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CSOs seek change of course in lead-up to WTO meet

Some 300 civil society organizations (CSOs) from over 150 countries have expressed grave concern over proposals for the WTO's upcoming Ministerial Conference to adopt or target new disciplines on electronic commerce, services regulation and fisheries subsidies that they fear will harm the public interest and development prospects. Stressing that "much is at stake" at the December conference, the groups are calling instead for WTO member states to reform existing trade rules that stand in the way of efforts to promote food security and development.

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CSOs urge WTO members to abandon expansionist agenda

Ahead of the WTO Ministerial Conference this December, civil society groups from around the world have called on member states to drop plans to widen the WTO's remit in favour of fixing existing trade rules so as to promote food security and development.

by Kanaga Raja

GENEVA: Some 300 civil society organizations (CSOs) from more than 150 countries have raised the alarm that some member states of the World Trade Organization (WTO) are "pushing a dangerous and inappropriate new agenda" in the run-up to the WTO's eleventh Ministerial Conference (MC11), which will take place in Buenos Aires on 10-13 December.

This caution was sounded just ahead of an "exclusive, invitation-only" mini-ministerial meeting of some 35 select countries in Marrakesh, Morocco, from 9-10 October aimed at solidifying the agenda for MC11.

In an urgent letter to the WTO members, the CSOs, comprising trade unions, environmental groups, farmers and other public interest groups, demanded a fundamental shift in the WTO agenda ahead of MC11.

The CSOs argued, amongst others, that there should absolutely be no new mandate on electronic commerce as well as no disciplines agreed on domestic regulation in services at MC11.

WTO members must instead deliver at Buenos Aires a positive resolution on the public stockholding issue that allows all developing countries to implement food security programmes without onerous restrictions, they said.

The letter was organized by the Our World Is Not for Sale (OWINFS) global network of non-governmental organizations and social movements.

Among the 36 international and regional CSO networks that signed the letter were: ACP Civil Society Forum; Arab NGO Network for Development (ANND); Association of Women's Rights in Development (AWID); Development Alternatives with Women for a New Era (DAWN); Fair Trade Advocacy Office; Friends of the Earth International (FoEI); LDC Watch; Public Services International (PSI); Society for International Development (SID); Third World Network (TWN); Third World Network – Africa; and Women in Development Europe (WIDE+).

The letter was also endorsed by a host of national organizations.

In their letter, the CSOs said: "We are increasingly concerned about press reports indicating that some WTO members are pushing a dangerous and inappropriate new agenda under the disguising rubric of 'e-commerce,' even though there was no consensus to introduce this new issue during or since the Nairobi Ministerial." (The tenth WTO Ministerial Conference was held in Nairobi in 2015.)

"In addition, we are deeply disturbed by reports that the urgent need to change existing WTO rules which are constraining governments' policy space for job creation and development, including achievement of the Sustainable Development Goals (SDGs), is becoming further blocked in the lead-up to the 11th Ministerial."

Citizens around the world have given clear messages to governments that the current rules of the global economy, including global trade rules, have exacerbated inequality and left far too many impoverished.

"Thus, we urge WTO members to reflect on this dynamic and to take decisions that will allow the global trading system to contribute to, rather than constrain, shared prosperity and development," the CSOs said.

E-commerce is the wrong agenda

In their letter, the CSOs noted that a number of new e-commerce proposals have been made at the WTO in the last year.

Proponents often disguise their proposals under the rubric of e-commerce as being necessary to unleash development through the power of small and medium-sized enterprises (SMEs). "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, tax avoidance strategies, and

a system of trade rules written for them and by their lawyers."

Key provisions of the proposals include prohibiting requirements to hold data locally and to have a local presence in the country; no border taxes on digital products; prohibitions on regulating cross-border data transfers; and even prohibitions on requiring open source software in government procurement contracts.

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, the CSOs pointed out.

Data is now the most valuable resource, they said. Furthermore, privacy and data protection are fundamental human rights and cannot be abandoned in the interests of trade.

Locking in rules in the WTO to allow corporations to transfer data around the world without restrictions would forever deny the right of countries and citizens to benefit from their own data and intelligence in the future, and it would restrict the ability of countries to implement appropriate data privacy and consumer protection measures.

What e-commerce proposal proponents call "localization barriers" are actually the tools that countries use to ensure that they can benefit from the presence of transnational corporations to advance their own development and the economic, social and political rights of their citizens.

"We need trade rules that allow for the creation of decent jobs, including in the technology sector. But the hallmarks of companies like Amazon, Facebook, Google, and Uber include dislocation of local businesses and labour markets, and increasing precariousness of work," said the CSOs.

These would accelerate if e-commerce proposals were accepted in the WTO, they warned.

"Existing technology giants would be able to further consolidate their monopoly power. Their infamous tax optimization (which is tantamount to evasion), including base erosion and profit shifting, would be facilitated by a binding international treaty, and it would be nearly impossible to rein in the political instability engendered by the economic and financial consequences of such a scenario."

The CSO letter pointed out that WTO members do not currently have a mandate to negotiate new global rules on e-commerce, and they should not obtain one in Buenos Aires.

All of the issues proposed for the e-commerce agenda have either already been discussed and resolved, or are currently being discussed, in other forums, most of which are more responsive and accountable to public interest concerns than the WTO.

E-commerce is already flourishing and SMEs can already sell their products online without new WTO rules.

Of course, e-commerce can be a force for job creation and development, and certainly has the power to expand innovation, increase consumer choice, and connect remote producers and consumers. But supporting e-commerce is not the same as having binding global rules that would primarily benefit US-based high-tech corporations at the expense of public interest regulation to protect consumers and promote development.

"While we support efforts by developing countries to address the digital divide, transfer technology, and obtain financing for infrastructure and information and communications technologies (ICTs), the WTO is not the proper forum to negotiate these issues," the CSOs underlined.

The groups noted that similar to the way other development issues have been treated in the WTO, these will not become binding obligations, while the agenda of the high-tech corporations will be binding.

"There should absolutely be no new mandate on e-commerce in MC11," the CSOs made clear.

Public interest regulation under threat

The CSO letter further noted that the SDGs recently agreed by all WTO members include a focus on expanding access to and quality of many public services, as well as key services often operated by the private sector such as financial services and telecommunications.

"Unfortunately, much like the e-commerce agenda, a similar corporate agenda is behind the effort to have new rules limiting domestic regulation of services."

The proposed rules on domestic regulation in the services negotiations in the WTO seek to ensure that three kinds of regulation – qualification requirements and procedures, licensing requirements and procedures, and technical standards – meet vague and open-ended standards that would severely undermine the regulatory sovereignty of countries, the CSOs argued.

"These are open-ended terms designed to minimize regulation and maximize the lobbying power of transnational corporations over sovereign governments."

According to the CSO letter, giving the WTO jurisdiction to adjudicate whether a regulation was "reasonable," "objective", "transparent" and "not more burdensome than necessary to ensure the quality of the service", and further that a technical standard was developed in an "open and transparent process", would put the interests of foreign services providers above governments' obligation to ensure that services are operated in the public interest.

It is not the WTO that should decide whether the administration of labour, tax, environmental or safety laws affecting foreign services firms is "reasonable." The WTO should not be given authority to decide if the local zoning commission's agreement with local objections to place a big box store near a historic site is "objective." If a state decides to accept an environmental review's recommendation to ban fracking as a method of mining gas, a WTO panel should not have the jurisdiction to decide if that is "too burdensome."

The CSOs said local governments – not trade panels – should have the ultimate authority to decide community issues that are inherently subjective because they involve important judgment calls. And foreign companies should not have "rights" to comment or input on measures proposed by local or national authorities before they are decided domestically.

"Members did agree years ago to develop any necessary disciplines on these measures – but there has never been an agreement whether such rules are 'necessary,' which they obviously are not. Thus, no disciplines should be agreed on domestic regulation in Buenos Aires," the CSOs emphasized.

New rules on fisheries subsidies

According to the CSO letter, 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 mandate for a pro-development and pro-environment out-

come; but this cannot be lost due to the insistence of existing industrial fishing nations on rules that undermine the future developmental aspirations of developing countries," said the CSOs.

Despite the use of subsidies to build their industrial fishing capacity, those very same nations are attempting to prevent other developing countries from also building their domestic capacity, undermining development and doing little to prevent illegal, unreported and unregulated (IUU) fishing as well as overfishing.

