

Deborah James is the Director of International Programs at the Washington DC-based Center for Economic and Policy Research (www.cepr.net) and coordinates the global Our World Is Not for Sale (OWINFS) network (www.ourworldisnotforsale.org) of civil society organizations working for a sustainable, socially just and democratic multilateral trading system. This article first appeared on HuffPost (www.huffingtonpost.com).

North to try to bury DDA, push e-commerce and MSME talks at MC11

Moves are reportedly afoot in the WTO to kill off the Doha Round of negotiations and its agenda of outstanding issues in favour of talks on new topics aligned with developed-country interests.

by D. Ravi Kanth

GENEVA: Major developed countries and their "allies" in the developing world have intensified efforts to quietly bury the Doha Development Agenda negotiations while launching negotiations on electronic commerce and micro, small and medium enterprises (MSMEs) at the WTO's eleventh Ministerial Conference (MCII) in Buenos Aires in December, several ministers and trade envoys told the *South-North Development Monitor (SUNS)*.

Encouraged by the positions adopted by the US at an informal ministerial meeting of select countries in Paris in the week of 5 June, the devel-

oped countries – the European Union, Japan, Canada, Australia, New Zealand, Norway and Switzerland – along with Brazil, Argentina, Mexico, Costa Rica, Chile, Colombia, Singapore and Hong Kong-China are preparing the ground for launching negotiations on e-commerce and MSMEs in Buenos Aires under the banner of "development-oriented" priorities, said trade envoys familiar with the development.

Following the deliberations in Paris, the proponents of e-commerce and MSMEs are assuming that the US will not walk away from the WTO despite the adverse pronouncements made by the Trump administration.

Trade ministers and envoys who took part in the Paris meeting maintain that Washington will announce its bilateral and multilateral trade priorities, including its review of the work at the WTO, in October, as per the 180-day review announced by the Trump administration.

The US will then make its positions clear on the outcomes it will either support or remain silent on at the Buenos Aires meeting, said a source from a major developed country who asked not to be quoted.

Probably, the US will make it explicitly clear in the 180-day policy review that the Doha Round is dead and that it will not accept its continuation in any form.

The US has already said that it will not negotiate minimal improvements, such as transparency and due process in the anti-dumping provisions, at the Doha rules negotiating body meeting in the WTO. Effectively, the US will allow fisheries subsidies negotiations in the Doha rules dossier but not improvements in anti-dumping provisions. In short, WTO members must make commitments in fisheries subsidies without securing commensurate outcomes in other areas of the rules negotiations.

Until now, the proponents of MSMEs and electronic commerce were unable to muster the courage to openly declare that the Doha Round is dead and that they will not participate in negotiations on the outstanding issues as per the Doha Work Programme, the source said.

But, after the US makes its position clear on the termination of the Doha Round, the decks will be cleared for a formal burial in Buenos Aires by the silent supporters of the US position on the Doha issues.

Consequently, the remaining WTO members – which strongly support the Doha Work Programme – in Africa, Asia and South America will not be able to resist the so-called new "development-oriented" issues of MSMEs and electronic commerce, these sources believe.

Promotion of new issues

For the last many months, particularly since the Nairobi Ministerial Conference, the supporters of the new issues have not mentioned the Doha Work Programme even remotely in their proposals either on domestic support or on fisheries subsidies. However, they have now added the tag of "development-oriented" to their proposals on MSMEs, e-commerce and other issues which are not part of the Doha Work Programme.

The proponents will also make a concerted effort to sound their new proposals in Washington so as to get a tacit approval from the US administration, the source said.

Further, the proponents of the new issues will seemingly engage on mandated issues such as the permanent solution for public stockholding programmes for food security and the special safeguard mechanism. However, they will seek to ensure either that there is no outcome on the public stockholding programmes or that any outcome is twisted and burdened with conditionalities that will make the solution infructuous, the source suggested.

An early test for the proposals on the new issues will come in the two meetings of capital-based senior officials from select countries which will be organized by Argentina in Geneva in July. Those two meetings will finalize the likely agenda for the Buenos Aires conference before the WTO breaks for summer recess in August.

Subsequently, for almost two months – September and the first half of October – efforts will be further mounted to finalize the elements of the proposed issues for discussion by a select group of ministers scheduled to meet in Marrakesh in October ahead of the Buenos Aires conference, the source maintained.

MSME proposal

As part of the so-called "development-oriented" priorities for the Buenos Aires meeting, Argentina along with Brazil, Paraguay and Uruguay have submitted a proposal on MSMEs.

In their four-page proposal, the four countries said "MSMEs should become an important component of a development-oriented agenda at the WTO."

"By undertaking to consider the issue of MSMEs as part of future discussions within the framework of the WTO, Members have the opportunity to take a decisive step to accomplish the WTO's mission of contributing to economic development and raising standards of living," the four countries argued.

Under the banner of "friends of development", the four countries maintained that "while some challenges are shared by MSMEs from both developed and developing countries, particular attention and specific positive efforts should be aimed at levelling the playing field in favour of MSMEs from developing countries and least developed countries (LDCs), which face additional obstacles and gaps in productivity."

As part of the "international trade issues related to MSMEs", the four countries want members to discuss issues such as "information and transparency", "trade facilitation", "e-commerce", "MSMEs and trade financing", and other issues such as "concrete actions to help reduce trade costs of non-tariff barriers (NTBs), which place a disproportionate burden on MSMEs, and technical assistance and capacity building initiatives focused on trade needs of MSMEs."

Further, the four South American countries urged "all Members to present their proposals and suggestions on the topics they suggested."

"We call the membership to participate in the open-ended, informal dialogue on Micro, Small and Medium Enterprises ('Friends of MSMEs') to explore concrete measures that Members could take to enable their participation in world trade," they stated in their proposal.

The four countries said members must work together "in order to adopt, at the Ministerial Conference in Buenos Aires, a Ministerial Decision creating a Work Programme [launching negotiations] that addresses the specific needs of MSMEs."

In short, the stage is set for the burial of the Doha Development Agenda negotiations while launching negotiations on new issues under the false banner of "development-oriented" priorities.

It remains to be seen whether the

other developing countries which have worked hard on the developmental issues in the Doha agenda for the past 16 years will let their core issues be buried without any resolution once and for all in Buenos Aires, or whether they would jointly resist such an outcome, if necessary by ensuring the failure of MC11 as at MC5 in Cancun in 2003, sources said. *(SUNS8481)* ❐

Prospects for Doha agri accords at MC11 bleak

The Buenos Aires Ministerial Conference seems likely to yield an inconsequential outcome in the key area of agriculture.

by D. Ravi Kanth

GENEVA: The African Group of countries, particularly the Cotton-4 – Benin, Burkina Faso, Chad and Mali – are going to be left high and dry at the WTO's eleventh Ministerial Conference (MC11) in December without any outcomes on their main demands for reducing developed countries' domestic support in agriculture, sources told the *South-North Development Monitor (SUNS)*.

