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UN expert calls for reform of credit rating agencies

Instead of issuing warnings about potential debt crises, credit rating agencies have often contributed to such crises due to structural flaws in their operations. A report by an independent UN rights expert underlines the need for reform of these agencies, which have been called "the fire alarm that never rings".

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Credit rating agencies need fundamental reform, says UN expert

Beset by conflicts of interest and prone to making inaccurate assessments, credit rating agencies have played a part in triggering and intensifying debt crises, says a UN rights expert calling for reforms to address the structural defects of these institutions.

by Kanaga Raja

GENEVA: Reform of credit rating agencies must be part of the reform of the global financial architecture, and these agencies should play a gatekeeper role in debt crisis prevention instead of contributing to the debt crisis.

This was one of the main conclusions highlighted by Yuefen Li, the Independent Expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, in a report presented to the UN Human Rights Council on 3 March.

The Council is currently holding its 46th regular session, which concludes on 23 March.

In presenting her report, Li said that the COVID-19 pandemic has triggered multiple social, economic and human rights crises affecting millions of people. "Debt levels, especially for public and external debt, have been rising fast, above all for developing countries, undermining the pandemic response and reversing poverty reduction and development progress."

More than 50% of low-income and least developed countries are assessed at high risk of or already in debt distress, while five developing countries defaulted on their sovereign debt in 2020.

"If the international community does not take comprehensive, effective and immediate steps to provide substantial debt relief and financial support, many developing countries on the verge of default would sink. And with them, their most vulnerable population," said the Independent Expert.

Li said that for decades, credit rating agencies have had an enormous influence on lending decisions of public and private investors and on market sentiments. In other words, they have a decisive impact on borrowing conditions and interest rates of sovereign and private debts as well as on access to the international capital market. "This is not news. In fact, past financial and debt crises, in particular the subprime mortgage crisis and the Asian financial crisis, have exposed the inherent structural problems of these agencies and their failure to perform the role they are supposed to."

Many reform proposals have been put forward over the years, Li said, but unfortunately, not much progress has been made so far on those reforms. She said that in her view, at the present juncture, the reforms can no longer be postponed, particularly to prevent further regression on economic, social and cultural rights because of the agencies' unfettered activities.

Noting that credit rating agencies have been called "the fire alarm that never rings," Li said instead of warning of the coming of the crisis, they end up contributing to the crisis.

Need for reform

In her report, Li said that despite various proposals having been made over recent decades, the structural defects of credit rating agencies, the market distortions they create and the errors in their assessments have yet to be amended. The amelioration of credit ratings has been marginal, she added.

She noted that the "big three" credit rating agencies, namely, Standard & Poor's, Moody's Investors Service and Fitch Ratings, continue to dominate over 92% of the market and there is still no meaningful competition within this oligopolistic credit rating system.

"Accountability and transparency have not improved much. Current existing regulations have not fundamentally altered the market structure for credit rating agencies, including the massive conflict of interest," she said.

"Many good proposals have either remained on paper or have been stalled or shelved. Yet the importance of credit rating has not diminished, as demonstrated by the difficulties encountered in the implementation of the Debt Service Suspension Initiative."

According to the report by the Independent Expert, credit rating agencies have an enormous influence on market expectations and the lending decisions of public and private investors. However, past financial and debt crises, in particular the subprime mortgage crisis, have exposed the inherent structural problems of credit rating agencies and their failure to perform the role they are supposed to.

"Even though many reform proposals have been put forward in recent decades, especially since the global financial crisis, not much progress has been made owing to resistance from these agencies and a lack of political will of States and regulators."

As part of international efforts to respond to the impact of the COVID-19 pandemic, some international initiatives have been introduced to address the mounting debt burden of vulnerable countries, including the endeavour to reduce the debt service burden of poor countries so as to allow them to use their limited financial resources to save lives and livelihoods. However, said Li, the fear of possible credit rating downgrades has deterred the implementation of the Debt Service Suspension Initiative of the Group of 20. Some sovereign downgrades have also increased financial market volatility and the difficulty of these countries to gain access to new sources of financing.

"The debt situation is going to be even more challenging in 2021 than it was in 2020, when most countries suffered negative gross domestic product (GDP) growth, exploding fiscal deficits, rising unemployment and rocketing debt levels," she cautioned.

Developing countries, in particular low-income countries, are at greater risk of defaulting on their sovereign debt, and over 50% of low-income countries are assessed to be at high risk of or in debt distress, according to the joint International Monetary Fund-World Bank Debt Sustainability Framework for Low-Income Countries.

There are currently unprecedented possibilities of several defaults taking place in parallel. Meanwhile, countries' ability to use fiscal and monetary expansionary tools has become much more constrained.

"Increasing levels of private debt have been a challenging problem for developing countries, including low-income countries, for some years already. During a health and economic crisis, the possibility of this kind of debt turning into a contingent liability would increase, adding a debt burden to sovereigns," said the Independent Expert.

"The COVID-19 pandemic has once again reminded the international community of the urgent and critical need to reform credit rating agencies in order to reduce the possibilities of a debt crisis," said Li.

She added that implementing structural reforms to credit rating agencies, as an element of the international debt architecture, would also contribute to mitigating the negative social and economic impact of these crises, which can lead to reversals of social and economic progress almost overnight, bringing immense suffering to a vast part of the population of a country.

Debt crises often affect most people living in poverty, especially women, indigenous peoples and informal workers, as well as small enterprises and small-scale farmers, adding millions of people to the ranks of the unemployed. "A social fabric already weakened by the pandemic, with widening income and gender inequalities, is bound to suffer considerably from an added debt crisis," said the Independent Expert.

She said that the reform of credit rating agencies should be part of the reform of the global financial architecture, adding that credit rating agencies should play a gatekeeper role in debt crisis prevention instead of contributing to the debt crisis.

"A more effective human rights-based international financial architecture is required now more than ever in order to respond to the socioeconomic downfall resulting from the global pandemic."

Li said that in a time of profound urgency to address debt crises and to ensure the investment of limited financial resources in the realization of the human rights of millions of people in despair, it is essential to address the need for accountability, transparency and regulation of credit rating agencies.

According to the Independent Expert, far from abating, the COVID-19 pandemic has intensified in 2021 with a rapid resurgence of cases in some countries and, worse still, with new and more contagious virus strains. As a result, many countries around the world have reintroduced lockdowns and travel restrictions.

With extraordinary fiscal and monetary expansionary policies having been adopted by central banks and fiscal authorities worldwide, 2020 did not see a systemic debt crisis even though some countries went through debt defaults and debt restructuring primarily due to pre-pandemic debt problems and the knock-on effects of the pandemic, said Li.

"As the end of the pandemic seems to become more remote than expected and as the synchronized global economic recession persists, concerns are rising about how to keep a systemic world debt crisis at bay."

Li said that the fiscal and monetary ammunition of countries suffering from a high debt burden seems to be mercilessly insufficient. According to the International Monetary Fund, advanced economies deployed the equivalent of 20% of GDP on pandemic response, and low-income countries only 2% of GDP.

"With negative GDP growth, fast-shrinking government revenue, the drastic contraction of international trade and foreign direct investment, the sudden stop of tourism and the free fall of remittances, it is natural that the debt indicators of developing countries have been deteriorating," she said.

According to the latest data, the total external debt stocks of low-income countries eligible for the Debt Service Suspension Initiative rose 9% in 2019 to $744 billion, equivalent on average to one-third of their combined gross national income. Lending from private creditors was the fastest-growing component of the external debt of Debt Service Suspension Initiative-eligible borrowers, up fivefold since 2010. Obligations to private creditors totalled $102 billion at the end of 2019. The debt stock of the Debt Service Suspension Initiative-eligible countries to official bilateral creditors, composed mostly of the Group of 20 countries, reached $178 billion in 2019 and accounted for 27% of the long-term debt stock of low-income countries.

Countries with an unprecedented high debt burden prior to the pandemic are facing even more unsustainable debt

and may face insolvency sooner or later, said the Independent Expert. "These would not be only low-income countries; many emerging economies, small island countries and middle-income countries are also facing a significant risk of unsustainable debt."

The pandemic has exacerbated existing debt vulnerabilities in many countries, Li said, adding that it is difficult to raise new money from any source during the pandemic. "Meanwhile, their revenue is declining and the expenditure to sustain social and economic order in their countries has been increasing quickly."

"If there is a wall of sovereign defaults, and taking into consideration a debt landscape much more complex than before with different forms of debt instruments and diverse and multiple creditors," Li asked, "what kind of role would credit rating agencies play?"