For many developing countries, fisheries are at the heart of their economic and developmental aspirations. Protecting the policy space of developing countries and the ability to support small-scale and artisanal fishers must be at the heart of any outcome, along with effective, binding prohibitions on subsidies.

The developmental and economic policy space of developing countries must be maintained whilst those nations that have contributed most to the problem of IUU and overfishing must agree to eliminate harmful subsidies.

"The management of fisheries resources must be maintained outside of the WTO," the CSOs pointed out.

Issues that should be on the agenda

According to the CSO letter, both e-commerce rules and domestic regulation disciplines would amount to an expansion of the WTO. But the vast majority of WTO members have argued that existing unfair and damaging rules must be fixed before the WTO remit can be expanded.

The CSOs said that this fight was at the heart of the last Ministerial Conference in Nairobi, which concluded with ambiguous language acknowledging that some countries wanted to bring in other issues, while others (the overwhelming majority) wanted to continue with the unfinished development agenda that had been the reason they had agreed to the Doha Round.

Unfortunately, the CSOs added, some WTO members are obstinately refusing to move forward on what should be the core agenda: to fix the unjust rules that hinder global efforts to ensure true food security, sustainable development, access to affordable healthcare and medicines, and global financial stability.

"At a minimum, in Buenos Aires, WTO members should focus on 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 be able to use trade for their own development."

The top priority for a genuine development agenda would be transforming the current rules on agriculture.

Unbelievably, the CSOs noted, 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. The tens of billions of dollars of subsidies allowed in developed countries per annum encourage overproduction and artificially depress world prices, wiping out farmers' livelihoods in countries that should be benefiting from global agricultural trade or production for domestic consumption.

Thus, a major outcome in Buenos Aires should be to reduce the amount of subsidies under the "domestic support" negotiations – including subsidies in the so-called "Green Box" category when these actually have trade-distorting impacts.

Given the existing subsidies, developing countries should also be able to increase tariffs to protect domestic production when faced with import surges. Unfortunately, some countries are opposing negotiations towards a workable "Special Safeguard Mechanism" (SSM) for developing countries.

An outcome on SSM – unconditioned on further tariff cuts – at the upcoming Ministerial Conference would greatly enhance developing countries' ability to achieve food security, promote rural development and safeguard farmers' livelihoods, and would be a step towards removing WTO constraints on food sovereignty, said the CSOs.

By contrast, most developing countries are only allowed minuscule subsidies. But the SDGs entreat countries to increase investment in sustainable agriculture. Also, 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 "public stockholding", in which governments guarantee farmers a minimum price for their production, and distribute that food to hungry people within their own borders.

But these programmes, implemented in dozens of developing countries, often run afoul of WTO rules – even though the agriculture supported is not traded in global markets.

The majority of WTO members have agreed that domestic public stockholding programmes should not be constrained by antiquated WTO rules. But the changes have been steadfastly blocked by the United States, the EU, Australia and other big agribusiness exporters.

"And now reality is being turned on its head as China and India are being accused of being the biggest subsidizers, when their payments per farmer on a per capita basis remain minuscule – only a few hundred dollars per farmer, as compared to tens of thousands for the United States," said the CSOs.

WTO members agreed to find a permanent solution to the public stockholding programmes by December of this year. Unfortunately the positions of countries representing big agribusiness exporters have remained entrenched.

In Buenos Aires, said the CSOs, WTO members must deliver a positive resolution on the public stockholding issue that allows all developing countries to implement food security programmes without onerous restrictions that are not even demanded of developed countries' trade-distorting subsidies.

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 them to enable them to enact policies that would promote their own development.

The Group of 90 (G90) developing countries has 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 rules since the time of the WTO's 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.

"The G90 proposals should be accepted in the Buenos Aires Ministerial as

proposed – without being conditioned on further market access concessions from developing countries," the CSOs argued.

They noted that even in an area that all WTO members should be able to agree on – ensuring benefits for the least developed countries (LDCs) – there is no consensus yet.

Although it was a priority mandate, the small LDC package agreed at 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.

"This modest LDC package must be strengthened and made operational by the time of MC11," the CSOs underlined.

"Much is at stake this December in Buenos Aires. We believe in a democratic, transparent, and sustainable multilateral trading system, and do not want to see the WTO depart even further from that ideal."

The secretive and anti-democratic practice of negotiating behind closed doors with only certain powerful members, and then bringing massive pressure to bear on developing countries to accept another bad deal, which has characterized the WTO since its inception but has become even more pronounced in the last two Ministerial Conferences, must be abandoned in favour of a transparent and member-driven process that leads to outcomes that are consistent with the multilaterally agreed Sustainable Development Goals.

"Will members agree to a harmful new mandate on e-commerce and new rules limiting the democratic oversight over services regulations? And new rules on fishing subsidies which end up harming poor fisherfolk? Or will members act in the interest of their citizens and change course at the WTO, removing WTO constraints over domestic policies that promote food security and development, and supporting LDCs in their efforts to increase their share of global trade?" the CSOs asked. *(SUNS8549)* ❐

African Group will not negotiate e-commerce rules at WTO

The African Group of countries has opposed moves to reorient ongoing WTO discussions on electronic commerce towards crafting multilateral disciplines in this sector.

by D. Ravi Kanth

GENEVA: The African Group on 5 October fiercely rejected proposals by major industrialized countries and their allies in the developing world for changing the structure of the current electronic commerce work programme so as to establish a separate working group at the WTO's eleventh Ministerial Conference in Buenos Aires, trade envoys told the *South-North Development Monitor (SUNS)*.

In one of the strongest messages delivered at the WTO, the African Group said unambiguously that it will "not negotiate multilateral rules on e-commerce, or agree to a time-based decision to move in this direction."

Many developing countries, including India, as well as the least-developed countries (LDCs) endorsed the position adopted by the African Group.

However, a group of industrialized countries and their allies in the developing world pressed ahead with their proposal for a new mandate on e-commerce (see following article).

Separately, Russia has circulated a draft ministerial decision to be considered at Buenos Aires for establishing "a Working Group on Electronic Commerce under the auspices of the General Council to perform such functions as may be necessary to ensure efficient continuation of work on e-commerce issues and to provide Members with the appropriate forum for discussions on e-commerce issues and its development, including the possibility of developing international rules."

The way forward

The chair of the WTO's General Council, Ambassador Xavier Carim of South Africa, convened the meeting on 5 October to discuss the way forward in e-commerce, including the current moratorium on import duties for e-commerce transactions.

Carim said that he had held consultations with 39 delegations to elicit members' views on four questions:

i. What are your delegation's views on the future of the Work Programme? Would we be able to recommend to Ministers that the current Work Programme be continued in its current form?

ii. With regard to the moratorium, what is your delegation's view on its possible renewal? What do you think we can agree on as a recommendation to Ministers?

iii. What are your delegation's views on a possible negotiating mandate on e-commerce? Would your delegation support the proposals for a negotiating mandate as expressed in two recent proposals?

iv. What are your delegation's views on establishing a horizontal forum for discussions as raised in some recent submissions?

On the existing moratorium for not imposing customs duties on e-commerce transactions, the chair said "some delegations stated their preference for a longer-term moratorium or a permanent one."

Many industrialized countries as well as some developing countries like Korea, Hong Kong (China) and Singapore had said repeatedly during the previous meetings that there should be a permanent moratorium.

Given the difficulties in reaching consensus on the permanent moratorium during the next two months, the proponents said they are ready "to accept, at a minimum, a 2-year extension", the General Council chair said.

But, "others raised concerns about the moratorium notably about costs related to revenue foregone or increased imports", the chair said.

"One delegation," according to the chair, "noted that an extension should not be seen as given."

Significantly, "one delegation did express the view that the moratorium should lapse at the end of the year", the

chair pointed out.

Carim said "most delegations were prepared to accept a 2-year extension, as in the past, with several recalling the link to the moratorium on non-violation complaints in the TRIPS context."

(At a separate meeting on 6 October, the US said that there is no linkage with the moratorium on non-violation complaints in the TRIPS context, according to an African trade official.)

Varied views

Coming back to the work programme on e-commerce, the chair said the views expressed by members were varied.

"Some suggested that it was ineffective and should be replaced by a new institutional arrangement to provide a locus for future discussions on e-commerce," the chair said.

"Another delegation indicated that if the work programme is considered to be ineffective, it could be terminated and not replaced by any new arrangement," Carim added.

In sharp opposition to changing the work programme, many delegations would like to see it "continue in its current exploratory, non-negotiating bottom-up manner", the chair said.