Indeed, the prospects for any outcome on the outstanding Doha agriculture issues – reduction commitments in domestic support, special safeguard mechanism for developing countries, and tariff simplification in market access – are close to zero at the Buenos Aires meeting.

Meanwhile, attempts are largely focused on finalizing a cosmetic deal on the permanent solution for public stockholding programmes (PSH) for food security and enhanced transparency provisions for export restrictions on developing countries, sources said.

During intense consultations held by the chairperson of the Doha agriculture negotiations, Ambassador Stephen Ndungu Karau of Kenya, with select countries in the second half of June, it has become clear that there will not be any deal on domestic support, tariff simplification and other outstanding issues in the Doha agriculture dossier, sources said.

Part of the reason for lack of progress on domestic support is the ongoing work in the US on its new farm bill.

The US has already indicated that it will not address domestic support issues based on the Doha Work Programme.

The European Union and Brazil, which opposed each other fiercely in 2003 during the Doha agriculture negotiations over domestic support reduction commitments, are now working together, cobbling a proposal that would take on board the US demands, including shifting the burden of subsidy reduction commitments onto developing countries, sources said.

During his consultations, the chair of the Doha agriculture negotiations discussed the permanent solution for PSH, the special safeguard mechanism for developing countries, domestic support, market access and export restrictions. The chair will discuss cotton, particularly a proposal by the Cotton-4 for cutting domestic support in cotton, on 30 June.

Effectively, the chair has decided what issues it will address, instead of tackling all the outstanding Doha agriculture issues, said a source who asked not to be quoted.

Differences over PSH solution

On the proposed permanent solution for PSH which is being advanced by Indonesia on behalf of the G33 grouping of developing countries, major industrialized and several developing countries expressed their willingness to finalize an outcome by December after sorting out issues concerning safeguards for preventing the leakage of stocks into the international market, according to trade envoys who attended the meeting.

Despite the G33's demand for considering the creation of a new annex in the WTO Agriculture Agreement to exempt market price support programmes from any AMS (Aggregate Measurement of Support) reduction commitments, the opponents said they will work towards a permanent solution but will not accept any demands for including PSH in the Green Box or creation of a special annex to include market price support for PSH.

The US, which has all along raised several hurdles to the permanent solution, urged the G33 proponents to suggest how they would address the concerns raised on the slippage of stocks procured for PSH into the international market.

The US, according to one trade envoy, said that it is not bound by the Nairobi Ministerial decision to finalize the permanent solution.

However, the US and India have held consultations on the specific elements of the permanent solution.

The EU insisted that the permanent solution for PSH, including for new programmes to be covered under the permanent solution, will only be discussed in relation to the reduction commitments in domestic support programmes, a stand that was opposed by leading G33 members.

Australia and other Cairns Group members expressed sharp concerns about leakage of stocks procured for PSH into the international market, suggesting that the G33 must come up with concrete proposals to address this.

The G33 is currently preparing a proposal on how it intends to address issues concerning the issue of transparency and leakage of stocks.

On the issue of special safeguard mechanism for developing countries as demanded by the G33, the leading opponents such as the Cairns Group led by Australia and major developed countries remained silent during the meeting. In short, barring five or six countries that pressed for a special safeguard mechanism for developing countries, no other member intervened during the meeting, sources said.

As regards export restrictions, there was wide support for an outcome at Buenos Aires, including from Argentina, which had opposed export restrictions in the past because of its export taxes.

A proposal by Singapore called for "clearer understanding on advance notification through stronger transparency provisions" so as to ensure greater predictability.

The US along with several other industrialized countries support commitments on export restrictions.

But three countries – South Africa, China and India – expressed sharp scepticism about undertaking transparency and notification requirements on grounds that these will impose onerous commitments on developing countries.

On domestic support reduction commitments, a priority area for South Af-

rica and the African Group, the US said it will not discuss the issue in the dark, implying that countries must submit their latest notifications without further delay.

The US also insisted that all members must take commitments to reduce their domestic support, while many developing countries said they will abide by the revised draft Doha agriculture modalities text of 2008.

South Africa said the developing countries are not required to undertake commitments in domestic support as per the Doha Work Programme.

India opposed attempts to do away with special and differential flexibilities in Article 6.2 of the Agriculture Agreement.

There is not going to be any outcome on domestic support at Buenos Aires except a general statement to continue with further work because of the ongoing consultations on the new US farm bill, an authoritative source told *SUNS*.

The EU and Brazil, which are working jointly to introduce a proposal on domestic support, have not been able to finalize it because of concern from several EU members on the proposed reduction commitments.

Several members of the G10 group of agriculture defensive countries have also remained sceptical on domestic support.

The EU and the G10 countries are also opposed to tariff simplification at this juncture. New Zealand also suggested that it would be difficult to address tariff simplification at this point because of high prices.

In short, the stage is set for inconsequential outcomes on agriculture at the Buenos Aires meeting while silently burying the huge volume of work done in the Doha agriculture negotiations, including the revised draft modalities of 2008.

The revised draft modalities, which were blocked by the US because of the underlying commitments in agriculture, provided clear landing zones in a balanced and equitable framework. Roberto Azevedo, when he was Brazilian ambassador to the WTO before becoming the WTO's Director-General, had said in 2011:

"The December 2008 draft modalities are the basis for negotiations and represent the endgame in terms of the landing zones of ambition. Any marginal adjustments in the level of ambition of those texts may be assessed only in the context of the overall balance of trade-offs, bearing in mind that agriculture is the engine of the [Doha] Round.

"The draft modalities embody a delicate balance achieved after ten years of negotiations. This equilibrium cannot be ignored or upset, or we will need readjustments of the entire package with horizontal repercussions. Such adjustments cannot entail additional unilateral concessions from developing countries."

Against this backdrop, it is a telling commentary on the state of play at the WTO that the African Group of countries are given a raw deal as none of their issues in agriculture are being addressed, sources said. *(SUNS8491)* ❐

DG Azevedo needs to come clean on his meeting with USTR

WTO Director-General Roberto Azevedo has remained conspicuously silent in the face of US moves seen as a threat to the independent functioning of the trade body's dispute settlement system.

by D. Ravi Kanth

GENEVA: The WTO Director-General Roberto Azevedo needs to come clean about his meeting with United States Trade Representative (USTR) Robert Lighthizer in June during which the USTR served notice about the changes the Trump administration wants to see in the WTO Dispute Settlement Body (DSB), according to people familiar with the development.

In his statement to the US Senate Finance Committee on 21 June, Lighthizer said he had delivered several critical messages to Azevedo on 1 June about the changes that the Trump administration would like to see in the functioning of the DSB, including the rulings issued by the Appellate Body.

Lighthizer said he told Azevedo that there would be "absolutely cataclysmic" consequences if a WTO dispute settlement panel upholds China's complaint against the European Union over the denial of market economy status to Chinese products.