"Would they once again hand out rapid-fire downgrades, plunging countries into even worse economic and social chaos? Would they continue to deter international efforts to assist countries in debt trouble?"

The United Nations and international financial institutions have called for urgent reforms of the international debt architecture, Li noted. The reform of credit rating agencies has not been clearly identified in an article by the International Monetary Fund calling for the reform of the debt architecture, but this reform is long overdue, she said.

Influence of credit rating agencies

Credit rating agencies play a crucial role in the international financial system, said the Independent Expert. They are supposed to act as a bridge between lenders and borrowers by reducing information asymmetry through the provision of objective, independent and expert information on issuers or borrowers of bonds and other debt instruments and fixed-income securities.

As the purpose of lending is to receive a return on the lender's investment, the major concern is centred around the creditworthiness of the borrower, that is, the ability of a government or an enterprise to observe its obligations to the debt. Reliance on the information of credit rating agencies is especially heavy among institutional investors, said Li.

Credit rating agencies provide analyses to evaluate the borrowers' financial situation, as well as their political and economic conditions, based on which the agencies also would give their opinion or judgment in letter form (for example, credit ratings such as A, B, C and so forth), which varies among agencies. Credit ratings would influence not only investors' portfolio allocation decisions but also the pricing of the debt instruments, such as the interest rates required for the debt to be repaid. Therefore, credit rating agencies are market makers and movers and have significant impacts on the allocation of financial resources and the cost of capital, said the Independent Expert.

If indeed credit rating agencies can provide expert, independent, objective and forward-looking information, they would play the role of preventing debt crises by guiding investment decisions, avoiding over-borrowing and assisting with debt crisis resolution by smoothing capital flows for countries facing temporary liquidity problems, said Li. Their risk analysis and evaluation at country and enterprise levels, if done properly, should forewarn the coming of a debt crisis and contribute to debt crisis prevention. While debt can promote economic development if used wisely, in order to allow investors to lend their money to the borrowers who need their unused capital, credit rating agencies are needed to fill in the information gap.

"The main issue at hand is that credit rating agencies are not structured to be in a position to take a balanced and objective view of the borrower's financial situation and its capacity to service or repay the debt," said Li.

She noted that as the subprime mortgage crisis of 2007-09 erupted and in its aftermath, many scholars and institutions expressed the view that credit rating agencies had contributed to the crisis in the United States, the subsequent global financial crisis of 2007 and the escalation of the eurozone debt crises. These crises brought negative impacts on the economic and social situations in relevant countries, discredited the credit rating agencies for what was identified as their role in the crises, and shed light on the inherent defects of the agencies.

"The operations of credit rating agencies have long been suffering from multiple problems and failures, including the characteristics of an oligopoly; conflicts of interest; pro-cyclicality in rating; inaccuracy or errors in their statements, rating warnings and downgrades; [and] a lack of transparency … and accountability," said Li.

She said while credit rating is a big international business, the credit rating market is highly monopolized by three agencies, namely Standard & Poor's, Moody's Investors Service and Fitch Ratings, which also have a cross-holding of shares among them, forming an oligopolistic position in the market of private and public debt. Although there are some smaller credit rating agencies in the world, according to a US Securities and Exchange Commission (SEC) report from January 2020, the "big three" control more than 94% of outstanding credit ratings, with Standard & Poor's and Fitch Ratings occupying about 82%.

The three agencies are de facto private and profit-seeking companies. However, since 1975, following the introduction of new rules by the SEC, they have been recognized as "official" rating agencies and each named a nationally recognized statistical rating organization. This status has elevated their profile and importance while giving more credibility to their judgments. In addition, this status has further strengthened and maintained the oligopoly by making market entry barriers more formidable, thus reducing the possibility for the entrance of medium and small competing companies, said Li.

The lack of competition and the privileged position these agencies enjoy appear to give the "big three" too much comfort and too little incentive to strive to hand out objective judgments of sovereign and private borrowers, she added.

Conflict of interest

According to the Independent Expert, conflict of interest is considered a serious problem in the financial world and offenders, when condemned in a court of law, are subject to punishment. However, there seems to be more tolerance for conflicts of interest among credit rating agencies.

"Briefly, it can be said that their business model, usually referred to as the 'issuer pay' model for their credit ratings, is at the heart of the conflict of interest. To give credit rating judgments to the very clients who pay them for their assessments casts a large shadow of doubt over the ability of credit rating agencies to give objective, impartial assessments," said Li.

"It is even harder to understand or trust the levels of objectivity when credit rating agencies are partners in the

design of the investment products or financial engineering instruments, such as mortgage-backed securities, that they rated before the subprime mortgage crisis, reaping huge profits from the instruments they themselves had rated as AAA level. Therefore, credit rating agencies have, in many cases, been paid for positive ratings."

The conflicts of interest of credit rating agencies have been considered one of the major underlying factors of the mortgage bubble that led to the dramatic impact on the right to housing and caused the global financial crisis, which set back many economies by a decade, said Li.

In 2015, Standard & Poor's paid about $1.4 billion to settle allegations that it had boosted ratings on mortgage-backed securities in the run-up to the crisis in the US, including in different states in the country, admitting that it had held off on downgrades for fear of losing market share. Moody's Investors Service paid $864 million in 2017 to settle similar charges.

Li noted that the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System (also referred to as the Stiglitz Commission) concluded that the credit rating system was one of the specific areas most urgently in need of reform. It identified as a key problem the fact that credit rating agencies were ineffective and plagued with conflicts of interest.

"Conflict of interest is the major underlining reason for many failures and errors by credit rating agencies," said Li. "More transparency and disclosure could facilitate better performance. However, this defect of credit rating agencies cannot be addressed through enhanced transparency alone, and fundamental reforms of their business model are needed."

"The fire alarm that never rings"

According to the Independent Expert, the ratings of credit rating agencies have a tendency to be lax or overly optimistic at the top of the economic cycle and too severe at the bottom of the business cycle.

Pro-cyclical ratings could encourage over-borrowing during good times and deepen the debt crisis during a crisis by triggering market panic and the resultant capital outflows and currency depreciation, Li said.

During an upswing in the economic cycle, overly optimistic credit ratings, which underestimate default risks in order to attract investors, can lead to over-borrowing, which sows the seeds for a debt crisis.

Conversely, during a period of economic downturn, when countries and enterprises require money (liquidity) to service debt and bridge fiscal gaps, such as in the context of the critical need for social investment in the midst of the COVID-19 pandemic, credit watch announcements or downgrades from credit rating agencies can lead to capital outflows and a loss of access to the international capital market owing to reputation damage caused by the downgrades. A reduction of inflows and an increase of outflows of capital from public and private investors combined with an inability to borrow new money from the international capital market could turn a liquidity problem (lack of money) into an insolvency crisis (inability to service debt) because of the credit crunch, which has been happening to some countries during the COVID-19 pandemic.

"Credit rating agencies have never once acted as a fire alarm to warn about the coming of a financial or debt crisis, which they could have done through their analyses and judgments of creditworthiness of countries and enterprises," said Li. "Some people have called them the fire alarm that never rings. Instead of preventing debt crises, credit rating agencies have contributed to the formulation of financial or debt crises, such as the global financial crisis of 2007, and increased the severity of the crisis, such as the eurozone debt crises and the current COVID-19 pandemic."

In the Asian financial crisis of 1997, the global financial crisis of 2007 and the eurozone debt crises of 2009, there was evidence of overly optimistic ratings and at times completely wrong public statements and warnings, which fuelled the pre-crisis lending boom and the capital inflows and resulting asset bubbles in some cases. Then, when the crisis set in, there were waves of fast credit downgrades, which contributed to massive capital outflows and a loss of access to capital markets by enterprises and sovereigns. "These actions exacerbate financial market volatility, make governments' efforts to contain debt crises ineffective and increase human suffering."

Pro-cyclical downgrades can trigger a self-fulfilling prophecy of debt crises, said Li. "Credit rating agencies' downgrades and negative statements can, in most cases, shift the sentiments of the capital market towards a debtor, and sometimes the multiplier effect can be triggered overnight. The 'self-fulfilling prophecy' effect would wipe out the efforts made by governments to resolve a debt problem."