Many members said "discussions have not yet been exhausted and many questions on the table remained unanswered", Carim maintained.

Other members, according to the chair, "suggested that the Work Programme should evolve to address current realities and, in their view, simply 'rolling over' the current Work Programme would not suffice."

They suggested "the Work Programme continue but with more focused discussion on issues of interest to Members including those raised in submissions, as well as the wide-ranging issues around development and e-commerce, the role of the WTO in e-commerce and the relevance of existing WTO agreements."

Many members also supported "more horizontal exchanges on e-commerce, notably to discuss cross-cutting issues."

Members also differed on how to conduct horizontal exchanges as some members said there is "no need to create a new structure and they were concerned about diverting attention from substance to structure", the chair said.

Effectively, many countries want the existing institutional structure of the work programme to continue as it allows "for horizontal discussions under the auspices of the [General Council]", and members "simply need to effectively utilize the existing structure."

Members remained sharply divided on "a possible recommendation to Ministers involving negotiations on rules, even at some future date."

Russia has indicated that "the ministerial decision should not only establish a working group on e-commerce, but also that the decision should empower the working group to begin preparing the ground for negotiations."

But a large majority indicated that "they would not agree to any reference to negotiations in a recommended decision for Ministers."

"In their view, it is premature to decide on negotiations given the different levels of development and the digital divide," the chair said.

Carim said "while several delegations expressed their readiness to negotiate rules, some were mindful that a negotiating mandate may not be possible at MC11."

"Thus, they were more tentative, suggesting that the ministerial decision only leave open the possibility for negotiation sometime in the future, perhaps, in one or two years," the chair noted.

Further, a few members "cautioned against pressing too aggressively in the short time we have left, or we risk closing off all dialogue on e-commerce."

Despite the entrenched positions and differences among members on e-commerce, the chair said "the immediate challenge now is to shift gear, adjust our approach, and begin to work towards preparing a draft decision for Ministers."

"Our objective should be to have an agreed draft decision, as we have done in the past, in Geneva, before proceeding to the ministerial conference, and this has to be done in time for the last General Council meeting at the end of November," Carim pointed out.

The draft decision on e-commerce, according to the chair, could contain the following elements:

A. The possibility of a two-year extension of the moratorium appears to have drawn the most support. Those that want a longer term or permanent moratorium and those opposed have expressed some willingness to accept a two-year renewal. However, members will need to reconcile the view expressed by one delegation that the moratorium simply lapses as well as take into account the link that has been made to the TRIPS moratorium.

B. Members will need to reconcile the different views expressed on the future of the current work programme. [Many members want it to continue as it is, others want it adjusted, while a few members believe it has become ineffective and should be terminated. If the work programme is to be continued, as most members appear to want, does it continue on its current trajectory or does it evolve and, if the latter, do we agree to more focused discussion on specific issues and / or encourage more horizontal discussions? If we want more focused discussion on specific issues, we may have to spend some time to agree on which issues to specify.]

C. If members agree to strengthen the possibility for more horizontal discussions, we will have to decide whether this is pursued on the basis of the current institutional setup, under the auspices of the General Council, or through the establishment of a new working group or some other institutional structure.

The chair said "the possibility of including a reference to negotiating e-commerce rules in a Ministerial decision may require particular focus as positions are quite polarized as I heard them."

Premature

In response to the chair's exhaustive summary of his discussions with 39 countries, Rwanda, on behalf of the African Group, said the Group "will not agree to change the structure of the current Work Programme to establish a separate Working Group, or to negotiate multilateral rules on e-commerce, or agree to a time-based decision to move in this direction."

Trade ministers of the African Group, in their recent meeting, had called for continuing the "discussions on e-commerce under the current Work Programme."

The African trade ministers said it is "premature to begin negotiations on multilateral rules on e-commerce."

Consequently, said Rwanda, the African Group wants to reaffirm "the comprehensive framework set out in the current Work Programme."

The 1998 work programme, according to the African Group, "covers a broad range of issues for technical examination within the scope of existing agreements and the WTO framework in the four relevant bodies."

Further, it provides "for a horizontal process to deal with issues that have matured in the technical bodies, examines trade-related issues of a cross-cutting nature, as well as the moratorium."

Rwanda said "the drafters of the

Work Programme, back in 1998 to 2015 intended for the work to be bottom-up, exploratory in nature, and for technical discussions within the scope of existing agreements to be held in regular bodies mandated to administer the relevant agreements."

"We do not think that the discussions have evolved in any substantial manner to justify a change in structure, or to move in a direction to negotiate rules," the African Group said.

The African Group underscored the need for addressing "the unresolved issues, as well as the development perspectives of e-commerce such as implementing digital industrial policies, narrowing the digital and technological divide, and the preservation of digital rights."

It called for a "Digital Industrial Policy and Development", specifically for examining issues relating to infrastructure, connectivity, competition and regulatory capacity.

The African Group posed the following questions for members to consider at this juncture:

- What is required to build the capabilities of developing and least-developed countries so that they can effectively participate in cross-border e-commerce?
- What specific government measures can be employed to support the development of e-commerce drawing on the experience of other countries?
- What is the impact of e-commerce on Africa's longstanding developmental objectives of industrial development, structural transformation and employment?
- What are the policy perspectives for promoting inclusive and equitable growth, trade and development in the digital economy?

Rwanda said that the moratorium for levying customs duties on e-commerce transactions "will have serious implications" at a time when countries in Africa have embarked on "building a single continental market and in terms of regional integration."

The African Group said that it "is still studying the issue [of the moratorium], and therefore the renewal of the moratorium should not be seen as automatic."

In short, the battle lines are drawn on changing the e-commerce work programme at the upcoming Buenos Aires meeting. It remains to be seen how the African Group and other developing countries will ensure a favourable developmental outcome that would enhance their interests in e-commerce, trade envoys said. *(SUNS8548)* ❐

ICs and allies push for new mandate on e-commerce

Despite continued opposition from many developing countries, proponents are persisting in their drive to initiate negotiations on e-commerce at the WTO.

by D. Ravi Kanth

GENEVA: Major developed countries and their allies in the developing world have upped the ante for launching negotiations on electronic commerce at the WTO's ministerial meeting in Buenos Aires. They have issued a fresh call for pursuing negotiations under a new mandate as opposed to the 1998 e-commerce work programme, trade envoys told the *South-North Development Monitor (SUNS).*

Despite massive opposition from developing and the poorest countries to switching gears on e-commerce discussions from the 1998 work programme, a group of developed countries along with their allies in the developing world have circulated a revised proposal on "advancing work on the e-commerce work programme."

"Focused" work programme

In the two-page proposal circulated on 22 September, the sponsors – Canada, Australia, New Zealand, Switzerland, Korea, Singapore, Malaysia, Hong Kong (China), Chinese Taipei, Laos, Myanmar, Moldova, Colombia, Panama, Qatar and Nigeria, among others – demanded a more "focused" work programme to replace the 1998 work programme.

The sponsors argued that members have already expressed their views "on a vast range of issues including, inter alia, infrastructure needs, facilitating regulatory framework, transparency, trade facilitation, electronic signatures and authentication, paperless trade, consumer protection, data flows, electronic payments, and sharing of regional experiences."

While some discussions took place at the dedicated discussions in 2016, most of the discussions took place in the four regular bodies in the work programme, viz., the WTO Council for Trade in Goods, Council for Trade in Services, TRIPS Council and Committee on Trade and Development, they said.

The recent discussions, according to the sponsors, brought to the fore "the inherent cross-cutting nature of e-commerce."

However, "the siloed nature of the discussions in the respective bodies also makes it difficult to have a holistic understanding of the various e-commerce issues", the sponsors maintained.

"For example," the sponsors said, "development issues often overlapped with the conversations under goods, services, and IP [intellectual property], and goods and services issues were often interlinked (e.g. enabling services for trade in goods enabled by the internet, relevance of e-signatures for trade facilitation and also cross-border supply of services)."

Therefore, "compartmentalized conversations make it hard to recognize synergies, and hence to make recommendations for a way forward", the sponsors claimed.

Further, the WTO General Council is not a technical forum to discuss the inter-linkages "between the issues or delve into any in-depth conversation on e-commerce", the sponsors argued.

"The current mechanism of the Dedicated Discussion also remains an informal arrangement, and makes knowledge management challenging as there are no formal records of the meeting," they argued.