The USTR said he was "assuming the WTO will do the right thing", failing which he said he would consult with the US Congress, according to a report in the *Washington Trade Daily*.

China did not drag the US to the dispute settlement proceedings along with the EU over the continued denial of market economy status. But the USTR chose to threaten the WTO chief with far-reaching consequences if the WTO panel and later the Appellate Body were to concur with China that the denial of market economy status is inconsistent with the commitments undertaken by the EU and other countries.

The US and the EU intend to continue with the 15-year-old practice of subjecting Chinese goods to higher anti-dumping duties based on NME (non-market economy) methodologies.

Under Section 15 of the protocol governing China's accession to the WTO on 11 December 2001, China can be treated as an NME in anti-dumping proceedings if Chinese firms are unable to establish that they operate under market economy conditions.

Over the past 15 years, Chinese goods were repeatedly subjected to high anti-dumping margins based on other methodologies to determine the normal value of the goods. Instead of domestic prices being used for computing dumping margins, the Chinese goods are often subjected to NME methodologies that invariably result in higher anti-dumping duties.

Beijing has repeatedly informed the US, the EU, Japan and other countries to discontinue with the current practice as per the legal obligation following the expiry of Section 15(d) of the accession protocol after 11 December 2016 and treat Chinese goods on market economy considerations.

"Systemic" consequences

Against this backdrop, the USTR's ultimatum to Azevedo could have serious "systemic" consequences on the functioning of the DSB, according to people familiar with the development.

The DSB, which has all along been claimed as the jewel in the WTO's crown for its so-called impartial and unbiased rulings, would cease to be an effective body.

Last year, the US blocked the reap-

pointment of then sitting Appellate Body member Seung Wha Chang from South Korea on the grounds that his rulings went beyond case law and jurisprudence.

A group of former Appellate Body members then wrote to the then DSB chair, Ambassador Xavier Carim of South Africa, accusing the US of resorting to "inappropriate pressures" and "political interference" by vetoing the reappointment.

Without explicitly naming the US in their letter, the former Appellate Body members warned that the decision by one member of the WTO "could threaten to politicize WTO dispute settlement and imperil the impartial independence of every member of the Appellate Body that is required by the WTO Rules of Conduct".

The US had claimed that Chang's rulings lacked substance and deviated from the covered agreements of the General Agreement on Tariffs and Trade and WTO jurisprudence. It said Chang and other adjudicators overstepped their mandate while delivering major rulings in four cases: three disputes involving the US and one where the US was the third party.

Around 30 members of the WTO, including India, the EU and Brazil, severely criticized the US action on the grounds that it would irreparably damage the "independent and impartial" functioning of the WTO's highest court for trade disputes.

The US move raised "serious systemic concerns" and "is an attempt to use reappointment as a tool to rein in AB [Appellate Body] members for the decisions they make on the bench", South Korea said at the time. The US action amounted to a warning to AB members that if their decisions in trade disputes "do not conform to US perspectives, they are not going to be reappointed", it added.

The process of reappointment of members to the WTO's highest adjudicating body will "undoubtedly have serious consequences on the independent functioning of the Appellate Body", India said.

In their letter, the former Appellate Body members said the US move raised the possibility of "inappropriate pressures by participants in the WTO trading system".

"There must be no opening whatsoever to the prospect of political interference in what must remain impartial legal judgements in the WTO's rule-based system of adjudication," they said in the three-page letter, which was reviewed by *SUNS*. They also raised grave fears about "upholding the rule of law in international trade".

Also, "we see it as a prerequisite to providing security and predictability for the rule-based multilateral trading system for the benefit of all of the Members of WTO", they emphasized.

On their part, the current Appellate Body members maintained that the rulings and recommendations of the body cannot be attributed solely to any one judge because "our reports are reports of the Appellate Body".

Throughout the first 20 years of the WTO and the Appellate Body, they maintained, the Appellate Body owned all the decisions "as one" to mutually reinforce "the strength of their individual commitment to impartiality and independence".

"Undermining the impartial independence of the Appellate Body now would not only call into question for the first time the integrity of the Appellate Body; it would also put the very future of the entire WTO trading system at risk," they warned.

The US has lost many trade disputes because of its continued trade-distorting practices ranging from cotton subsidies to controversial "zeroing" methodologies in anti-dumping actions. In addition, the US has failed to implement several rulings of the Appellate Body.

But, for inexplicable reasons, Azevedo remained conspicuously silent about the removal of Chang.

It remains moot as to how long Azevedo will remain silent about the continued threats from the USTR on the functioning of an impartial and independent DSB, said a trade envoy who asked not to be quoted.

In short, it is important that Azevedo sets the record of his meeting with the USTR straight so that WTO members know what transpired during the meeting.

Otherwise, there is grave danger of a "systemic" crisis as well as crisis of confidence in the functioning of the DSB, trade envoys said. *(SUNS8489)* ❐

EGA participants call for stalled talks to resume

Many of the WTO members negotiating the liberalization of trade in so-called environmental goods have urged resumption of the currently deadlocked talks.

by Kanaga Raja

GENEVA: A formal meeting of the WTO Committee on Trade and Environment on 20 June heard a number of participants in the stalled negotiations on the plurilateral Environmental Goods Agreement (EGA) calling for resumption of the talks, which are aimed at eliminating tariffs on a range of environmental goods.

According to trade officials, in their first public showing since the EGA talks stalled last December, some 11 of the 18 participants (involving some 46 WTO members) in the EGA talks at the WTO spoke at the Committee following an update by Australia, which is chairing the negotiations.

The United States, a participant in the EGA negotiations and which co-chaired the ministerial segment at the last round of talks that broke up in December after failing to agree on a final product list, however, did not speak on this issue at the Committee meeting.

The participants negotiating the EGA are Australia; Canada; China; Costa Rica; the European Union (representing Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom); Hong Kong-China; Iceland; Israel; Japan; Korea; Liechtenstein; New Zealand; Norway; Singapore; Switzerland; Chinese Taipei; Turkey; and the United States.

No consensus

The eighteenth round of negotiations on the EGA took place from 28 November to 2 December last year, with trade ministers and senior officials arriving on 3 December for the ministerial segment to try and conclude a deal by 4 December. They however failed to reach

a deal on that day, with negotiators ending the meeting but not setting a date for subsequent talks.

A joint statement issued after the ministerial segment by the co-chairs, the then US Trade Representative Ambassador Michael Froman and EU Trade Commissioner Cecilia Malmstrom, said: "As co-chairs of this weekend's EGA Ministerial, the United States and the European Union worked with all WTO members involved to achieve the broadest possible consensus through creative solutions to bridge the gaps in the negotiations.

"Many EGA participants engaged constructively and brought new contributions to the table. The Chairs issued documents designed to stabilize the text of the agreement and produced a revised products list that balances priorities and sensitivities. The participants will now return to capitals to consider next steps."