Credit rating agencies have also shown a preference for ideological beliefs in their ratings, Li said. She cited the United Nations Conference on Trade and Development (UNCTAD) as stating: "Credit rating agencies' assessments appear to be based on a bias against most kinds of government intervention. In addition, they often associate labour market 'rigidities' with output under-performance, and a high degree of central bank independence as having a positive impact on debt sustainability. At the same time, their ratings are significantly correlated with indicators that measure the extent to which the economic environment is 'business-friendly', regardless of what impact this might have on debt dynamics." Some academics have also affirmed that credit rating agencies' methodology in sovereign ratings shows a preference for countries implementing austerity measures.

One of the reasons why credit rating agencies are not held accountable for their inaccurate or incorrect ratings on the ground, said Li, is that the credit ratings of debt instruments are considered as opinions and not judgments. Downgrades and credit watch announcements are considered as opinions expressed by credit rating agencies regarding the creditworthiness of enterprises and sovereigns. Therefore, they have been shielded from liability by the first amendment of the US Constitution ensuring "freedom of speech", even though this kind of speech or opinion has the power to create volatility in the financial market, including massive capital inflows and outflows for developing countries in particular. With this accountability gap, investors and borrowers cannot be protected from mistakes made by credit rating agencies or any abuse of power by these agencies.

Recent crises have highlighted the tremendous importance of ensuring that credit rating agencies play their role properly, said the Independent Expert. "Therefore, it is not surprising that many proposals, especially from the United States and the European Union, were made immediately after the subprime mortgage

crisis and subsequent global financial meltdown of 2007 and the eurozone debt crises of 2011 to address the inherent structural defects of the agencies and the lack of regulation and accountability."

However, most of these proposals have run into various challenges and resistance, she said, adding that thus far, little progress has been made in reforming credit rating agencies and most of the reform proposals have been either stalled or shelved completely, mainly due to strong resistance from the agencies. The reliance on the "big three" agencies will likely continue for the near future, she said.

The Independent Expert made a number of recommendations in her report, including reducing or breaking the current oligopoly of the "big three"; addressing the issue of conflict of interest; introducing a system of monitoring and accountability of credit rating agencies; strengthening the incorporation and application of relevant international human rights standards and norms in the context of the activities of credit rating agencies; suspending the issuance of ratings during a crisis when there are international efforts to introduce mechanisms to deal with the crisis; and enhancing disclosure and transparency. *(SUNS9299)*

The Third World in the Third Millennium CE

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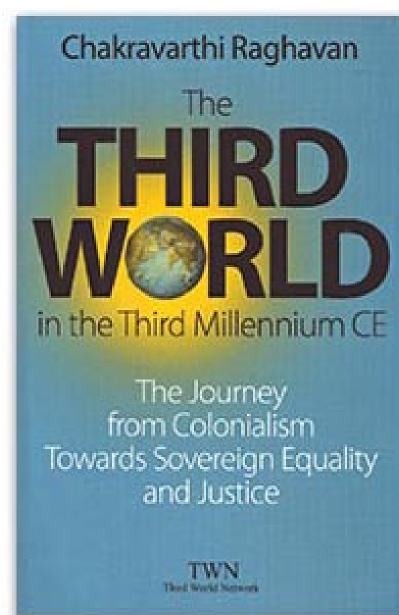

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New WTO DG delivers "divisive" trade agenda

In her first major address at the WTO after taking office as Director-General, Ngozi Okonjo-Iweala appeared to be leaning towards the priorities pushed by the major developed-country members.

by D. Ravi Kanth

GENEVA: The new WTO Director-General Ngozi Okonjo-Iweala has apparently delivered a "divisive" trade agenda for the WTO's upcoming 12th Ministerial Conference (MC12), allegedly seeking to promote the priorities of the United States, the European Union and Japan in accelerating work on non-mandated issues such as the informal Joint Statement Initiatives (JSIs), disciplines on industrial subsidies and state-owned enterprises, and reforming special and differential treatment to provide "policy space" for the least-developed countries (LDCs).

In her first major address to the WTO's General Council (GC), on 1 March, the new DG emphasized that a business-as-usual approach will not work, arguing that trade ministers want outcomes at the WTO, otherwise they will lose confidence in the organization's ability to deliver results.

She called for finalizing the work programme for MC12 – which will take place in Geneva in the week of 29 November – continuing the dialogue on the proposed TRIPS waiver to combat the COVID-19 pandemic while discussing with Big Pharma as to how vaccines can be rapidly rolled out, and accelerating work on the controversial JSIs regardless of the questions being raised about their legal status.

"Permit me to speak frankly," Okonjo-Iweala said at the meeting, suggesting that if things don't change, trade ministers will change their stand on the WTO.

"But there is hope," she maintained, saying she heard that the 56 statements made by delegations at the informal Doha Trade Negotiations Committee (TNC) meeting on 25 February "were virtually identical to the priorities listed in my acceptance speech" made at a special GC meeting on 15 February.

She said she heard that delegations want the following priorities to be taken up:

1) Address the COVID-19 pandemic, particularly public health and revival of economic recovery;
2) Conclude the fisheries subsidies negotiations;
3) Reform the dispute settlement system, including the restoration of the Appellate Body;
4) Action on agriculture, domestic support, market access and the exemption for the World Food Programme to procure food items without any restrictions;
5) Complete existing mandates on public stockholding programmes for food security, special safeguard mechanism, and cotton;
6) Work on industrial subsidies and state-owned enterprises and special and differential treatment;
7) "Without neglecting the questions raised on the legal status of JSIs, delegations want forward movement on JSIs especially e-commerce, services domestic regulation, investment facilitation, and MSMEs [micro, small and medium enterprises]";
8) Work on trade and environment and climate change;
9) Work on LDC-specific issues such as services waiver and graduation of LDCs; and
10) Work on issues concerning small and vulnerable economies.

Surprisingly, she did not mention the WTO's 1998 work programme on e-commerce involving the moratorium on customs duties on electronic transmissions, and other multilateral issues, said a person who asked not to be quoted.

Okonjo-Iweala said that she wants to meet delegations individually and "listen and brainstorm" with them to finalize the "deliverables" at MC12.

DG's responsibilities

Clearly, the new DG's remarks at the GC meeting have raised alarm over her priorities, which appear to be inconsistent with the DG's role as per the Marrakesh Agreement Establishing the WTO, said a person who asked not to be quoted.

According to paragraph 4 of Article VI of the Marrakesh Agreement, "The responsibilities of the Director-General and of the staff of the [WTO] Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties."

In effect, the specific role and duties of the DG are well-defined to ensure that the DG remains impartial and independent without attracting the wrath of the members, the person said.

Her independent and impartial discharge of duties as the DG is a sine qua non for addressing a range of systemic crises being faced by the WTO. These crises are largely due to:

1) unilateral trade policies by the United States;
2) a dysfunctional two-stage dispute settlement system whose enforcement function has been almost destroyed by one country;
3) mandated multilateral negotiations being undermined by powerful members;
4) attempts to change the WTO's negotiating function without any clear idea of the structure, scope and objectives of the proposed reforms; and
5) the questionable legal status of the JSIs on e-commerce, investment facilitation, MSMEs and domestic regulation in services.

While Okonjo-Iweala's latest statement is a shot in the arm for the US, the EU, Japan and Canada to pursue their non-

mandated and legally dubious JSIs, it is an early warning that the new DG might not advance the "development and inclusive" agenda proposed by the developing countries in reforming the WTO, the person said.

Clearly, the new DG's remarks may amount to causing confusion and uncertainty because of their excessive reliance on the trade priorities being advanced by the US, the EU, Japan, Canada, and other industrialized and some developing countries, the person suggested.

Moreover, they appear to be a violation of the duties assigned to the DG in Article VI of the Marrakesh Agreement.

Further, the delay in finalizing her cabinet and the new Deputy Directors-General has apparently caused some dismay within the secretariat, said a person familiar with the situation.

The time has come for the WTO to play a major role in ensuring the centrality of development instead of pursuing the same old trade liberalization policies that are being discarded by the powerful members themselves in the face of the COVID-19 pandemic, the person said. *(SUNS9296)*

Developing countries demand text-based negotiations on TRIPS waiver

The WTO General Council meeting on 1 March heard calls from developing countries to begin crafting the text of a decision to suspend COVID-19-related intellectual property rights in order to better tackle the pandemic.

by D. Ravi Kanth

GENEVA: Almost two dozen countries have demanded urgent text-based negotiations on concluding an agreement on the TRIPS waiver in combating the COVID-19 pandemic.

The proposed waiver seeks to temporarily suspend certain provisions of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) relating to copyrights, industrial designs, patents, and protection of undisclosed information, with the aim of ramping up global production of vaccines, therapeutics and diagnostic tools for the prevention, containment and treatment of COVID-19.