Although the 1998 work programme "sets out the programme of work for the four relevant bodies, with a view towards having these bodies make recommendations to the Ministerial Conference for action", and useful work has been done under that mandate, there has been "limited progress in making recommendations despite nearly 20 years of discussions at the WTO."

"Given that e-commerce is increasingly becoming an important driver of inclusive economic development, it would be useful to have more clarity on how to advance work, how the current process can be improved, what issues to

focus on, and how to facilitate Members arriving on concrete recommendations on the way forward," the sponsors said.

Against this backdrop, the sponsors proposed a "next step from now to MC11" under which members must embark on a discussion on "how the E-commerce Work Programme could better facilitate more focused work and holistic discussions on e-commerce."

The sponsors want members to "reflect and build on the discussions since MC10, and identify possible (i) improvements to processes, and (ii) issues of interest, if any that they would like to take forward. This could be done on the basis of Members' proposals and ideas."

Although the sponsors maintained that their proposed next step "would not alter the underlying exploratory nature of the Work Programme", they suggested that "the outcome of these discussions should be captured in the MC11 Ministerial Decision on E-commerce."

Further, "Ministers at MC11 should give clear direction for future work in e-commerce, with development at the core, and set out a clear, updated framework / process through which future work could be undertaken", the sponsors said.

Digital divide

Effectively, the sponsors are calling for launching negotiations on e-commerce at the Buenos Aires meeting, said a trade envoy familiar with the proposal.

But a large majority of developing and poorest countries have repeatedly maintained that the discussions in various WTO bodies under the 1998 e-commerce work programme – which are exploratory in nature – have not clarified a range of issues about the grotesque disparities in the e-commerce infrastructure between countries as well as the digital divide.

India along with countries in the African Group and South American members have repeatedly argued that issues concerning the development of e-commerce infrastructure cannot be addressed through the e-commerce rules proposed by the developed countries and their allies in the developing world.

Uganda, for example, has presented credible arguments as to why members cannot move from the 1998 work programme.

In an intervention on 26 July, Uganda said e-commerce, "in theory, provides a critical gateway for consumers and businesses in weaker countries allowing them to surmount obstacles faced when competing domestically, and with enterprises in stronger players, in the trading system."

However, "in reality, most LDCs [least-developed countries] face a number of constraints due to insufficient basic infrastructure and access to electricity, Internet, high cost of broadband connectivity, amongst others, and bottlenecks that hinder LDCs from taking advantage of opportunities theoretically available through the e-commerce platforms."

More important, e-commerce needs "connectivity, without which it would be a clear case of putting the cart before the horse", Uganda said.

"In Africa, for instance, 75% of the entire population is not on the Internet and while more than 50% of the population in LDCs is covered by a mobile broadband signal, only 15% use the Internet."

"In terms of individuals using the Internet, only 15.2% in LDCs use the Internet, as opposed to 82.1% in the developed world," Uganda said.

In terms of households with Internet use, the figures suggest that 11.1% in LDCs use the Internet against 83.8% in the developed world.

"The digital divide is huge and there is therefore need to bridge it," Uganda said.

Therefore, the claimed benefits "are not self-imposing nor are they automatic ... countries have to undertake deliberate measures with the view to ensure and guarantee that there is a trickle down effect of these benefits to the masses and enable catch up."

Uganda and other African countries want first the huge digital divide between developed, developing and least-developed countries to be addressed on a war footing. "If this is not addressed, it will create even bigger future divides, i.e., income, workforce skills, infrastructural, etc. between those who have, and those who do not. In other words, inequality will increase and most of Africa will be left behind because multilateral rules will entrench these imbalances," Uganda had argued.

More disturbingly, argued Uganda, "the existing global e-commerce space is extremely asymmetrical and the gains are not shared equitably."

The African Group and Uganda now face a litmus test of whether they can ultimately stand up to the assault of the industrialized countries and their allies in the developing world, and ensure that there is no launch of e-commerce negotiations at Buenos Aires, said a trade envoy who asked not to be quoted. *(SUNS8540)* ❐

India, Africa resist IC moves to finalize domestic regulation outcomes at MC11

Proposed WTO disciplines governing domestic regulation of services have sparked apprehension among India and the African Group, which argue that such rules would constrain countries' right to regulate.

by D. Ravi Kanth

GENEVA: India and the African Group have expressed sharp concern over attempts by major industrialized countries and their allies in the developing world to finalize outcomes on domestic regulation for trade in services without adhering to the work done in previous draft negotiating texts, services negotiators told the *South-North Development Monitor (SUNS)*.

The proponents are seeking an outcome on various disciplines in domestic regulation concerning trade in services at the WTO's upcoming eleventh Ministerial Conference in Buenos Aires.

The proposed disciplines seem to have been transposed from the failed draft text of the plurilateral Trade in Services Agreement (TiSA), in which the US was largely comfortable with the proposals for transparency improvements in domestic regulation, according to negotiators familiar with the discussions.

The US was not prepared to address the substantive issues on which considerable work had been done in 2009 and 2011 draft texts issued by the then chairs of the WTO domestic regulation talks, according to negotiators familiar with the work.

In a restricted proposal issued on 3 October, the proponents – the European Union, Japan, Canada, Norway, Switzerland, New Zealand, Australia, Chile,

Colombia, Costa Rica, Hong Kong (China), Iceland, Israel, Kazakhstan, Korea, Mexico, Liechtenstein, Moldova and Chinese Taipei, among others – floated a working document for negotiating outcomes on various disciplines on domestic regulation.

The working text for negotiations in the WTO GATS (General Agreement on Trade in Services) Working Party on Domestic Regulation, according to the proponents, "consolidates proposals on Administration of Measures, Development of Measures, Transparency, Technical Standards, and Gender Equality."

These disciplines, the proponents said, "apply to measures by Members relating to licensing requirements and procedures, qualification requirements, and procedures, and technical standards affecting trade in services where specific commitments are undertaken."

The proposed disciplines, however, "do not apply to any terms, limitations, conditions, or qualifications set out in a Member's schedule pursuant to GATS Articles XVI [Market Access] and XVII [National Treatment]" in specific commitments.

Further, "Members recognize the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet [national] policy objectives".

These proposed disciplines, according to the proponents, "shall not be construed to prescribe or impose particular regulatory approaches or any particular regular provisions in domestic regulation."

The proposal calls for various disciplines in the administration of measures such as submission of applications, application timeframes, electronic applications, acceptance of copies, processing of applications, fees and examinations.

It has suggested how a competent authority must administer decisions in an independent manner and listed various transparency provisions such as publication and information to be made available by members, setting up of enquiry points, opportunity to comment and information before entry into force.

The proponents included technical standards and development of measures based on objective and transparent criteria.

In addition, some of the proponents – Albania, Argentina, Canada, Chile, Colombia, the EU, Iceland, Kazakhstan, Liechtenstein, Moldova, Norway, Panama and Uruguay – included their proposal on gender equality.

The proposal says: "Where a Member adopts or maintains licensing requirements, licensing procedures, qualification requirements or qualification procedures, the Member shall ensure that such measures do not discriminate against individuals on the basis of gender."

Significantly, another subset of proponents – Chile, Hong Kong (China), Moldova, New Zealand and Switzerland – included a proposal on "necessity test."

The proposal says: "Where a Member adopts or maintains [measures relating to licensing requirements and procedures, qualification requirements and procedures, or where a Member adopts or maintains measures relating to technical standards as a condition for the supply of a service], the Member shall ensure that such measures are not more burdensome than necessary to ensure the quality of the service."

In short, the consolidated draft text includes elements on which some of the proponents are not on board and yet, they pressed for negotiating an outcome on all the issues.

Contradictions

India, in a restricted room document, exposed the glaring contradictions in the consolidated proposal issued by the proponents.

India said significant work by members had been undertaken in the chair's reports of 2009 and 2011, including several clauses in the 2011 report on which there was "ad referendum" agreement.

It asked the proponents "why did they adopt the approach of dissecting specific elements, only to consolidate them" in their document.

The draft consolidated text "does not reflect the common position of the proponents, and there appear to be several aspects on which some of the Members are still consulting, or differences remain with regard to bracketed texts", India said.

Some of the members "appear to be proponents only for the single article on Gender Equality, and not on the remaining aspects of the Disciplines", India said.

More important, "given the fragmentation of views, what is the process that the proponents believe should be followed on the way forward?" India asked.