The joint statement gave no tentative dates or time horizon for further talks.

According to media reports, going into the eighteenth round of negotiations, there had been differences between the EU and China over the issue of bicycles, a sector of offensive interest to China but of defensive interest to the EU.

Other outstanding issues of concern among the various participants included wood pallets and high-tech batteries, media reports had said.

Following the conclusion of the ministerial segment on 4 December, one participant in the EGA talks said that there had been no agreement on the list of products that would serve as the basis for the continuation of the work.

The consultations had taken place on two product lists: the list put forward by the co-chairs of the talks (the US and the EU), which was not accepted by China, and a shorter list by China. Neither had been accepted as consensus for the continuation of the talks, said the participant.

Speaking to journalists after the ministerial segment broke up on 4 December afternoon, EU Trade Commissioner Malmstrom said most countries thought they could live with the co-chairs' revised list that had been presented earlier in the morning, but "very late in the process" came the Chinese list which "had a different point of departure" and made a lot of changes.

"All delegations had some of their red lines moved in or moved out in a way that it was impossible to deal with in a couple of hours," she said.

Calls for resumption

At the Committee meeting on 20 June, Andrew Martin of Australia, the chair of the EGA negotiations, said: "EGA ministers gathered in December to see if a consensus agreement on a final EGA product list was within reach. It was unfortunately not possible to meet a final conclusion."

"EGA members continue to take stock on the way forward for negotiations and call on others to consider joining," he added.

According to trade officials, many EGA participants then took the floor and called for talks to start up again, with some stressing the need for a swift conclusion.

Japan said that it was "ready and seeking early resumption of negotiations", while Korea said it hoped "for the early resumption of EGA negotiations."

New Zealand highlighted the importance of reaching "an ambitious and timely outcome."

Chinese Taipei said it hoped to see an agreement "as soon as possible", adding that it stood ready to continue the work.

Hong Kong-China reaffirmed its commitment to working with EGA participants "to achieve a meaningful outcome early."

Switzerland said it was "ready to come to the negotiating table as soon as possible". It urged other members to do the same soon.

According to trade officials, others highlighted their commitment to continuing the negotiations on the EGA.

The EU said it remained committed to concluding an ambitious and forward-looking EGA. "The EU is committed to relaunching negotiations once circumstances allow us to do so and participants are ready for engaging," it said.

Norway in turn said that it "stands ready to engage in negotiations."

Citing the benefits of delivering on the EGA, Canada encouraged "renewed engagement from participants going forward."

Singapore and Turkey also expressed their support for the resumption of the EGA talks.

China said: "Common but differential responsibility is a core principle in the climate change talks and should be reflected in the outcome of the EGA negotiations." It affirmed that the EGA was important and could be a way for the WTO to contribute to addressing climate change.

Besides the US, other EGA participants which did not take the floor this time were Costa Rica, Iceland, Israel and Liechtenstein.

The Committee meeting also heard the WTO secretariat briefing on the status of the negotiations on fisheries subsidies disciplines.

Norway said it was preparing to submit a proposal. "We hope to have a consolidated draft text before the summer break," it said. Norway maintained that doing so would put members on a good track for work in the autumn ahead of the eleventh WTO Ministerial Conference in Buenos Aires in December.

At present, there are four draft texts on fisheries subsidies: a joint proposal from New Zealand, Iceland and Pakistan; a proposal from the EU; a proposal from Indonesia; and a proposal from a group of Latin American countries (Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay).

Besides these four draft texts, there are also two papers, one by the African, Caribbean and Pacific (ACP) Group of states, and the other by the least developed countries (LDCs).

In a related development, the ACP Group circulated a revised paper on 20 June on principles and elements for concluding the negotiations on fisheries subsidies, in which it said that it intends to circulate a text proposal and looks forward to further engagement with members towards a decision at the eleventh Ministerial Conference.

Meanwhile, the Committee also heard Canada provide a briefing on the status of separate negotiations on a plurilateral Fisheries Subsidies Agreement.

According to trade officials, Canada informed the Committee that a fifth round of talks was scheduled for the end of July.

Earlier rounds of talks had been held in January, March and May, and the fourth round was "currently underway."

Canada said that the group was working on developing disciplines on subsidies for illegal, unreported and unregulated (IUU) fishing as well on subsidies that lead to overcapacity and overfishing.

Canada said that they were considering elements such as transparency and the form of the agreement.

It said that the plurilateral negotiations were "open to any WTO member willing to participate."

Canada maintained that this smaller negotiating group was "complementary to the multilateral negotiations" and that they did not believe that progress in one precluded progress in the other. *(SUNS8488)* ❐

WTO TRIPS Council debates IP and the public interest

WTO member states recently discussed the relationship between intellectual property and the public interest, including the use of compulsory licences to override patent rights on public health and other grounds.

by Kanaga Raja

GENEVA: The WTO Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) on 13 June discussed a major proposal tabled by Brazil, China, Fiji, India and South Africa which cited growing concern about the "imbalance between intellectual property and the public interest."

In their proposal, the five countries for the first time called on WTO members "to exchange views and experiences on measures within the IP [intellectual property] system that they have adopted to promote the public interest, including but not limited to compulsory licensing, patentability criteria, IP and competition, and the Bolar exception."

For the 13-14 June TRIPS Council meeting, the co-sponsors of the proposal invited delegations to share their experiences on the use of compulsory licences for accessing health and other technologies.

Balance

In their proposal, the five countries noted that the WTO's TRIPS Agreement established minimum standards of protection that each government has to give to the intellectual property of fellow WTO members. WTO members have the flexibility to design their national intellectual property systems within these minimum standards, in cognizance of a country's economic, developmental and other objectives, including public health.

The TRIPS Agreement attempts to strike an appropriate balance between the interests of intellectual property rights (IPRs) holders and users. The co-sponsors said an important consideration in the WTO's work has been the search for a balance between the need to protect IPRs to provide incentives for research and development (R&D) on the one hand and, on the other, to address concerns about the potential impact of such protection on the health sector – in particular its effect on prices.

The TRIPS Agreement also recognizes that the principles of IP protection are based on underlying public policy objectives. Article 8 of the Agreement, entitled "Principles", states that WTO members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socioeconomic and technological development, provided that such measures are consistent with the provisions of the Agreement.

Article 8(2) further states that appropriate measures may be needed to prevent the abuse of IPRs by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

The five countries pointed out that a number of safeguards or flexibilities have become an integral part of the TRIPS framework. These flexibilities can be used to pursue public health objectives. However, to implement these flexibilities, action is needed at the domestic level by incorporating them into national IP regimes keeping in mind each country's individual needs and policy objectives.