Amidst a groundswell of support within the WTO and from international civil society organizations for the waiver, the opponents of the waiver seem to have toned down their positions, said a person who asked not to be quoted.

At the WTO General Council (GC) meeting on 1 March, developing countries coalesced around the waiver proposal co-sponsored by 57 countries with support from some 61 developing countries, said the person.

Surprisingly, the United States and the European Union, the two major opponents, remained silent at the meeting, the person said. The other major opponents such as Japan and Switzerland made mild statements without challenging the waiver, while New Zealand said that it wants constructive discussions on the scope of the waiver.

Continued consideration

In her statement at the meeting, the chair of the WTO's TRIPS Council, Ambassador Xolelwa Mlumbi-Peter from South Africa, delivered a short report saying that "at the meeting of the TRIPS Council on 15-16 October 2020, India and South Africa introduced document IP/C/W/669, requesting a waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19, which had been circulated on 2 October 2020 and has since been co-sponsored by the delegations of Kenya, Eswatini, Mozambique, Pakistan, Bolivia, Venezuela, Mongolia, Zimbabwe and Egypt."

Recently, the African Group and the least-developed countries (LDCs) also co-sponsored the proposal, bringing the total number of co-sponsors to 57.

Mlumbi-Peter said "the Council continued its discussions under that agenda item at informal meetings on 20 November and 3 December, as well as at its resumed meeting on 10 December 2020. Following the status report to the General Council on 16-17 December 2020, the Council continued its consideration of the waiver request at informal meetings on 19 January and 4 February 2021, and at its formal meeting on 23 February 2021."

"At those meetings," she said, "delegations highlighted the common goal of providing timely and secure access to high-quality, safe, efficacious and affordable vaccines and medicines for all."

The chair said that "delegations exchanged views, asked questions, sought clarifications and provided replies, clarifications, and information, including through documents IP/C/W/670, IP/C/W/671, IP/C/W/672, IP/C/W/673 and IP/C/W/674, on the waiver request but could not reach consensus, including on whether it is appropriate to move to text-based negotiations."

Further, "delegations indicated a need for further discussions on the waiver request and views exchanged by delegations," she said.

"This means that the TRIPS Council has not yet completed its consideration of the waiver request. The TRIPS Council will therefore continue its consideration of the waiver request and report back to the General Council as stipulated in Article IX:3 of the Marrakesh Agreement," the chair explained.

The DG's "camouflaged" position

Speaking on the COVID-19 pandemic at the GC meeting, the new WTO Director-General Ngozi Okonjo-Iweala acknowledged for the first time that "we have a demand for a TRIPS waiver by a growing number of developing countries

and the dialogue is intensifying."

In her acceptance speech delivered at a special GC meeting on 15 February after being appointed DG, Okonjo-Iweala had remained silent on the waiver.

Instead, she spoke about a "third way" in her acceptance speech "to broaden access through facilitating technology transfer within the framework of multilateral rules, so as to encourage research and innovation while at the same time allowing licensing agreements that help scale up manufacturing of medical products."

However, the proposed "third way" seems to be more of the "same way" – a business-as-usual approach that has failed to engage all potential manufacturers, especially in developing countries, and to increase supply so as to meet global demand. One year since the onset of the pandemic, equitable access remains elusive. Historically, promises of technology transfer in the context of WTO rules have largely remain unfulfilled, and there is no evidence to suggest that this time the situation will be any different, especially given the "voluntary" nature of the approach.

That "third way" is now "camouflaged" in Okonjo-Iweala's GC statement on 1 March, said a trade envoy who asked not to be quoted.

At the GC meeting, she said, for example, that "whilst this [the discussion on the TRIPS waiver] is happening, I propose that we 'walk and chew gum' by also focusing on the immediate needs of dozens of poor countries that have yet to vaccinate a single person."

She wanted the pharmaceutical companies "to work with us [the WTO] on know-how and technology transfer now," suggesting that there will "soon be a world manufacturing convention where we can seek to build this partnership."

It is pretty confusing as to what she meant by "a world manufacturing convention where we can seek to build this partnership," said a person who asked not to be quoted.

The new DG said she hopes that "we can initiate a dialogue and information exchange between us [the WTO members] and representatives of manufacturers' associations from developing and developed countries."

Effectively, she has hidden the "third way" in her latest GC statement by alluding to working with companies and a "world manufacturing convention", the person said, adding that the proposal is likely aimed at distracting discussions away from text-based negotiations on the TRIPS waiver.

Okonjo-Iweala, who was previously Board Chair of Gavi, the Vaccine Alliance, did acknowledge a problem raised by the waiver proponents that "there is serious supply scarcity and some countries are outbidding COVAX and diverting supplies." She said "the world has a normal capacity of production of 3.5 billion doses of vaccines and we now seek to manufacture 10 billion doses," adding that "this is just very difficult, so we must focus on working with companies to open up and license more viable manufacturing sites now in emerging markets and developing countries."

The interim solution suggested by Okonjo-Iweala is as good as dead on arrival because she fails to recognize that for Big Pharma, profits and patents come before saving human lives, said another person who asked not to be quoted.

"The time to act is now"

In a sharp statement at the GC meeting, South Africa's TRIPS negotiator, Mustaqeem De Gama, said that, as apparent from the TRIPS Council chair's report, the "co-sponsors [of the waiver proposal] provided various clarifications and written replies to address issues and questions raised by other WTO members in various formats, including in formal and informal meetings of the TRIPS Council, small group and bilateral meetings."

He said that members "have not yet reached consensus on this matter, therefore, the co-sponsors, which now include both the African Group and the LDC Group, are in favour of moving to text-based discussions based on Article IX:3 of the Marrakesh Agreement."

Citing the DG's remarks that members "do not have time, in order to save lives, this issue must be addressed in the shortest possible time frame," De Gama said "it is unlikely that enough vaccines will be manufactured in 2021 or even 2022 to meet the global demand or to achieve global population immunity."

He said that while the DG pointed to the gap between the normal production capacity of 3.5 billion doses and the manufacturing target of 10 billion, "the global need is likely to be greater than 10 billion doses, given that the world population is 8 billion, and generally 2 doses are required, and with mutations emerging, populations will require to be re-vaccinated."

The South African negotiator drew attention to the "unused capacity [that] exists in the developing world which should be accessed in order to ramp up production in the shortest possible time."

He argued that "attempts must be made to engage and allow all possible producers across the world to scale up production," suggesting that "up to this point voluntary approaches have not worked."

"What we are proposing is a limited scope and a temporary waiver that would provide countries with the policy space needed to collaborate in research and development (R&D), manufacturing, scaling up, and supplying COVID-19 tools which are currently in short supply," De Gama said.

He emphasized that "the waiver is an instrument that is provided for in the WTO legal framework in exceptional circumstances," adding that "no one can dispute that COVID-19 is an unprecedented crisis facing the global economy today."

The proponents are ready to demonstrate their flexibility "to engage on the scope and timeframe for the application of the waiver and we are ready to engage in constructive text-based discussions with members towards a solution," De Gama said.

He warned that the world cannot afford any more delays and it should be the most urgent priority for the WTO. "History will judge us harshly should we fail to provide a credible response to this crisis. The time to act is now."

While praising the countries that made "generous financial contributions" to international collaborative mechanisms such as COVAX, De Gama said "it is quite evident that COVAX has not yet secured sufficient funding for an adequate number of vaccines to reach its goal of 20% coverage for all participating countries in 2021." This, he said, poses a challenge for many countries which primarily rely entirely or largely on COVAX to secure access to vaccines.

"Only truly global and inclusive solutions will save lives, the waiver is the only possible way to address universal, equitable and timely access to life-saving medical products, including vaccines, diagnostics and therapeutics," he concluded.

True vaccine internationalism

India's Ambassador to the WTO Brajendra Navnit said the proponents of the waiver have answered all questions and provided evidence about how intellectual property rights remain a main hindrance to ramping up production of COVID-19 diagnostics, therapeutics and vaccines.

He cited a recent study which estimated that the global economy stands to lose as much as $9.2 trillion if the international community fails to ensure developing economies access to COVID-19 vaccines. Thus, he said, "advanced economies, even if they vaccinate all of their citizens, will remain at risk of a sluggish recovery with a drag on GDP [gross domestic product] if infection continues to spread unabated in emerging markets."

The Indian envoy quoted UN Secretary-General Antonio Guterres as having said that "the progress on vaccinations has been wildly uneven and unfair, and that more than 130 countries have not received a single dose." The Secretary-General has warned that "if the virus is allowed to spread like wildfire in the global South, it will mutate again and again and this can prolong the pandemic significantly, enabling the virus to come back to plague the global North," said Navnit.