India said it is "concerned" about the overarching aspect of the consolidated text wherein it is stated that "these disciplines relate to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services where specific commitments are undertaken".

The African Group said that its trade ministers had already emphasized in November 2016 that "the work we undertake in multilateral trade and rule-making [should] support Africa's continental integration agenda and, at a minimum, not undermine it." The African trade ministers had underlined the need to ensure that "any outcome on GATS Article VI.4 disciplines on domestic regulation does not involve implementation of new and/or onerous administrative requirements or requirements that intrude into the domestic policy-making processes."

The proposal by the proponents, according to the preliminary assessment of the African Group, includes various provisions that "are intended to prescribe or impose particular regulatory approaches."

"In our view, this would significantly constrain African Members' right to regulate for legitimate public policy objectives," the African Group said.

The African Group said domestic regulation must provide "the right to regulate and the inter-linkages between regulations and broader domestic economic imperatives."

The African Group posed the following general questions:

i. In accordance with GATS Article VI.4, which disciplines do you think are necessary, and why?

ii. What were the circumstances or specific issues that led to the suspension of the domestic regulation (DR) negotiations in the past, and have those circumstances changed?

iii. Is there a clear economic rationale for adopting DR disciplines, and what is the evidence that benefits from the proposed disciplines will accrue to all members?

iv. Is there any evidence of the costs entailed by introducing these new obligations, and who would bear those costs?

v. Is there any consideration that

(continued on page 15)

Making right to development a reality for everyone

The recently appointed UN Special Rapporteur on the right to development has highlighted major challenges in realizing this right, decrying how "millions of people around the world are living with the consequences of the failure to deliver it".

by Kanaga Raja

GENEVA: More than 30 years after the adoption of the Declaration on the Right to Development, business-as-usual will not be sufficient to achieve progress, a United Nations human rights expert has said.

In his first report to the UN Human Rights Council since being appointed to the new mandate of Special Rapporteur on the right to development, Saad Alfarargi (of Egypt) said that in order to ensure the implementation of the Declaration, there is a need to reinvigorate the advocacy process.

In a landmark resolution adopted at its thirty-third session in September 2016, the Council had decided to establish the mandate of the Special Rapporteur on the right to development for a period of three years.

The mandate of the Special Rapporteur includes, amongst others, to contribute "to the promotion, protection and fulfilment of the right to development" in the context of the coherent and integrated implementation of the 2030 Agenda for Sustainable Development and other internationally agreed outcomes of 2015. These include the Sendai Framework for Disaster Risk Reduction, the Addis Ababa Action Agenda of the Third International Conference on Financing for Development and the Paris Agreement on Climate Change.

At its thirty-fourth session (27 February-24 March 2017), the Council appointed Alfarargi as the Special Rapporteur, and he formally took up his position on 1 May 2017.

The Council held its regular thirty-sixth session here from 11-29 September.

In his first report to the Council, the Special Rapporteur underlined that the right to development is not just a declaration or a topic for political debate within the United Nations or political forums. The reality outside these forums is that of billions of people who are in need of improvements in their lives and who are entitled to have their human rights, including the right to development, realized, he said.

The particular value of the right to development is that it shifts the focus away from statistics and goods to the well-being of people. Only when people have access to education, when they are allowed to work in a profession of their choice, when they have access to financial services, healthcare and housing, when they can fully and fairly participate in shaping the policies that govern their lives, are they able to lead lives to their full potential.

The right to development brings to the discussion the paradigm of choice – the right of every human being to participate in, to contribute to and to enjoy economic, social, cultural and political development, in order to achieve sustainable development.

"More than 30 years after the right to development was established in a UN declaration, millions of people around the world are living with the consequences of the failure to deliver it," Alfarargi said, in a UN news release.

"Negative global trends have their harshest impacts on the poorest sections of society. People are feeling the impact of the global financial and economic crisis, the energy and climate crisis, and an increasing number of natural disasters."

"Add to that the new global pandemics, corruption, the privatization of public services, austerity, and the ageing of the global population, including in developing countries, and the effect is a harsh and worsening impact on the poor," he added.

"We are witnessing some of the greatest challenges the world has ever seen, without the global commitment to deliver change. People in developing countries are paying a heavy price for global actions beyond their control."

The Special Rapporteur said that people in Africa, in the world's least-developed countries, and in developing countries that are either landlocked or small islands are losing out the most.

"Too many people are unaware that the right to development even exists. We need to raise this low level of awareness, from grassroots organizations to governments, and make sure they are all fully engaged in implementing it."

"There is an urgent need to make the right to development a reality for everyone," he added.

Right to development in four key policy documents

In his report, the Special Rapporteur provided some historical background on the right to development, noting that the right was first mentioned in 1966, when then-Foreign Minister of Senegal, Doudou Thiam, referred to the right to development of the "Third World" before the UN General Assembly. Reflecting on the decades of failure of States to meet the goals of the first UN Development Decade, Thiam linked that failure to the failure of newly decolonized States to resolve the growing economic imbalance between the developing and developed worlds.

The Declaration on the Right to Development was adopted by the General Assembly on 4 December 1986.

In 2015, the right to development was explicitly recognized in four key internationally agreed policy documents: the Addis Ababa Action Agenda of the Third International Conference on Financing for Development; the Sendai Framework for Disaster Risk Reduction 2015-2030; "Transforming our world: the 2030 Agenda for Sustainable Development", which included the Sustainable Development Goals; and the Paris Agreement on climate change.

The Special Rapporteur noted that while the Declaration on the Right to Development is not in itself legally binding, many of its provisions are mirrored in legally binding instruments, such as the Charter of the United Nations and the International Covenants on Human Rights; and principles such as non-discrimination and State sovereignty are also part of customary international law, which is binding on all States.

The 2030 Agenda is explicitly grounded in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights treaties.

The key principles of the Declaration on the Right to Development are reaffirmed throughout the Agenda, which recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.

"The right to development can and

should be used as a guiding concept when measuring progress in the implementation of the new policy framework for sustainable development," said Alfarargi.

"The Sustainable Development Goals provide an opportunity to galvanize global and local action and resources to implement universal goals and targets that could contribute substantially to the promotion and implementation of the right to development."

The rights expert noted that in one of the guiding principles for the implementation of the Sendai Framework for Disaster Risk Reduction 2015-2030 [para. 19(c) of the Framework], it is stated that managing the risk of disasters is aimed at protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while promoting and protecting all human rights, including the right to development.

People across the world are increasingly exposed to natural disasters, the effects of which destroy development efforts and reduce entire regions to poverty. Poverty and vulnerability to disasters are closely linked: low-income countries, in particular the poor and disadvantaged groups within them, are typically more vulnerable to and disproportionately affected by disasters.

"The implementation of the right to development is, therefore, closely interlinked with disaster risk reduction," said the Special Rapporteur.

The Special Rapporteur recalled that in the opening paragraph of the Addis Ababa Action Agenda, the heads of state and government and high representatives gathered in Addis Ababa for the Third International Conference on Financing for Development referred to the right to development.

They specifically stated that their goal was to end poverty and hunger and to achieve sustainable development through promoting inclusive economic growth, protecting the environment and promoting social inclusion, and that they committed to respecting all human rights, including the right to development.

The Addis Ababa Action Agenda and the 2030 Agenda are closely intertwined; the former is referred to in the latter as an integral part of the 2030 Agenda, and it has been affirmed that the full implementation of the Addis Ababa Action Agenda is critical for the realization of the Sustainable Development Goals and targets.

The Addis Ababa Action Agenda is explicitly linked to the means of implementation targets established under Goal 17 and under each specific Sustainable Development Goal, in that it is recognized as supporting, complementing and helping to contextualize those targets. The targets under Goal 17 operationalize the Addis Ababa Action Agenda commitments in the areas of finance, technology, capacity-building, trade and systemic issues.

The rights expert further said that the Intergovernmental Panel on Climate Change, in its assessments of climate change, which are based on the work of hundreds of scientists from all over the world, has repeatedly confirmed that climate change is real and that human-made greenhouse gas emissions are its primary cause.

Extreme weather events and natural disasters, rising sea levels, floods, heatwaves, droughts, desertification, water shortages and the spread of tropical and vector-borne diseases are some of the grim results of climate change. These phenomena directly and indirectly affect the enjoyment of a range of human rights, including the rights to life, water and sanitation, food, health, housing, self-determination and culture, as well as the right to development.

It was recognized in the preamble of the Paris Agreement that the parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, including the right to development.