Key TRIPS flexibilities include transition periods for least developed countries (LDCs) (extended by the WTO until 1 January 2033); differing IP exhaustion regimes; refining the criteria for grant of a patent (patentability criteria); pre-grant and post-grant opposition procedures; as well as exceptions and limitations to patent rights once granted, including the regulatory review exception ("Bolar" exception) to facilitate market entry of generics, compulsory licences and government use.

According to the proposal, for pharmaceutical patents, these flexibilities have been clarified and enhanced by the WTO's 2001 Doha Declaration on the TRIPS Agreement and Public Health. WTO members have the flexibility to interpret and implement TRIPS provisions in a manner supportive of their right to protect public health.

The Doha Declaration added a new flexibility, which was put into practice in 2003 by the WTO with a decision enabling countries that cannot manufacture medicines themselves to import pharmaceuticals made under compulsory licences. In 2005, members agreed to make this decision permanent through a protocol amending the TRIPS Agreement, which entered into force on 23 January 2017 after two-thirds of members accepted it. "The amendment provides legal certainty that generic versions of patent-protected medicines can be produced under compulsory licences specifically for export to countries with limited or no pharmaceutical production capacity," said the co-sponsors of the proposal.

Use of flexibilities challenged

The five countries noted: "Many governments have not used the flexibilities available under the TRIPS Agreement for various reasons, such as capacity constraints or political pressure from states and corporations [as] mentioned in the UN Secretary-General's High Level Panel Report on Access to Medicines."

Moreover, even where some developing countries used the flexibilities available to them under the TRIPS Agreement to address public interest objectives through measures which are fully consistent with the Agreement, these attempts have been challenged legally as well as politically.

The co-sponsors said that "political and economic pressure placed on governments to forego the use of TRIPS flexibilities violates the integrity and legitimacy of the system of legal duties and rights created by the TRIPS Agreement, as reaffirmed by the Doha Declaration."

They also warned that a slew of regional trade agreements containing "TRIPS-plus" standards of IP protection and enforcement have the potential to significantly affect the policy space available for effective and full use of the TRIPS flexibilities. The most common TRIPS-plus provisions in free trade agreements that affect the pharmaceutical sector are: the definition of patentability criteria; patent term extensions; test data protection; the linkage of regulatory approval with patents; and enforcement of IPRs, including border measures. "Such provisions can delay market entry of generics and increase prices of medicines," they said.

Investor-state disputes under regional or bilateral investment protection agreements are also emerging as significant threats to the use of TRIPS

flexibilities in the public interest.

Ironically, the five countries said, the abovementioned challenges to the use of TRIPS flexibilities to further the public interest objectives underlying IP protection, have been occurring in spite of the emergence of laws and jurisprudence in developed countries that seek to limit the scope of IP protection and enforcement.

For example, in the Myriad Genetics (2013) case, the US Supreme Court had ruled unanimously that naturally occurring genes cannot be patented, even if they are isolated. In 2003, the US Federal Trade Commission had proposed tightening the non-obviousness standard, in order to limit the grant of unwarranted patents.

"There is a growing concern about an imbalance between intellectual property and the public interest," the five countries underlined.

With regard to health technologies, for example, patents and related monopoly rights in test data, without sufficient use of balancing exceptions and limitations to protect the public interest, permit companies to maintain high prices and exacerbate crises of access around the world, where many patients cannot afford medicines, and force governments with finite health budgets to ration care.

Increased copyright protections create similar problems of access to knowledge goods, limiting the ability of many people around the world to access print, audio or visual works of education or entertainment that we take for granted.

"These are only a few examples of the problem. There is a need to pursue a development-oriented approach towards formulating IP laws and policies rather than pursue an iconoclastic approach of IP for development."

Compulsory licensing

More than 20 years after the adoption of the TRIPS Agreement, there is a need for discussion in the TRIPS Council on the relationship between IP and the public interest and to broaden the understanding of how the IP system can be more responsive to public interest considerations, the five countries said. While this issue is very pertinent for developing countries, it has also been a topic of significant policy debate even in developed countries.

Calling for a sharing of experiences on the use of compulsory licences, the five countries said that compulsory licensing occurs when a government allows someone else to produce the patented product or process without the consent of the patent owner. Article 31 of the TRIPS Agreement lays down a set of conditions for issuing compulsory licences of patents.

The Doha Declaration on the TRIPS Agreement and Public Health states, "Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted."

"In spite of the clarity of this language," the co-sponsors pointed out, "WTO Members around the world seeking to make use of compulsory licences as a tool to increase access to affordable medicines have faced various challenges / barriers."

The Doha Declaration confirmed what was already implicit in the TRIPS Agreement – that WTO members have the freedom to determine the grounds upon which compulsory licences are granted. They are thus not limited to emergencies or other urgent situations, as is sometimes mistakenly believed. A range of grounds have been set out in national laws, such as: (i) non-working or insufficient working of the patent, (ii) anti-competitive practices, (iii) public interest, (iv) dependent and blocking patents, and (v) government use.

In inviting members to share their national experiences and examples of using compulsory licences, the five countries highlighted some guiding questions:

- What grounds are available in their national laws to issue compulsory licences?
- What are the difficulties faced by WTO members in using compulsory licences, including constraints, such as insufficient or no manufacturing capacities?
- How was the measure of compulsory licensing used by governments to obtain price reduction from patent holders?
- What was the result of using compulsory licences in terms of price and access to affordable products and technologies?

The Indian experience

According to trade officials, some 15 delegations spoke on this issue at the TRIPS Council meeting. South Africa (which introduced the proposal on behalf of the co-sponsors), India, El Salvador, Indonesia and Colombia, amongst others, underlined that WTO members must have the complete freedom to decide the grounds upon which compulsory licences are granted.

In its statement, India noted that during the 1980s and 1990s, the antiretroviral (ARV) medicines used to treat HIV / AIDS were priced beyond the reach of most people who needed them in developing countries. Countries like Brazil, Thailand, South Africa and others have used flexibilities under the TRIPS Agreement, including compulsory licences, to bring down the price by increasing the supply of generic ARV medicines for a fraction of the price of the patented equivalents.

Indian generic companies, especially Cipla, played an important role by announcing in early 2001 that triple therapy could be manufactured for less than $1 a day compared with the price of standard triple therapy of $10,000 per patient per year. Indian generic companies made ARV medicines accessible to all those who needed the drugs but had previously not been able to afford them.

On the issue of compulsory licensing, India reiterated that WTO members have the freedom to determine the grounds upon which compulsory licences are granted. There have been many studies that examine the possible grounds for issue of compulsory licences. For instance, said India, the diversity in the grounds for compulsory licensing is documented in a 2014 US Congressional Research Service article titled "Compulsory licensing of patented inventions" by John R. Thomas, which mentions that "depending upon particular national laws, the grounds for government award of a compulsory licence may include:

– Circumstances of national emergency or extreme urgency.

– Where the invention serves vital public health needs.

– A strong societal interest has arisen in access to the patented invention.

– The patent owner has failed to practise the patented invention in the jurisdiction that granted the patent within a reasonable period of time.