Therefore, "to slow down the virus's ability to infect new people and mutate further, we need true vaccine internationalism and [the] TRIPS waiver is an effective and pragmatic way to achieve it," he argued.

Navnit also addressed questions raised by some members as to whether the waiver is a proportional response to the pandemic. He said that since the outbreak of the pandemic, almost every country implemented or is still implementing lockdowns of some sort to curtail the spread of COVID-19, but it does not mean that authorities are against the principle of "right to freedom of movement". Likewise, while "governments worldwide have introduced fiscal packages to the tune of billions of US dollars to help the recovery of ailing economies", that "does not mean that they have deviated from their stated objective of fiscal consolidation towards fiscal profligacy".

"In the same light, the temporary waiver from certain provisions of the TRIPS Agreement by following due process does not mean that the co-sponsors are against the principle of intellectual property rights," he clarified.

He reminded members that "we should not forget that research and innovation during this period has been spearheaded by massive public funding, expedited regulatory approvals, and global collaboration."

It is little wonder that "the global community has resorted to exceptional measures in the exceptional circumstances of the COVID pandemic, and the waiver should be seen in similar vein," he emphasized.

According to the Indian envoy, "globally, governments have intervened to suspend air transport and restrict mobility in order to prevent the spread of coronavirus" and "sectors like civil aviation, travel and tourism, hospitality, small businesses including MSMEs [micro, small and medium enterprises] continue to be severely impacted by such state interventions." He drew attention to the sharp drop in trade in travel services of 68% in the third quarter of 2020 as compared with the same period in 2019. He said trade in transport services also declined by 24% over the same period. These sectors, he said, are also important for growth and employment.

Then "why are commercial interests of only a few [pharmaceutical] companies so sacrosanct?" Navnit asked.

"If it is to preserve incentives to innovate, then such commercial loss, to the tune of few tens of billions of USD at the maximum, can always be compensated by further incentives through pooling of public funding and global coordination," he suggested. "On the other hand, one percent improvement in global GDP from the baseline scenario will give $850 billion worth of global output."

"Therefore, an outcome on the waiver will not only help in saving valuable human lives but will also give a comforting signal to boost consumer confidence in the economy and will accelerate the recovery of world trade and global GDP," he emphasized.

Responding to claims raised by opponents of the waiver that it would come in the way of the COVAX facility, the Indian envoy said that the waiver "is only going to aid in meeting the final objective of COVAX."

He said that COVAX is a demand-side initiative which does not address supply-side constraints. But if members "do not address supply-side issues, then we will not be able to increase the production of vaccines". In this regard, the waiver "will help the COVAX mechanism by augmenting the manufacturing capacity globally."

Navnit said the proponents of the waiver "cannot continue to engage in endless discussions while millions of lives and livelihoods are lost to the coronavirus pandemic." Countries need "concerted efforts by all WTO members to ensure that the WTO makes a meaningful contribution to defeat COVID-19 and prove that the WTO can indeed deliver in crisis situations."

He said "the proponents are ready to engage in good faith and have frank discussions on the text of the waiver, relating to both its duration and scope, in order to operationalize the waiver in the shortest possible time."

He urged members "to reach consensus on the waiver proposal to ramp up production for the cause of truly ensuring fair, equitable and affordable access to COVID-19 products in a timely manner."

The proponents "sincerely hope that the proposal will reach a common landing zone and not suffer the repeated blocking of text-based negotiations," he concluded.

The African, Caribbean and Pacific (ACP) Group thanked the co-sponsors of the waiver proposal for "their hard work, and take this opportunity to invite other members to engage constructively with a view to finding a landing zone."

"In order to move to such a landing zone, the ACP Group would support a move to text-based discussions," it said, emphasizing that "this seems to be the most effective way to tailor the waiver to a consensus approach without being tied up in a continuous evidentiary loop."

The African Group pointed to "the positive calls from many quarters that opposition to the TRIPS waiver may further exacerbate a dangerous North-South divide when it comes to COVID vaccines and therapeutics towards suppressing the pandemic on a global scale, with the goal that no one is safe until everyone is safe."

"Encouraged by such calls and as the TRIPS Council continues the consideration of the waiver proposal, the African Group supports that we shift to text-based negotiations." *(SUNS9297)*

Proponents fail to respond to challenge over legal status of JSIs

Concerns raised by India and South Africa over the compatibility of the plurilateral Joint Statement Initiatives with the multilateral character of the WTO were inadequately addressed at the General Council meeting.

by D. Ravi Kanth

GENEVA: The leading proponents of the informal Joint Statement Initiatives (JSIs) have apparently failed to address questions posed by India and South Africa about the legal status of the JSIs, namely that the proposed JSIs on e-commerce, domestic regulation in services, MSMEs and investment facilitation would violate the WTO's fundamental rules as laid out in its founding Marrakesh Agreement, said people familiar with the development.

At the WTO General Council (GC) meeting on 2 March, the main proponents of the JSIs – Australia, the US, Japan, the European Union, Canada, Norway, Switzerland, the United Kingdom and Singapore among others – ostensibly brushed aside the legal issues raised by India and South Africa in a document circulated on 19 February (see *TWE* No. 717), said participants who asked not to be identified.

Further, the new WTO Director-General Ngozi Okonjo-Iweala, who was present at the GC meeting, seemed to have ignored the legal concerns and went ahead with her support for the JSIs by writing an article that appeared in the *Financial Times* on 3 March, said a person who asked not to be quoted.

In the op-ed piece, she wrote that "the WTO rule-book must be updated to take account of the 21st-century realities such as the digital economy." She said that "the pandemic has accelerated the use of e-commerce, enabling women and small and medium-sized enterprises to participate in international trade. But we must bridge the digital divide that makes some developing countries reluctant to join the e-commerce negotiations."

She went on to say that "negotiations among some WTO members on facilitating investment and removing regulatory red tape in services trade have continued fairly intensely despite the pandemic. Participants need to broaden the support for these initiatives (regardless of their legal status) and attract interest from developing countries with the aim of concluding talks by the end of the year".

In short, the DG appears to be flagrantly violating her discharge of functions as set out in paragraph 4 of Article VI of the Marrakesh Agreement by pitching for non-mandated issues that were opposed by a large majority of developing countries at the WTO's 11th Ministerial Conference in Buenos Aires in 2017, the person said.

Marrakesh Agreement requirements

Introducing its joint submission with South Africa on the legal status of the JSIs at the GC meeting, India's Ambassador to the WTO Brajendra Navnit drew attention to the manner in which the JSIs had been launched without any multilateral consensus in Buenos Aires.

He delved into the provisions of the Marrakesh Agreement, particularly the legal underpinnings as laid out in Article X concerning how amendments to the multilateral WTO agreements must be carried out, and Annex 4 of the Marrakesh Agreement concerning plurilateral agreements.

He said that decisions can be reached only by consensus and suggested that "flexible multilateralism" has to adhere to Article X of the Marrakesh Agreement.

In their joint paper, India and South Africa said that "a procedure for amending rules is enshrined in Article X of the Marrakesh Agreement", while the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS) contain specific provisions for modifications of schedules.

The two countries argued that the "proponents of JSIs have confused amendments to rules and modifications to schedules, and the proposed introduction of new agreements into the WTO to bypass the requirements of Article X of the Marrakesh Agreement."

India and South Africa also flagged the systemic and developmental implications of the JSIs, saying that "any attempt to introduce new rules resulting from the JSI negotiations into the WTO without fulfilling the requirements of Articles IX and X of the Marrakesh Agreement, will be detrimental to the functioning of the rule-based multilateral trading system."

In her intervention at the GC meeting, South Africa's WTO Ambassador Xolelwa Mlumbi-Peter said that "our interest in submitting this paper is to remind ourselves of the legal architecture that governs the functioning of the WTO which is critical to preserve the multilateral character of the WTO."

She said any group of members may discuss any issues informally, but "when discussions turn into negotiations, and their outcomes are sought to be formalized into the WTO framework, it can only be done in accordance with the rules of procedure for amendments as well as decision-making as set out in the Marrakesh Agreement."

She said that "the language in the Marrakesh Agreement was carefully negotiated and is a result of the experience acquired in the GATT which was characterized especially after the Tokyo Round by agreement on a number of plurilateral codes." According to her, "there was recognition that these plurilateral codes created a fragmented system of rules."