The Special Rapporteur also pointed to a raft of Human Rights Council resolutions as well as other global, regional and national instruments where the right to development is mentioned.

For instance, in the United Nations Declaration on the Rights of Indigenous Peoples, it is recognized that indigenous peoples have the right to development.

In Article 33 of the Charter of the Organization of American States, it is stated that development is a primary responsibility of each country and should constitute an integral and continuous process for the establishment of a more just economic and social order that will make possible and contribute to the fulfilment of the individual.

The 53 States parties to the African Charter on Human and Peoples' Rights are legally bound to ensure the exercise of the right to development, which is included in Article 22 of that Charter.

In addition, the right to development is recognized in the Arab Charter on Human Rights as a fundamental human right, while the Association of Southeast Asian Nations Human Rights Declaration contains a section on the right to development.

Challenges to the right to development

The Special Rapporteur went on to highlight some of the major challenges for the realization of the right to development. He said that through informal consultations with permanent missions, intergovernmental organizations and non-governmental organizations, he has become aware of numerous concerns that require further study, including:

1. Politicization: Despite the fact that more than 30 years have passed since the adoption of the Declaration on the Right to Development, views among States are still divided.

The European Union has asked for further clarity on the right. There are disagreements on the nature of the duties of States to realize the right to development and on the relative emphasis to be placed on the national dimension of State obligations (individual rights and corresponding State responsibilities, rule of law, good governance, combating of corruption) as compared with obligations of international cooperation (international responsibilities, international order, development cooperation, global governance). There are also differences of opinion among States regarding criteria for measuring progress towards implementing the right to development.

The above conceptual differences have often resulted in a lack of sufficient momentum in the intergovernmental debate at the relevant UN forums, such as the General Assembly, the Human Rights Council and the Working Group on the Right to Development.

2. Lack of engagement: The political divide has resulted in a low level of engagement of UN agencies and civil society in promoting, protecting and fulfilling the right to development.

The Special Rapporteur said despite the progressive evolution of the concept of the right to development and its inclusion in some international and regional instruments and national constitutions, the general level of awareness and engagement for its implementation are low.

Progress in development has been uneven, particularly for people in Africa, least-developed countries, landlocked developing countries and small island developing States, and in developing countries more generally.

In addition, the low level of awareness of the right to development among grassroots organizations further ham-

pers advocacy efforts.

3. Adverse global trends: The implementation of the right to development faces numerous other challenges – the global financial and economic crisis, the energy and climate crisis, the increasing number of natural disasters, the new global pandemics, the increase in automation in many sectors, corruption, illicit financial flows, the privatization of public services, austerity and other measures, and the ageing of the global population, including in developing countries.

There is a growing demand for resources for the realization of the right to development. The rise of nationalistic tendencies and the related trend to move away from international solidarity and cooperation may further weaken international governance.

Addressing these challenges will require the concerted effort of all relevant stakeholders, both at national and at international levels, Alfarargi said.

The mandate and focus areas of work

The Special Rapporteur noted that the history of the implementation of the Millennium Development Goals suggests that minorities and indigenous peoples have progressed at a slower rate and that, for these already disadvantaged groups, existing inequalities have been exacerbated as others have benefited from interventions.

He said indigenous peoples, minorities, persons with disabilities and other disadvantaged groups, in particular in developing countries, have a stake in the implementation of the right to development and sustainable development processes and should not be left behind. At the same time, international and national efforts to implement the right to development have not been successful in fully integrating a gender perspective.

In implementing his mandate, the Special Rapporteur said that he will advocate for the inclusion of the most disadvantaged groups in all international and national forums linked to the implementation of the right to development and related sustainable development processes.

He also aims to pay special attention to the gender dimension in his work, considering, in the first instance, the developmental challenges that women and girls face in most societies. According to the rights expert, these challenges are many, ranging from laws that give unequal access to land and other resources, to development or disaster reduction policies that do not provide women with access to education and financing to develop their businesses or even enough food to feed their children and that do not ensure basic services, such as healthcare and housing.

He noted that when establishing the mandate of the Special Rapporteur, the Human Rights Council emphasized the urgent need to make the right to development a reality for everyone.

The Special Rapporteur said that he sees his role as ensuring that the right to development remains a focus in the global discourse on the post-2015 development agenda.

Alfarargi said that he will work to ensure that the right to development, and indeed all human rights, are recognized as an integral part of the sustainable development discourse, while emphasizing that development should happen in accordance with human rights principles and with the goal of achieving the realization of the right to development for all, rather than simply for economic growth.

"While economic growth is important, it is a quantitative and value-neutral concept that can have both negative and positive impacts on people's lives. Development, on the other hand, is a qualitative concept; including the human rights dimension is crucial to assessing the actual success of human development," he said. *(SUNS8540)* ❐

Further efforts needed to curb illicit flows, Switzerland told

More should be done to stem the flow of "dirty money" through the Swiss financial sector despite the progress made on this front, a UN rights expert has suggested.

by Kanaga Raja

GENEVA: While the Swiss federal government has undertaken several efforts and achieved progress in curbing illicit financial flows in recent years, there are several areas in which there is room for improvement in the fields of accountability, regulation and supervision of the Swiss financial market.

This was the assessment of Juan Pablo Bohoslavsky (of Argentina), the UN Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, at the end of his first official visit to Switzerland.

"Progress has been achieved, but further efforts are necessary to make sure that dirty money stemming from tax evasion and corruption is not entering the Swiss financial market," he said in a UN news release issued on 4 October.

"Illicit financial flows undermine the rule of law and human rights. In particular, they reduce the ability of developing countries to finance essential public services, such as healthcare, education and basic social security schemes," the rights expert added.

"Despite significant efforts in adopting legislation and improving procedures to detect suspicious transactions, the risk that the Swiss financial market is used for money laundering remains," said Bohoslavsky.

Unlawful transfers

In a separate end-of-mission statement also released on 4 October, the rights expert pointed out that illicit financial flows are financial transfers of an unlawful nature. These can be, for example, funds deposited offshore in order to evade taxes, which deprive states of needed resources to ensure the realization of rights such as to education, food, housing and healthcare. The assets can also stem from other criminal activity, such as corruption, misappropriation of public funds, trafficking of persons, drug trafficking or illegal arms trade.

"As the so-called Panama Papers scandal has underlined, more prone to siphon money abroad are the rich, corporate and political elites and their entourage. Among them there are also human rights abusing rulers, the Abacha's, Marco's, Duvalier's and Ben Ali's of today [sic]," said the rights expert.

"It is obvious that States have to make concerted efforts to make sure that criminal conduct and robbing people of public resources does not pay and that stolen assets are returned to their legitimate owners."

It has been estimated that the total volume of illicit financial flows leaving

developing countries amounts to over $1 trillion per year. This is more than 10 times the development assistance provided to these countries.

While illicit financial flows affect all countries, including European countries that struggle to fund their public health and social security systems, their impact on the enjoyment of human rights is particularly severe in low-income countries, which are struggling to fund essential public services.

Role of Switzerland

The Independent Expert noted that the Swiss financial centre is a leading global location for cross-border management of private assets, with a market share of 25%. Its financial sector contributes 9.1% to the GDP and assets held in Swiss banks by non-resident custody account holders amount to CHF2.92 trillion.

Switzerland is also a hub for commodity trading, with an estimated global market share of 35% for trade of crude oil, 50% for sugar and about 60% for coffee and metals such as zinc, copper and aluminium. The commodity trading industry closely depends on the services of local banks which provide financing.

"It is my view that Switzerland can play a key role in curbing illicit financial flows and can also become a frontrunner in integrating human rights in the public and private financial sector," Bohoslavsky said.

According to the rights expert, his general impression is that official policies in relation to illicit financial flows have seen a positive change over the years. In the 2030 Agenda for Sustainable Development, all States have pledged to significantly reduce illicit financial flows by 2030.

Since 2008, many initiatives have been undertaken in Switzerland to restore the reputation of its banking sector, which has suffered under revelations that banks domiciled in the country assisted foreigners in tax evasion or lacked adequate due diligence procedures to prevent politically exposed persons from using its jurisdiction to hide stolen assets.

Before 2009 there was widespread cross-border tax evasion by foreign nationals from various jurisdictions facilitated by banks operating in Switzerland. The data relating to tax evasion by US taxpayers is revealing in itself, said the rights expert.

In 2009 UBS reached a $770 million settlement for facilitating tax evasion of US taxpayers and by August 2013 US authorities had started investigations against 12 additional Swiss financial institutions.