– The patent owner has abused its economic power in such a manner as to violate the antitrust laws.

– In circumstances where multiple patents held by different owners cover a particular technology. For example, combination therapies – such as triple antiretroviral drugs – may be subject to

more than one patent. In such cases, if one patent owner refuses to license, then the technology may not be marketed absent a compulsory licensing."

India provided some details of its own law with regard to compulsory licensing. It said that Sections 83 to 94 of its Patents Act contain detailed provisions regarding compulsory licences including those that generic companies can apply for, government use licences, those issued in cases of national emergency, extreme urgency and public non-commercial use, and compulsory licences for exports.

India has issued only one compulsory licence so far. In March 2012, Indian generic manufacturer Natco Pharma was granted a compulsory licence to manufacture Bayer's drug sorafenib tosylate (Nexavar) used for the treatment of kidney and liver cancer.

Bayer had been granted a patent and received marketing approval for Nexavar for the treatment of liver and kidney cancers in 2008. Bayer would have supplied 200 patients in 2011, which was a little more than 2% of the affected population. According to India, the primary reason for the abysmally low coverage vis-a-vis the need was the exorbitant cost of nearly Rs284,000 ($4,370) for a month's treatment, which priced the medicine out of reach of almost all people in India.

Patent rights cannot be allowed to impede protection of public health, India underlined. Natco proposed to sell the generic form of Nexavar for Rs8,800 ($135) a month. The Controller General of Patents in India granted a compulsory licence because the TRIPS Agreement allows members to adopt measures to protect public health and Bayer did not meet its duty under the Indian Patents Act as the patented invention was not available to the public at a reasonable price, and it was not worked in the territory of India. The decision of the Controller General of Patents has been upheld by the Indian courts.

India also provided some details on the use of compulsory licences in a few other WTO members.

It said that, according to an article entitled "Compulsory licensing of patented pharmaceutical inventions: evaluating the options" by Jerome H. Reichman published in the *Journal of Law, Medicine and Ethics* in 2009, the US threatened Bayer in 2001 with a compulsory licence on ciprofloxacin (Cipro), which the US intended to stockpile as a defence against anthrax. Bayer drastically lowered its price in response.

The Italian competition law authorities issued compulsory licences against Merck on certain antibiotics for abuse of a dominant position in 2005; against Glaxo for refusal to license a patented migraine drug in 2006; and against Merck again for refusal to license a treatment for baldness in 2008.

India also pointed to the Apple v. Motorola case filed in the US District Court for the Northern District of Illinois (Eastern Division). Judge Richard Posner, in June 2012, while dismissing with prejudice the patent infringement suits, cited the decision in eBay Inc. v. MercExchange, L.L.C. and specifically noted that a "compulsory licence with ongoing royalty is likely to be a superior remedy in a case like this because of the frequent disproportion between harm to the patentee from infringement and harm to the infringer and to the public from an injunction".

India also cited the September 2016 report of the UN Secretary-General's High-Level Panel on Access to Medicines, which states that many governments have not used the flexibilities available under the TRIPS Agreement, including compulsory licences, for various reasons, ranging from capacity constraints to undue political and economic pressure from states and corporations, both express and implied.

The panel report also refers to resolution No. 2475 by the Colombian Ministry of Health that was a pathway for issuance of a compulsory licence to access the leukaemia drug imatinib in the public interest. Many domestic and foreign parties tried to dissuade the Colombian government from issuing a compulsory licence as provided by the TRIPS Agreement and the Doha Declaration.

India concluded by quoting the recommendations on compulsory licences in the panel report: "Governments should adopt and implement legislation that facilitates the issuance of compulsory licences. Such legislation must be designed to effectuate quick, fair, predictable and implementable compulsory licences for legitimate public health needs, and particularly with regard to essential medicines. The use of compulsory licensing must be based on the provisions found in the Doha Declaration and the grounds for the issuance of compulsory licences left to the discretion of governments."

Balanced IP system

In its statement, Brazil said that IP addresses the public interest by providing incentives for innovation. At the same time, governments have the responsibility of safeguarding the public against a potential negative impact, notably on competition.

"A balanced IP system, therefore, provides powerful incentives for innovation with the least effects on the competitive landscape; in economic terms, it will stimulate the pro-competitive dynamic effects of intellectual property while limiting and controlling its potential anti-competitive static effects."

Under Brazilian law, rights holders may be subject to compulsory licences if they exercise patent rights in an abusive manner or if they engage in abuse of economic power. In the case of dependent patents, for instance, anti-competitive behaviour can be established if the holder of the main patent fails to reach agreement with the holder of the dependent patent on the exploitation of the earlier patent.

Brazil said in 2007 it issued its first and only compulsory licence to date, regarding the antiretroviral efavirenz for public non-commercial use. The underlying intention was to guarantee that HIV patients received appropriate treatment from the Brazilian public health system, as efavirenz was used by 40% of all HIV patients in Brazil at the time.

Prior to the compulsory licence, the Brazilian government had engaged with the patent owner in several meetings with a view to reaching a negotiated solution. Those negotiations, however, did not lead to an agreement on terms and conditions adequate for addressing the public interest.

In conjunction with the procedures necessary for the compulsory licence, the Brazilian government initiated the preparation for the production of efavirenz. Despite strictly following the requirements contained in the national and international legal framework, the government faced legal disputes in national courts which were initiated by the owner of the patent. These disputes, however, were not successful.

As a result of such efforts by the Brazilian government, and taking full advantage of legally permissible limitations and exceptions, it was possible to substantially reduce the price of efavirenz from $1.59 to $0.45 per tablet at nominal prices. This helped to ensure adequate provision of the medicine to HIV patients who need to take it on a daily basis to keep the disease under control.

According to Brazil, thanks to successful public policies combined with the steady availability of innovative drugs, it is able to provide treatment to the vast majority of patients diagnosed with HIV / AIDS. Nowadays, among those re-

ceiving treatment, 90% have no detectable viral load, a sign of success of the treatment. This is a result only possible with the active participation of government, pharmaceutical companies and patients' associations, in line with the higher-level goals of the IP system.

Brazil said it believes that respect for intellectual property and efforts to promote the public interest in sectors of vital importance to socioeconomic and technological development are not mutually exclusive. It said a balanced IP system, with built-in flexibilities as well as complementary policies and incentives, is the best way to incentivize innovation in all fields of technology.

IP incentive

According to trade officials, the US warned against the potential negative effects of the co-sponsors' view of public interest, in the sense that it could discourage members from striving towards upholding robust domestic IP regimes, and therefore deny the public the benefit of critical future innovations and creative endeavours.

According to the US, IP and patents should not be viewed as intrinsic barriers to access. To properly address barriers to access, it is necessary to look at relevant factors outside the IP system, such as pricing and procurement policies, taxes, mark-ups in tariffs, and other national policies that in the US view result in higher cost for consumers and health systems.