Mlumbi-Peter said "the Preamble to the Marrakesh Agreement clearly articulates members' vision for the WTO and it is to develop an integrated, more viable and durable multilateral trading system..."

She said "the Marrakesh Agreement does not make provision for the so-called open plurilaterals and flexible multilateralism."

"Therefore, any suggestion that when offered on MFN basis, no consensus is required for bringing new rules into the WTO is legally inconsistent with the fundamental principles and procedures of the Marrakesh Agreement," she argued.

"Importantly, new rules cannot be brought into the WTO through amendment of members' schedules."

Mlumbi-Peter listed out the following

"systemic and developmental implications inherent in plurilaterals, especially if they attempt to subvert established rules and foundational principles of the Marrakesh Agreement": (1) eroding the integrity of the rule-based multilateral trading system; (2) creating a precedent for any group of members to bring any issue into the WTO without the required consensus; (3) disregard of existing multilateral mandates; (4) marginalization of issues which are difficult but yet critical for the multilateral trading system, such as agriculture, development, thereby undermining the balance in agenda setting, negotiating processes and outcomes; and (5) fragmenting the system and undermining the multilateral character of the WTO.

Several developing countries – Sri Lanka, Pakistan, Nepal, Bangladesh, Cuba, Zimbabwe, Tanzania and Indonesia, which is a member of the JSIs – supported the legal issues raised by India and South Africa in their joint paper.

Defending the JSIs

In response to the case made by India and South Africa, Australia said "we will not agree with the legal analysis", adding that "we are exploring the legal architecture."

Without offering any evidence, Japan said flatly that "JSIs are constitutional", while South Korea expressed concern about the adverse implications of the joint proposal by India and South Africa.

In a brief statement, the US merely said that plurilateral negotiations are aimed at advancing the interests of a group of members. It argued that the plurilaterals are essential for multilateral outcomes, pointing out that they can address the challenges of today and tomorrow.

The EU said plurilateral agreements pave the way, arguing that without these negotiations, the WTO's negotiating arm will not achieve any goals. It said that very large numbers of members are in the JSIs and they are essential to ensure that global trade rules are relevant. Otherwise, the WTO will become irrelevant without these plurilateral negotiations.

Costa Rica, Colombia, Uruguay, Brazil, Chinese Taipei, Singapore, the Philippines, Hong Kong-China, Saudi Arabia and Nigeria, among others, made strong statements that the JSIs and plurilateral negotiations have brought life and creative energies to the WTO and made the WTO relevant by addressing 21st-century issues.

The plurilaterals must be multilateralized to strengthen the WTO, the JSI proponents said, adding that it is premature to discuss issues concerning the legal status when most of the work is focused on negotiating new rules. They repeatedly emphasized that the JSIs are open, transparent and inclusive, urging other members to join the negotiations and saying they are also free to leave after joining.

It is clear that the proponents are rattled about the lack of legal status of the JSIs as per the Marrakesh Agreement, given their "political" and "theological" positions that are not based on legal rules and evidence, said a participant at the GC meeting who asked not to be quoted.

At the end of the meeting, India said "we have not heard much of the legal issues."

It also pointed out that the JSI participants on domestic regulation on trade in services are the same members which have failed to provide answers to issues raised in the WTO's multilateral working group on domestic regulation.

If the numbers of participants are any indicator, India pointed to the large numbers of members supporting the G90 proposal for making special and differential treatment effective, and backing the proposed TRIPS waiver.

India further asked whether there is any point in moving forward on the JSIs without a functional dispute settlement system.

In a nutshell, the JSI proponents have failed to advance any credible legal arguments against the legal issues raised by India and South Africa, said participants who asked not to be quoted. *(SUNS9298)*

US warns over moves to discontinue moratorium on e-commerce duties

WTO members remain divided over the need for a ban on tariffs on electronic transmissions and for deeper discussions on the broader development aspects of e-commerce.

by D. Ravi Kanth

GENEVA: The United States has apparently warned developing countries led by India and South Africa that any move to discontinue the moratorium on imposing customs duties on electronic transmissions under the 1998 e-commerce work programme at the World Trade Organization will be fraught with serious consequences, said people familiar with the development.

At the WTO General Council (GC) meeting on 2 March, the US also flatly rejected calls from India, South Africa and other developing countries to ensure that the e-commerce work programme is a "standing item" in the GC as well as in the relevant WTO bodies as mandated by the GC in 1998.

Without offering any concrete evidence, the US went on to claim that e-commerce has provided huge benefits to countries, calling for a permanent moratorium on customs duties on electronic transmissions.

The US also warned that if the moratorium is discontinued, then members will need consensus to continue with the work programme, said people familiar with the US stand.

The US call for permanent tariff-free treatment for electronic transmissions "will benefit the net exporters which are

based in developed countries. So the US argument holds true for them as they have to safeguard the interests of their big tech firms," said one analyst. "However, most developing countries are net importers and therefore, they need to regulate these imports and judiciously raise and use their domestic financial resources. Also, there is no reason why luxury items like video games, music and movies should come duty-free while exporters of physical products face customs duties."

As regards the US stand of applying the consensus principle of decision-making to the 1998 work programme if the moratorium is discontinued, the analyst said that "when it comes to WTO reforms, consensus decision-making becomes a problematic issue for the US, but now they want to use consensus decision-making as an excuse for not continuing the work programme."

The new WTO Director-General Ngozi Okonjo-Iweala, who has been repeatedly emphasizing the importance of digital trade and the plurilateral Joint Statement Initiative (JSI) on e-commerce, has however remained silent on the multilaterally mandated 1998 e-commerce work programme and on the moratorium on customs duties on electronic transmissions.

Her "calculated" silence indicates her priorities in the area of e-commerce, the analyst said.

Strengthening the work programme

At the GC meeting on 2 March, India, which introduced the agenda item on "work programme on electronic commerce and moratorium on imposing customs duties on electronic transmissions," stressed the importance of bridging the digital divide by providing digital infrastructure.

India said many members at the WTO are yet to "fully comprehend the implications of e-commerce on competition and market structures, issues related to transfer of technology, data storage, automation and its impact on traditional jobs, and the gaps in e-commerce policy and regulatory frameworks in developing countries."

Indian Ambassador to the WTO Brajendra Navnit said that New Delhi has been a proponent of strengthening the multilateral, non-negotiating 1998 work programme on e-commerce.

He then drew attention to India's December 2020 joint proposal with South Africa about the implications of the moratorium on customs duties on electronic transmissions. The proposal called for "reinvigorating" the work under the e-commerce work programme.

He said that India joined the consensus in December 2019 to extend the moratorium for six months until the WTO's 12th Ministerial Conference (MC12) "with an understanding that the work programme on electronic commerce will be reinvigorated with an objective of achieving clarity on issues related to the scope of the moratorium, definition of electronic transmissions as well as the impact." Due to the postponement of MC12 (as a result of the COVID-19 pandemic), the moratorium has since been extended far beyond the earlier intended six months, he added.

"The WTO has a unique opportunity to make a contribution towards laying the foundation for an inclusive and development-oriented approach to electronic commerce," the Indian envoy said, emphasizing that "multilateralism is vital in a world facing development challenges."

He said the GC should play a central role in discussions on the work programme by keeping this issue as a standing item on its agenda. He also urged the GC to direct that the work programme be a standing item in the relevant WTO bodies as mandated under WTO document WT/L/274 adopted by the GC in 1998.

South Africa, which co-sponsored the proposal with India on the e-commerce work programme, pointed out that "there is no single agreed definition and/or use of the term e-commerce and what it comprises, with the WTO, its individual members, international organizations, business entities and other relevant stakeholders using different formulations."

"To make matters worse," said South Africa's WTO Ambassador Xolelwa Mlumbi-Peter, "the terms 'e-commerce' and 'digital trade' are often, but not always, used interchangeably. This interchangeable use of terms and the existence of various definitions means that the definition of e-commerce and/or digital trade are a matter of debate, with potential implications for the scope and definition."

The South African envoy said that when the 1998 work programme was launched, "it was not possible to predict the far-reaching and fast-paced evolution of digital technologies and their effect on trade that have led to the spread of e-commerce as we know, including its implications on production."

She said that "there are issues identified by members under the work programme that require clarification to enable common understanding on e-commerce and these issues cannot be clarified by a group of members under the JSI."