By the end of January 2016, 76 further banks operating in Switzerland had entered into non-prosecution agreements because they had reason to believe that they had committed tax-related criminal offences under the law of the United States in connection with undeclared accounts of US residents. The list of banks includes Swiss branches of many well-known international commercial banks. These non-prosecution agreements include statements of facts providing details about how the respective banks or client relationship managers working for them had organized tax evasion schemes for their clients.

Under the so-called "Swiss bank programme", respective financial institutions would receive a penalty based on the value of the assets held in undisclosed accounts. In total, penalties have amounted to more than $5.5 billion.

Yet as the Chief Executive Officer of the Swiss Financial Market Supervisory Authority (FINMA) pointed out in April 2016, despite significant efforts in adopting legislation and improving procedures to detect suspicious transactions, the risk that the Swiss financial market continues to be abused for the purpose of money laundering is not fully over.

"This is in particular highlighted by the involvement of several Swiss banks in the Petrobras corruption scandal [in Brazil] and in the suspicious cash flows linked to the Malaysian sovereign fund 1MDB," said the Independent Expert.

Particularly troubling is the fact that these events are not from years ago – the money was still accepted until quite recently – that evidence points to very obvious cases of corruption and that the sums are vast with individual transactions running into hundreds of millions, which should have raised red flags in the concerned financial institutions.

"Media reports about Swiss financial institutions suspected to be involved in facilitating tax evasion or being used for money laundering have continued to appear in 2017," said Bohoslavsky.

Returning stolen assets

Both the effectiveness and speed with which stolen assets can be returned are of paramount importance, he said. In addition, it is important that sanctions on those financial institutions that have failed to exercise due diligence are imposed in a timely, transparent and proportional manner in order to make sure that neither robbing funds nor hiding them pays off.

Bohoslavsky welcomed the impending participation from next year of Switzerland and its financial institutions in the Automatic Exchange of Information for Tax Purposes (AEOI) with 38 states and territories. However, he expressed concern that "the new system could remain an ineffective tool for curbing tax evasion in certain developing countries that lack the technical requirements to participate in the new system."

He also noted that the commitment of the Swiss government to curb illicit financial flows is underlined by its efforts to freeze and return illicit assets deposited in its jurisdiction belonging to authoritarian rulers. Over the last 30 years, Switzerland has returned $2 billion of illicit assets pertaining to politically exposed persons and frozen suspicious assets valued at hundreds of millions of dollars.

"It is my impression that there is a clear political will in Switzerland to return stolen assets to the legitimate owners. This is also demonstrated by technical assistance that Switzerland has offered to countries that have requested the return of stolen assets," the rights expert said.

"Indeed, I would encourage other countries that have received stolen assets to follow the Swiss example and adopt similar policies and legal regulations to facilitate their freeze and return and report annually in public about the amounts frozen and returned."

A balanced and nuanced role of the state is of paramount importance to ensure accountability, transparency and fairness in the financial sector when dealing with human rights abuses and illicit financial flows, said Bohoslavsky. The supervision of Swiss banks through self-regulatory norms set by the Swiss Banking Association and regulation by FINMA is therefore crucial.

The rights expert said investigations of recent cases show that the majority of banks fulfil their duties under the Swiss Anti-Money Laundering Act, but a minority do not. In the Petrobras case, for instance, FINMA has revealed that 75% of Swiss banks involved were in conformity with Swiss legal prescriptions in

applying their money-laundering rules. However, it noted that for the remaining percentage of banks there were "concrete indications that the measures those banks had in place to combat money laundering were inadequate".

"It is my view that the staffing, resources and powers of FINMA need to be proportional to the size of the Swiss financial market and the volume of assets managed by its financial institutions. FINMA should have sufficient capacities to supervise all banks and financial intermediaries adequately irrespectively of their size," Bohoslavsky suggested.

He also pointed out that criminal sanctions in Switzerland for assisting foreigners to evade taxes are weak. "While assisting a foreigner to steal some few hundreds CHF is a crime in Switzerland, assisting a foreigner to 'steal' from a foreign treasury a quarter of a million within one year, is not punishable within Switzerland."

Tax reform

The rights expert also noted that the government presented to the Swiss electorate a comprehensive corporate tax reform package in 2016 (USR III) which included measures to bring Swiss corporate tax regimes in line with OECD standards to combat base erosion and profit shifting (BEPS) of multinational companies. The new law would have outlawed certain tax reduction regimes that are no longer accepted internationally, replacing them with patent-box regimes and other avenues for tax reduction.

In February 2017, the government proposal failed to reach a majority during a public referendum. A few weeks ago, the Federal Council published a revised tax proposal 17 for public consultation with the aim of ensuring that Swiss corporate tax regimes will become compliant with OECD standards.

"I continue to be concerned about the potential human rights impact of the revised tax reform proposal 17 in other countries," Bohoslavsky said.

Essentially the tax reform proposal 17 aims to keep taxation of multinational corporations in Switzerland at low levels to make placing headquarters in Switzerland attractive. While this undoubtedly brings benefits in the form of tax receipts for the country and employment opportunities, it should not be forgotten that harmful tax competition between countries has resulted over the last decades in a dramatic reduction of corporate tax burdens of large corporations worldwide and contributed to the increase of unsustainable public debt in the developing world.

"Therefore, I would like to call upon the Swiss authorities to carry out a social and human rights impact assessment of the tax reform package, which should include an assessment of how the reform will impact on tax revenues available for the realization of economic and social rights within Switzerland and for individuals living abroad, in particular in developing countries."

UN Guiding Principles

Bohoslavsky noted that Switzerland has been a strong supporter of the process that resulted in the adoption of the United Nations Guiding Principles on Business and Human Rights. "In December last year, the Government adopted a National Action Plan for implementing the Guiding Principles in Switzerland after a consultative process with the private sector and non-governmental organizations; an important step that I salute."

The National Action Plan endorses the concept of a smart mix of mandatory and voluntary commitments; however, only a few of its action points refer to any regulatory measures to improve business respect for human rights.

While the National Action Plan is rather comprehensive, it regrettably does not include particular action points in relation to the financial sector of Switzerland, except mentioning the important role played by the Thun Group of Banks, an informal network of 11 major banks aimed at exchanging good practices in implementing the Guiding Principles in the financial sector of large corporate banks.

The rights expert welcomed the leading role of UBS and Credit Suisse in setting up the Thun Group of Banks with the aim of engaging with peer international banks in a discussion and exchange of information on human rights due diligence. However, he shared the concerns voiced by the UN Working Group on Business and Human Rights and other stakeholders that one of its recent discussion papers would unduly limit the responsibilities of banks for preventing and mitigating human rights impacts to which they are directly linked in the context of their client relationship.

He therefore welcomed the fact that the Thun Group recently invited human rights experts and non-governmental organizations to its annual meeting, and hoped that concerns expressed by human rights experts will be taken into account.

"Furthermore, I would like to encourage the Government, Swiss Banking, the Association of Swiss Private Banks and other professional associations to consider developing in dialogue with non-governmental organizations and human rights experts a banking sector agreement on responsible business conduct in Switzerland."

The Dutch Banking Sector Agreement may be a source of inspiration in this context, the rights expert said, adding that in his view there is a need to develop a common understanding and more consistency in what it means to include human rights due diligence in the financial sector.

"In my view, the secret loan scandal in Mozambique pushing the country close to bankruptcy underlines the real need to incorporate the Guiding Principles [on] foreign debt and human rights and UNCTAD's principles for responsible borrowing and lending in such sector agreements."

Sustainable investments

Bohoslavsky welcomed the fact that an increasing number of pension funds in Switzerland have adopted investment policies that include some human rights criteria, including the public pension funds of the cantons of Geneva and Vaud. In December 2015, seven public pension funds managing investment assets totalling over CHF150 billion founded the Swiss Association for Responsible Investments (SVVK-ASIR). The pension funds include the BVK (Zurich canton's civil service pension fund), compenswiss (AHV / IV / EO compensation fund), comPlan, the Swiss Post Office pension fund, the Swiss Federal Railways pension fund, the federal pension fund PUBLICA and Suva.

In total, the volume of assets managed in Switzerland following sustainability criteria has significantly increased in recent years. A market study covering 41 Swiss institutional investors indicates that sustainable investments reached $266 million in 2016.

Violation of human rights was the most important exclusion criteria of asset managers, followed by violation of labour rights, corruption and bribery and disrespect for the environment.