The US claimed that compulsory licensing diminishes the exclusivity of the patent grant and undermines the incentive for innovation and investment that is a critical component of technological progress.

Switzerland maintained that the current system of IP protection fully integrates a balance between private and public interests, while constantly nurturing the pipeline of new generic products. Reliable and solid rules on IPRs provide for the necessary legal certainty to encourage investment in new and better drugs for unmet medical needs, it said.

Instead of advocating for the use of compulsory licences, Switzerland said it supports the promotion of initiatives and approaches which incentivize R&D and improve access to medical products for people in low- and middle-income countries.

According to Switzerland, the way forward is building on voluntary and inclusive efforts such as the Medicines Patent Pool, the Global Fund's e-procurement platform or World Intellectual Property Organization (WIPO) research, rather than dis-incentivizing research for the development of new and experimental drugs.

According to trade officials, the EU said that a balanced system of IPRs which takes into account legitimate interests of users and rights holders fully serves the public interest. The TRIPS Agreement provides a reasonable balance and its rules and flexibilities allow countries to have a pragmatic and flexible approach that can help them to maximize the potential of their own intellectual assets and their integration into international trade while achieving broader societal welfare, it said.

The EU maintained that this debate confirms that the current system is well suited and has reached a carefully crafted balance. Even countries asking for more flexibilities have decided not to use them, it said. *(SUNS8484)* ❐

Closing the gender gap could add $5.8 trillion to world economy

Reducing the disparity between men's and women's participation in the labour force can significantly raise global employment and output, according to a report by the International Labour Organization (ILO).

by Kanaga Raja

GENEVA: Closing the gender gap by 25% by the year 2025 has the potential to boost global employment by 189 million and raise global gross domestic product (GDP) in 2025 by 3.9%, or $5.8 trillion, the International Labour Organization (ILO) has said.

In its *World Employment and Social Outlook* report released on 14 June, the ILO said that the achievement of such a goal could also unlock large potential tax revenues. For example, global tax revenue could increase by $1.5 trillion given currently projected government revenue shares in GDP, most of it in emerging ($990 billion) and developed countries ($530 billion). "Consequently, policies promoting gender equality could be self-financing," it said.

It however noted that larger female participation might shift some home production, which is unaccounted for in GDP, to market production, so that the actual increase in global output will be smaller.

"The fact that half of women worldwide are out of the labour force when 58% of them would prefer to work at paid jobs is a strong indication that there are significant challenges restricting their capabilities and freedom to participate," said Deborah Greenfield, ILO Deputy Director-General for Policy.

"The most immediate concern for policymakers, therefore, should be to alleviate the constraints that women face in choosing to enter the labour market and address the barriers they are confronted with once they are in the workplace," she added.

"We need to start by changing our attitudes towards the role of women in the world of work and in society. Far too often some members of society still fall back on the excuse that it is 'unacceptable' for a woman to have a paid job," said Steven Tobin, lead author of the report.

According to the ILO report, in 2014, leaders of the G20 major economies committed to the "25 by 25" target, i.e., to reduce the gap in participation rates between men and women by 25% by the year 2025. Estimates indicate that, under certain assumptions, if such a goal were to be realized across all countries, it has the potential to boost global employment by 189 million, or 5.3%.

The vast majority of job gains (162 million) would be in emerging countries due to their relative size, combined with the fact they also have the widest gender gaps. The impact in developing and developed countries would be smaller, both in absolute terms and as a percentage of current employment levels (due primarily to the presence of comparably narrower gender gaps in labour market participation). Nevertheless, in both instances employment would grow, by 2% in developing and by 3.3% in developed countries.

"Such an outcome would yield significant economic gains, raising global GDP in 2025 by 3.9%, or US$5.8 trillion (equivalent to raising average global GDP growth over the next eight years by almost half a percentage point)."

Perhaps not surprisingly, said the ILO, the regions with the largest gender gaps, namely Northern Africa, the Arab States and Southern Asia, would see the greatest benefits in terms of growth. Nevertheless, even Northern America and Northern, Southern and Western Europe could increase their average annual GDP growth by a quarter of a percentage point, an important contribution during times of near-zero economic growth.

Labour force participation

According to the ILO report, globally, the labour force participation rate for women – at 49.4% – is 26.7 percentage points lower than the rate for men in 2017 and likely to remain unchanged in 2018.

Underlying this gap is a long-term downward trend in participation rates for both men and women, with the combined participation rate decreasing from 65.7% in 1997 to 62.9% in 2017.

The largest gender gap in participation rates, at 30.6 percentage points, is faced by women in emerging countries. The second largest occurs in developed countries, at 16.1 percentage points; however, this has narrowed by more than 5 percentage points over the past two decades and is projected to continue to close.

The ILO said with the exception of Eastern Asia and Southern Asia, the gender gap in labour market participation has narrowed in every region over the past two decades, albeit to varying degrees. This narrowing is largely attributable to improvements in female participation rates. The one exception is Northern America, where the participation rate for men is falling faster than the rate for women, thus leading to an apparent "improvement" in the gap.

Northern Africa has one of the widest gender gaps in labour force participation rates, at 51.2 percentage points (behind the Arab States at 55.2 percentage points). A declining male participation rate and a relatively stable female rate helped narrow the gap by 2.2 percentage points between 1997 and 2007. During the past decade, however, progress has slowly reversed, with a widening of the gap by 0.2 percentage points albeit as participation rates increased for both genders (though at different rates). The region still faces one of the lowest rates of female labour force participation, at 22.9% in 2017, but a continued narrowing in the gender gap is expected through 2021.

Over the past two decades, Latin America and the Caribbean has recorded the largest percentage-point reduction in the labour participation gap of all regions. The gap narrowed by 9.5 percentage points over the period, to 25.6 percentage points in 2017, most of which took place between 1997 and 2007 (7 percentage points). The overall trend was driven by a steady decline in the male participation rate combined with an increase in the share of women entering the labour force. The ILO said between 1997 and 2007, the female participation rate rose by 5.3 percentage points, but since then it has increased by a more modest 0.8 percentage points, reaching 52.7% in 2017. A further modest narrowing in the gap is anticipated from 2018 to 2021.

In Northern America, the participation gender gap has narrowed by 3.4 percentage points over the past 20 years, to reach 12.1% in 2017. Since 2007, the participation rate for men has declined by 3.8 percentage points and that for

women by 2.5 percentage points, bringing the female rate to 56.2% in 2017. Both the female and male rates are anticipated to decrease marginally in 2018, but at similar paces, and so the gap should remain unchanged through 2021.

The widest gender gap in labour force participation – at 55.2 percentage points – continues to persist in the Arab States. The participation rate for women is still the lowest globally, but it has been rising steadily – reaching 21.2% in 2017. However, said the ILO, progress has been too slow to bridge the gap and catch up with the male counterpart rate of 76.4%. Moreover, progress has slowed over the past 20 years, as the gap has narrowed by only 0.2 percentage points since 2007, following a reduction of 2.6 percentage points between 1997 and 2007. The gender gap is expected to continue to close through 2021.