She gave the example of the "positive list" approach used by the General Agreement on Trade in Services (GATS) schedules of commitments coded to a classification of categories of services and modes of supply. These govern market access and national treatment obligations. Under the "positive list" approach, countries are supposed to list all exceptions or conditions to these market access and national treatment obligations that countries want to apply. She said the classification used in the WTO in GATS is the W120, which is based on the 1991 Provisional Central Product Classification (CPC) system of the United Nations, but there is no agreement whether new services created since 1991 are captured in the existing categories in the W120 or CPC, or whether new categories should be created.

Mlumbi-Peter further said that the work programme provides that the GC examines any issue of "a cross-cutting nature" and such issues include: (1) classification of digital products as "goods" or "services"; (2) issues concerning developing and least-developed countries; (3) revenue implications of e-commerce, especially for developing countries; (4) relationship between e-commerce and traditional forms of commerce to assess short-term disadvantages for developing countries; (5) impact of continued moratorium on custom duties on developing countries; (6) competition-related issues including constraints on e-commerce due to concentration of market power; and (7) jurisdictional challenges for e-commerce disputes.

"These issues are relevant and the discussions urgent," she said, adding that the COVID-19 pandemic has highlighted the need to reinvigorate the work under the work programme in view of the deepening digital divide both within and between countries.

She said that "the renewal of the e-commerce moratorium becomes an anomaly when there is limited discussion on the fundamental issues outlined in the

work programme and there is no effort by members to engage in constructive discussions that should result in equitable benefits for all".

Therefore, a serious conversation on the scope and definition is required, otherwise a decision at MC12 will be a challenge, she said.

Deepening engagement

Jamaica, speaking on behalf of the African, Caribbean and Pacific (ACP) Group, said that the e-commerce work programme "continues to be a critical feature of the WTO's regular work and an essential fixture on the General Council's agenda."

It called for deepening "our engagement and understanding of the question of the customs duties moratorium."

The Group also wanted the discussions to "go beyond the moratorium and include other pertinent issues such as the extent of coverage of digital or internal taxes and a wider range of issues."

It expressed concern that "by MC12, we will again face the expiry of the moratorium should we fail to establish a common understanding on the scope and definition of electronic transmission."

Despite tremendous strides made in information and communication technology (ICT) infrastructure and services, including the benefits seen during the COVID-19 crisis, members "still face a significant digital divide within and among countries that must be addressed with urgency", said the Group.

"In conducting our diagnosis of the moratorium," the Group said, "some of the other areas of interest to our countries include the costs to developing country and LDC [least-developed country] consumers and businesses, discrepancies between traditional goods or products and electronic equivalents, and the application of internal taxes on electronic transmission."

Observing that "a number of issues which were raised in the work programme are under negotiation in the JSI," the Group said "it is important that the work programme is prioritized as it encompasses an agreed workstream which will result in balanced outcomes in the context of e-commerce."

Further, it will be "important to take a pragmatic approach to discussing within the context of the existing 1998 work programme the issues of source code, localization and the impact on data flows, as well as consumer protection".

"These issues should be prioritized as they will begin to not only match or exceed the perceived impact which the moratorium may have on our regimes, but to treat our ability to make greater use of e-commerce to earn revenue, become producers of higher-level technological advancements and to improve the basic way of life for our people," the Group underlined.

Moreover, members also "need to play our part in ensuring that the work programme continues to remain relevant and address issues of social and economic interest to our countries".

Mauritius, on behalf of the African Group, said the e-commerce work programme "remains an important element in our ongoing discussion both in respect of the moratorium on the application of customs duties on electronic transmissions as well as the broader cross-cutting issues."

The Mauritian Ambassador to the WTO Usha D. Canabady said the COVID-19 pandemic continues to have a devastating impact on the services sector, with demand in sectors such as tourism and transport being affected. "The toll on income and employment in these sectors has reached such levels in some countries that recovery to pre-pandemic level will take years," she said.

"At the same time, e-commerce boomed but it is confirmed that the benefits were neither fairly nor equitably distributed, highlighting the existing digital divide."

The African Group drew attention to its 2017 communication on "digital industrialization policy and development", saying that "we did point out the extremely high market concentration levels in the global e-commerce space."

The Group said "any post-pandemic recovery strategy must, among others, aim to bridge the digital divide to allow more countries to take advantage of digitization."

It advocated the need to reinvigorate the 1998 work programme with a view to comprehensively addressing the development aspects of e-commerce.

Indonesia, which is a JSI member on e-commerce, threw its weight behind India and South Africa in addressing the issues of scope and definition of electronic transmissions and the moratorium on customs duties on electronic transmissions.

Indonesian Ambassador Syamsul Bahri Siregar said "it is important for us to bear in mind that the conclusion of the mandate for all WTO members to work on the work programme on e-commerce, along with the issue of moratorium on imposing customs duties, should not be forgotten."

He drew attention to the General Council decision on 10 December 2019 where members had agreed to reinvigorate the multilateral work under the work programme as agreed and mandated in 1998.

With the unfolding and rapid development of e-commerce in this digital era, he said, "this multilaterally mandated work has never been more important."

Siregar said that members must "fully comprehend the complexity and whole aspects related to e-commerce, in order to further relate to their social developmental circumstance."

"The gaps among members in utilizing and reaping the benefits from e-commerce should never be belittled, as we believe the potential of benefits from e-commerce should be accessible to all for the development of their economies," he emphasized.

"Hence, Indonesia fully supports the continuation of the work under the work programme on e-commerce, as mandated, and of the view that this work must be advanced," he said. Also, "the multilateral work to clarify the scope, definition, and impact of the customs duties on electronic transmissions should be kept in place and moved forward in this organization".

"The fact that some members attempted to advance an ambitious agenda on this matter through other mechanisms should not hinder the continuation of this multilateral work and degrade the relevance of this mandate," he said.

Indonesia, which raised the issue of what would constitute electronic transmissions at the WTO's 11th Ministerial Conference in 2017, reiterated that "its position on the moratorium on customs duties remains unchanged."

It is important to "address the digital divide and the need for addressing this issue along with the moratorium."

Siregar said there are conflicting studies on the loss of revenue as a result of the moratorium, with the UN Conference on Trade and Development (UNCTAD) suggesting that the loss is much more than $10 billion. As part of the dedicated

sessions, it would be important to call experts from different organizations to present their views for members to take this into consideration, he said.

Call for a permanent moratorium

In a short statement, a US official said that the moratorium on customs duties has enabled rapid development of digital trade for the past two decades. The official urged WTO members to agree on a permanent moratorium.

Referring to questions about scope and definition and whether the moratorium applies to content supplied electronically, the US said that the moratorium "requires tariff-free treatment for digital content transmitted electronically," insisting that an alternative view would render the moratorium meaningless and call into question what ministers had agreed in 1998.

The US said that while it is open to further discussion on any aspect of the moratorium in advance of MC12, "we do not see any reason to establish a permanent agenda item for discussion or for the subsidiary bodies".

The US said that "some members have continually noted the importance of the work programme [while] also signalling their continued opposition to the renewal of the moratorium."

Acknowledging the relationship between the work programme and the moratorium in the 1998 decision, the US said that "if the moratorium were to be discontinued, it is unclear that there would be a consensus to continue the work programme."

The European Union said that the discussion on the moratorium and the work programme has raised development issues, including e-commerce in the context of COVID-19.

The EU said the moratorium "provides the predictability and security that our consumers and business in developed and developing countries need" at this juncture. It said that several studies suggested positive and beneficial effects from e-commerce, and argued that the UNCTAD study which estimated a revenue loss of more than $10 billion due to the moratorium took a "narrow view".

The EU also demanded a longer term for the moratorium to be continued at MC12.

Commenting on the EU's remark about the UNCTAD study, a digital trade analyst said that "even with the 'narrow view', the potential tariff losses for developing countries are huge. With a broader definition of electronic transmissions, these losses will be manifold higher".

"Apart from the potential tariff revenue losses, the UNCTAD study has also highlighted the adverse impact of the moratorium on digital industrialization in developing countries," the analyst said.

China spoke about the benefits accruing to consumers and businesses, suggesting that discussions in various bodies have shed more light on electronic transmissions and the implications of the moratorium on the global economy. It urged members to continue with the discussion to achieve a meaningful outcome at MC12.

Turkey, which is a JSI member on e-commerce, made a nuanced statement suggesting that due concern has to be given to the clarification of the scope and definition of electronic transmissions. *(SUNS9299)*

Battles in the WTO

Negotiations and Outcomes of the WTO Ministerial Conferences

By Martin Khor

The World Trade Organisation has been an extremely controversial and divided organisation ever since its establishment in 1995. The big battles are most evident at its highest governing body, the Ministerial Conference, where the Trade Ministers of member states convene to chart the WTO's course.