"Private Banks that have specialized in wealth management can similarly integrate human rights approaches in their asset management strategies and in financial products offered to their clients," said the rights expert.

For example, the private bank Lombard Odier excludes, as a general policy at group level, any investments involved in the production or distribution of controversial weapons, including biological weapons, chemical weapons, anti-personnel mines, cluster weapons, depleted uranium and white phosphorus. It is in particular noteworthy that it has also banned investments in financial instruments such as futures, options, swaps, indices and exchange-traded funds directly linked to "essential food commodities" such as wheat, rice, corn and soybean.

Coherence

Switzerland has adopted a human rights policy aiming for coherence and for the protection of human rights at home and abroad. Its government expects that private financial institutions headquartered in Switzerland respect human rights wherever they operate and that they exercise human rights due diligence throughout their business and client relationships.

In recent years, the federal government has undertaken several efforts and achieved progress in curbing illicit financial flows which undermine the rule of law and the enjoyment of human rights in Switzerland and in foreign countries.

"I believe, however, that it is necessary to integrate more systematically human rights considerations into financial policies of public and private institutions based in Switzerland," said Bohoslavsky.

First of all, there is a legal obligation to do so. Second, further embedding human rights in financial policy would enhance the reputation of the Swiss financial market. It would also give further credibility to its human rights policies and to the aim of making Switzerland's financial market a leader in sustainable finance.

"Finally, and this is in my view the most important aspect, it would improve the protection and enjoyment of human rights in Switzerland and abroad," said Bohoslavsky.

"As outlined above, I have identified several areas in which there is room for improvements in the fields of accountability, regulation and supervision of the Swiss financial market and hope that my recommendations will be duly considered."

Making further efforts to implement human rights in the financial field should be considered an evolving duty as asymmetric power relations undermining human rights operating underneath financial markets need to be continuously recomposed, said the rights expert. *(SUNS8548)* ❐

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there are different capabilities amongst members, and amongst their firms and stakeholders, to take greater advantage of these proposed new disciplines?

vi. Have the proponents undertaken an economic impact assessment that demonstrates that their stakeholders are losing out on economic opportunities in the absence of multilateral DR disciplines?

vii. In which members have your stakeholders experienced problems that the disciplines are seeking to address, and has there been any attempt to resolve them bilaterally? Have domestic remedies been exhausted?

viii. In instances where you have felt aggrieved, has the issue been taken up with the competent authorities in the member?

ix. To what extent has the application of GATS Article VI.5 been insufficient in meeting the objectives being sought?

x. How will these disciplines contribute to supporting structural transformation and industrialization for Africa?

xi. Can proponents indicate the basis for making their proposal/s differently from the approaches taken in 2009-11 where separate rules were considered for licensing requirements and procedures and qualification requirements and procedures?

xii. Can proponents clarify whether their proposals would impose obligations only on existing commitments?

xiii. Are there linkages between the proposed DR disciplines and e-commerce and investment?

xiv. What are the proponents' perspectives on DR in an increasingly digital world economy, how do each of the DR elements relate to e-commerce, and what are the implications?

On administration of measures, the African Group raised several pertinent questions:

1. What is the scope of these provisions, and how does this scope relate to the development of measures and transparency provisions?

2. Some proponents have recently introduced changes to their skilled visa policies. To what extent would these proponents themselves be infringing on the proposed DR disciplines, in terms of the general provisions where it says, "These disciplines apply to measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services where specific commitments are undertaken"?

3. How do you define "authorization"?

4. How do technical standards and licensing requirements operate in Mode 1 in relation to the proposed DR disciplines?

The African Group also posed numerous questions on "transparency", "development of measures," including gender equality, and on "development."

It asked the proponents "under which mandate" they are seeking to "address transparency in DR disciplines" and "what do these provisions have to do with trade?"

It asked the proponents to clarify on the "relationship between GATS Article III and the transparency provisions," and "under which mandate are the proponents seeking to expand GATS Article III?"

On gender equality, the African Group sought to know "how would gender issues be taken up in DR disciplines and trade agreements" and the "underlying economic rationale" for such a provision.

"Could those principles and approaches be extended to other poor, disadvantaged or marginalized groups or regions in Members?" the African Group asked.

On development measures, the African Group asked the proponents whether the provisions suggested by them are subjected to their own necessity test.

In short, the proposal by the major industrialized countries along with their allies seeking outcomes on disciplines in domestic regulation at the Buenos Aires meeting fails to address the core issues concerning the recent spate of barriers imposed by major industrialized countries themselves, trade negotiators argued. *(SUNS8547)* ❐

How low can you go?

Regressive tax systems and resort to tax dodging mean the wealthy are not paying their fair share of taxes, explains *Jomo Kwame Sundaram*.

Since the 1950s, there has been a popular dance called the "limbo rock", with the winner being the one who leans back the furthest to get under the bar. Many of today's financial centres are involved in a similar game to attract customers by offering low tax rates and banking secrecy.

This has, in turn, forced many governments to lower direct taxes not only on income but also on wealth.

From the early 1980s, this was sought to be justified by US President Ronald Reagan's embrace of Professor Arthur Laffer's curve which claimed higher savings, investments and growth with less taxes.

Following a long hiatus, Laffer is now making a comeback with the recent election of Donald Trump, who has espoused a similar claim that lower taxes will lead to higher growth, lifting all American boats. It remains to be seen how President Trump will reconcile this with his promise to build and improve infrastructure in the US, which many hope will finally create the basis for the long-awaited recovery following the 2008 financial crisis and the ensuing Great Recession.

With the decline of government revenue from direct taxes, especially income tax, following Laffer's advice, many governments were forced to cut spending, often by reducing public services, raising user fees and privatizing state-owned enterprises.

Beyond a point, there seemed to be little room left for further cuts, while governments had to raise revenue to fund its functions. This increasingly came from indirect taxes, especially on consumption, as trade taxes declined with trade liberalization.

Many countries have since adopted value-added taxation (VAT), touted in recent decades by the International Monetary Fund (IMF) and others as the superior form of taxation: after all, once the VAT system is functioning, raising rates is relatively easy.

The growth of VAT has made the overall impact of taxation more regressive as the rich pay proportionately less tax with all the loopholes available to them, both nationally and abroad.

In contrast, a progressive tax system would seek to ensure that those with more ability to do so, pay proportionately more tax than those with less ability.

After Panama

Although there are many reasons for income inequality, untaxed assets have undoubtedly also increased both wealth and income inequalities at both national and international levels.

Following the Panama Papers revelations, most Western government leaders have pledged tough action against tax evasion and avoidance, especially by those using developing-country tax havens.

In the face of continued failure to deliver on the almost-half-century-old United Nations commitment by developed countries to provide development aid equivalent to 0.7% of their national incomes, then OECD Development Assistance Committee (DAC) chair Erik Solheim proposed greater tax cooperation instead.

After all, many developing countries are not devoid of financial assets, but so much has been taken out and hidden by wealthy elites in private financial institutions, especially in "offshore" tax havens.

But since most using tax havens seek assets in the rich OECD countries, the Paris-based organization has historically focused efforts on very limited matters of concern to their members. Hence, they have blocked efforts to give the UN a stronger mandate to advance international cooperation on taxation, culminating in the modest Addis Ababa Action Agenda declared at the third UN Financing for Development conference in July 2015.

As major users of such facilities themselves, many developing-country elites have been conspicuously silent in the face of the Panama Papers revelations of what they have long enabled and practised. After all, much of what is involved is publicly considered illicit, immoral and even "sinful", even if not illegal. As Warren Buffett and the group of "patriotic millionaires" in the US have noted, the rich currently pay less in tax than most of their lowest-paid employees.

Many tax avoidance schemes are not illegal. But just because they are not illegal does not mean they are not a form of abuse, fraud or corruption.

To tackle the corruption at the heart of the global financial system, tax havens need to be shut down, not reformed.

"Onshoring" such funds, without prohibiting legitimate investments abroad, will ensure that future investment income will be subject to tax as in the US and Canada.

If not compromised by influential interests benefiting from such flows, responsible governments should seek to enact policies to:

- Detect and deter cross-border tax evasion;
- Improve transparency of transnational corporations;
- Curtail trade mis-invoicing;
- Strengthen anti-money-laundering laws and enforcement; and
- Eliminate anonymous shell companies. *(IPS)* ❐

Jomo Kwame Sundaram, a former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007.