Eastern Asia is one of only two regions (with Southern Asia) where the female labour force participation rate has declined markedly since 1997. For Eastern Asia, this has resulted in a widening of the labour force participation gap to 15.5 percentage points in 2017. In fact, the participation rates for both men and women declined significantly between 1997 and 2007, but over the past decade the male participation rate has declined by 1.3 percentage points, while the female rate has declined by 2 percentage points, resulting in a widening of the gap. Despite this, the participation rate for women in the region remains the second highest globally at 61.3%. A further decline in female participation through 2021 is expected to widen the gap further.

Over the past decade, Southern Asia has experienced the largest widening of the gap of all regions. The gap increased by around 2.1 percentage points from 2007 to 2017, resulting in a gap of 50.8 percentage points in 2017. From 2007, the rising participation rate of women observed during 1997-2007 began to reverse, resulting in a decline of 4.5 percentage points in the rate of female participation, to 28.6% in 2017. A slight increase in the female rate and narrowing in the participation gap are anticipated from 2018 to 2021.

In Northern, Southern and Western Europe, the gap in the labour force participation rate has narrowed by 8.3 percentage points in the past 20 years, to reach 12.5 percentage points in 2017. "This trend has been driven by a declining male participation rate, while the rate for women has increased, reaching 51.3% in 2017." This trend was amplified in the wake of the global financial crisis. A modest narrowing in the gap is anticipated between 2018 and 2021, as participation rates are expected to decrease for both women and men.

Unemployment gap

The ILO report found that while women are less likely to participate in the labour force, when they do participate, they are more likely than their male counterparts to be unemployed.

Globally, the unemployment rate for women stands at 6.2% in 2017, representing a gap of 0.7 percentage points from the male unemployment rate of 5.5%. This is projected to remain relatively unchanged going into 2018 and through 2021.

Since 1997, the global gender gap in unemployment has stayed around 0.8 percentage points. In emerging countries, however, the gap has widened in the past decade: from 0.5 percentage points in 2007 to 0.7 percentage points in 2017. In contrast, since 1997 the gaps in both developing and developed countries have narrowed, by 0.2 and 0.8 percentage points respectively. Accordingly, as of 2017, developed countries have the least difference between male and female unemployment rates, with a gap of 0.5 percentage points.

Women in the Arab States experience the highest rate of unemployment across all regions, at 21.2% in 2017. This is more than twice the rate for their male counterparts, at 8.3%, resulting in the largest regional unemployment gender gap, at 12.9 percentage points. Since 2007, the region has experienced a substantial widening of the gap, by 1.8 percentage points, mostly due to an increase in the unemployment rate for women. The gap is expected to narrow somewhat between 2018 and 2021.

In Northern Africa, women who participate in the labour force face the second highest unemployment rate globally, at 20%, more than twice the rate for men. Significant narrowing in the unemployment gap was achieved between 1997 and 2007, with the gap being reduced by 2.5 percentage points. However, progress has since reversed; the gap widened by 0.7 percentage points between 2007 and 2017 and is expected to continue to widen, albeit marginally, through 2021.

Northern America is one of three regions in the world where women in the labour force have a higher likelihood of being employed than men. The unemployment rate for women, at 4.9% in 2017, is 0.4 percentage points lower than the rate for men, at 5.3%.

Gender segregation

The ILO report said that a comparison of the sectoral distribution of employment by sex reveals strong evidence of gender segregation.

The global average segregation across all sectors has increased between 1997 and 2017, from 15.0 percentage points to 20.5 percentage points.

"In other words, to achieve matched allocation of men and women in every sector would require a shift of one in every five men or women to different sectors."

At the global level, education, health and social work is the sector with the highest relative concentration of women, followed by wholesale and retail trade. In contrast, the sectors of construction and transport, storage and communication tend to have the highest relative concentration of male workers.

"Labour market segregation at the sectoral and occupational levels is potentially self-reinforcing because some occupations are more common in some sectors than in others."

Furthermore, said the ILO, such segregation also affects gender gaps related to incomes and working conditions, and could even affect gaps in labour force participation and unemployment.

In other words, if women are segregated into certain occupations and those occupations are not growing, this phenomenon can have a severe impact on labour market outcomes, the ILO cautioned.

The report found that globally, the share of wage and salaried employment in total employment has increased from 48.4% in 1997 to 54.8% in 2017. Over this period, the share for women increased by 8.9 percentage points, from 46.5% to 55.4%, while for men the share increased by 6 percentage points, from 48.4% to 54.4%. As a result, the gender gap was reversed, so that in 2017 the share of workers in wage and salaried employment is higher for women than for men.

In developing countries, only 13.6% of women enjoy wage and salaried employment, compared with 24.3% of men. At the other end of the spectrum, the share of women in wage and salaried

employment in developed countries is 89.1%, compared with 83.7% of men. The difference is marginal for emerging countries (around 51% for both).

By region, the greatest disparities are observed in sub-Saharan Africa, where the male share in wage and salaried employment, at 36.3%, is 13.7 percentage points higher than the female share, at 22.6%. The gap has also widened over the past decade, from 12.9 to 13.7 percentage points.

Southern Asia also has a large gender gap in the wage and salaried employment share, in which the male rate, at 26.8%, is 8.6 percentage points higher than the female share at 18.2% in 2017.

In contrast, said the ILO, the share for women is higher than that for men in four out of 11 regions in 2017 – the biggest difference is in Northern, Southern and Western Europe, where the share for women is 88.6%, 7.7 percentage points higher than that for men, at 80.9%.

Overall for developed countries, the higher the average wage, the wider the gap in wages. In these countries, the gender wage gap is particularly magnified among the highest-paid occupations, such as managers and CEOs: this is known as vertical segregation, or the "glass ceiling". For instance, in Europe, the overall gender pay gap reaches close to 20%; however, among CEOs the gap is twice as large, at nearly 40%, and it continues to widen to 50% among the top 1% of earners, said the report.

"Given the importance of social norms and gender role conformity in explaining gender gaps in the world of work, appropriate policy responses must address the root causes of segregation and diversify traditional employment opportunities for women and men," said the ILO. Only then can the constraints on women's roles in the workplace be broken down. This means combating discrimination both within and outside the workplace.

In particular, appropriate policy responses, with a view to achieving the targets of the Sustainable Development Goals (notably Goal 5, Gender Equality), need to principally address the differential treatment and perception of women relating to their place both in the world of work and in society more broadly.

According to the ILO, these include, but are not limited to, promoting equal remuneration for work of equal value; tackling the root causes of occupational and sectoral segregation; and transforming institutions to prevent and eliminate discrimination, violence and harassment against both women and men. *(SUNS8483)* ❐