This book is a compilation of contemporaneous reports and analyses of what unfolded at each Ministerial, as well as a few "mini-Ministerials", that took place from the WTO's inception up to 2017. As these articles reveal, the Ministerials have been the stage on which battles over the future direction of the WTO are most prominently played out. These clashes have mainly pitted developed member states pushing to expand the WTO's ambit into new subject areas, against many developing countries which call instead for redressing imbalances in the existing set of WTO rules.

This book also shines a light on the murky decision-making methods often employed during Ministerials, where agreements are sought to be hammered out by a select few delegations behind closed doors before being foisted on the rest of the membership. Such exclusionary processes, coupled with the crucial substantive issues at stake, have led to dramatic outcomes in many a Ministerial.

The ringside accounts of Ministerial battles collected here offer important insights into the contested dynamics of the WTO and the multilateral trading system in general.

Email twn@twnetwork.org for further information, or visit https://www.twn.my/title2/books/Battles%20in%20the%20WTO.htm

MARTIN KHOR *(1951-2020) was Adviser to the Third World Network. He was formerly Executive Director of the South Centre (2009 to 2018). He was the author of several books on trade, development and the environment, including Globalization and the South. He followed the negotiations in the WTO for many years, including at most of the Ministerial Conferences.*

Neoliberal finance undermines poor countries' recovery

Weighed down by debt and starved of foreign exchange inflows, developing countries are in dire need of a financial lifeline, write *Anis Chowdhury* and *Jomo Kwame Sundaram*.

After being undermined by decades of financial liberalization, developing countries now are not only victims of vaccine imperialism, but also cannot count on much financial support as their COVID-19 recessions drag on due to global vaccine apartheid.

Developing countries have long been pressured to liberalize finance by the International Monetary Fund (IMF) and the World Bank. The international financial institutions claimed this would bring net capital inflows. This was supposed to reduce foreign exchange constraints to accelerating growth, creating "a rosy scenario, indeed".

Globalization's claim naively expects "more birds to fly into rather than out of an open birdcage". Instead, financial globalization meant net capital flows from capital-poor developing countries to capital-rich developed countries, dubbed the "Lucas paradox". A decade later, flows "uphill" had "intensified over time".

The past decade saw the largest, fastest and most broad-based foreign debt increase in these economies in half a century. Total foreign debt of emerging market economies rose from around 110% of gross domestic product (GDP) in 2010 to more than 170% in 2019, while that of low-income countries (LICs) increased from 48% to 67%.

Pandemic woes

Developing countries saw private finance drop by $700 billion in 2020, while foreign direct investment flows to developing countries declined by 30-45% in the same year. Remittances fell by 7% in 2020, and are expected to fall by another 7.5% in 2021.

Meanwhile, developing countries' indebtedness increased as total aid flows had long fallen short of even half the long-promised 0.7% of donor countries' incomes. In 2020, when developing countries needed it most, donor governments cut bilateral aid commitments by almost 30%.

With limited access to other finance, developing countries, especially LICs, face much higher borrowing costs, even in normal times. With the pandemic, developing countries have been downgraded by rating agencies, further raising borrowing costs. Facing falling foreign exchange earnings needed to import essential drugs, vaccines and other vital supplies, including food, most countries have to borrow. In 2020, official foreign debt probably rose by 12% of GDP in emerging market economies, and by 8% in LICs.

The pandemic thus greatly worsened developing countries' debt distress. Before the pandemic, more than a quarter of official revenue went to servicing debt. With the worst recession since the Great Depression in 2020, as well as declining revenue and foreign exchange inflows, debt is now blocking finance for more adequate relief and recovery in many countries.

Many – even World Bank Chief Economist Carmen Reinhart, once a "debt hawk" – have called for debt relief, but little has happened. IMF debt service relief of about $213.5 million for 25 eligible LICs ended six months later in mid-October 2020, as scheduled.

The G20's "Debt Service Suspension Initiative for Poorest Countries" for 73 mainly LICs for May-December 2020 covered around $20 billion of bilateral public debt owed to official creditors by International Development Association and least developed countries (LDCs).

The G20 initiative did not provide lasting relief, not even reducing foreign debt burdens and barely addressing immediate needs. It merely kicked the can down the road. Debt still had to be repaid in full during 2022-24 as interest continues to accumulate. It also offered middle-income countries (MICs) nothing. Also, private creditors refused to join in or help out. UNCTAD estimates that in 2020 and 2021, lower MICs and LICs will pay between $0.7 trillion and $1.1 trillion to service debt, as upper MICs pay $2.0-2.3 trillion. Meanwhile, some countries have used $11.3 billion of IMF funds meant "for health budgets and food imports" to service private sector debt.

SDRs to the rescue?

Undoubtedly, distressed developing countries desperately need foreign exchange to cope. But IMF Managing Director Kristalina Georgieva's call to boost global liquidity with "a sizeable SDR" (Special Drawing Right) allocation was blocked by the Trump administration, who objected that it would give China, Iran, Russia, Syria and Venezuela access to new funds.

The *Financial Times* (*FT*) argues that the proposed new SDR 1 trillion ($1.37 trillion) issuance – almost five times the $283 billion issued in 2009 – is justified by the scale of the crisis. For the *FT*, it would be "the simplest and most effective way to get additional purchasing power into the hands of the countries that need it".

It is now widely agreed that "new issuance of SDRs is vital to help poorer countries". It would augment the IMF's $1 trillion lending capacity, already inadequate to address the ongoing pandemic and economic crises.

SDRs can only be used to pay other central banks, the IMF and 16 "prescribed holders", including the World Bank and major regional development banks. Thus, SDRs can help foreign-exchange-constrained countries, especially if rich countries transfer their unused SDRs to the IMF or for development finance. The IMF could thus expand two existing special funds for LICs: the Poverty Reduction and Growth Trust provides interest-free loans, while the Catastrophe Containment and Relief Trust pays interest and principal due on their IMF obligations.

But SDRs are not an equitable magic bullet as apportionment reflects the size of a country's economy. In other words, rich countries would get much more, regardless of need, as during the 2008-09 global financial crisis.

With 85% of the IMF votes required to issue new SDRs, and the US effectively holding veto power with 16.5%, Biden administration support is vital.

For SDR issuance under $650 billion, the White House only needs to consult rather than get approval from the US Congress.

US Treasury Secretary Janet Yellen has urged the IMF and World Bank to do everything they can "to ensure that developing countries have the resources for public health and economic recovery". She has supported new SDRs despite conservative opposition, e.g., from Rupert Murdoch's *Wall Street Journal*.

But Fund and Bank resources still pale in comparison with the challenge. With preferred creditor status, they can borrow at the much lower interest rates available to them. By so intermediating, they can help developing countries, especially LICs and LDCs, to more cheaply access desperately needed funds. *(IPS)*

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

A Clash of Climate Change Paradigms

Negotiations and Outcomes at the UN Climate Convention

By Martin Khor and Meenakshi Raman

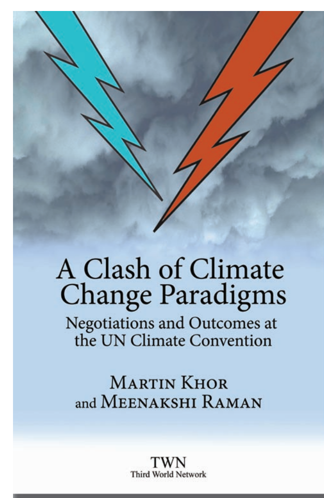
Climate change is the biggest problem facing humanity and the Earth. To address it requires fundamental changes to economies, social structures, lifestyles globally and in each country.

International cooperation is crucial. But to achieve this is difficult and complex, because there are many contentious issues involved, not least the respective roles and responsibilities of developed and developing countries.

This book is an account of the outcomes and negotiations at the UN Framework Convention on Climate Change (UNFCCC). It covers the Convention's annual Conference of Parties (COP) from Bali (2007) to Paris (2015), where the Paris Agreement was adopted, to 2018 where the rules on implementing Paris were approved, and to Madrid (2019).

The two main authors took part in all the COPs analysed except the 2019 COP. The book thus provides a unique ringside view of the crucial negotiations and their results at the UNFCCC as the different countries and their groups grappled with the details on how to save the world, and who should take what actions.

This brief account will be useful, even indispensable, for policy-makers, researchers, civil society activists and all those interested in the climate change issue.



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https://www.twn.my/title2/books/Clash%20of%20climate%20change%20paradigms.htm

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