

International negotiations by virtual means in the time of the COVID-19 pandemic

*Vicente Paolo B. Yu III **

I. Impact of the COVID-19 pandemic on international meetings

The physical distancing required as a safety measure to limit the spread of the novel coronavirus disease (COVID-19), such as through bans on gatherings involving multiple individuals, has meant that in-person meetings involving close-proximity interactions among individuals can no longer take place. In the area of multilateral diplomacy, this has meant that heretofore in-person meetings and negotiations among diplomats have ceased since around the end of March 2020 in the major diplomatic centres such as New York, Geneva, Nairobi, Vienna, Rome, and many other locations where the governing or decision-making bodies of the United Nations and other international organisations usually meet. As of end-February 2021, in-person meetings in the international organisations based in New York, Geneva, Vienna and Rome continue to be severely limited or have shifted to virtual modes.¹

The inability to convene in-person meetings has impacted on the ability of international organisations to carry out international negotiations among their Member States, particularly in instances where the negotiations require universal participation. Prior to the pandemic, in virtually all international organisations, resolutions, decisions or declarations were normally adopted after the conduct of in-person negotiations among the delegates of the Member States. These in-person negotiations were crucial in enabling the delegates to speak directly with one another, work directly on the text together with one another and with facilitators, and work towards narrowing differences in positions and perspectives and eventually arrive at agreed compromise language to be included in the text that would eventually be adopted. The closure of physical premises due to the pandemic by the United Nations and its specialised agencies and the World Trade Organization has meant that these in-person meetings and negotiations have not taken place since at least the end of March 2020 to the present.

* With contributions from Lim Li Lin, Sanya Reid Smith and Meena Raman of Third World Network.

¹ See e.g. UN Daily Journal for UN New York indicating meetings are virtual - see <https://journal.un.org/>; in UN Geneva, in-person meetings are restricted, and no in-person negotiations are taking place – see <https://www.ungeneva.org/en/covid-19>; in the WTO, all meetings are taking place virtually, according to delegates.

Third World Network (TWN) is an independent non-profit international research and advocacy organisation involved in bringing about a greater articulation of the needs, aspirations and rights of the peoples in the South and in promoting just, equitable and ecological development.

Address: 131 Jalan Macalister, 10400 Penang, MALAYSIA
Email: twn@twnetwork.org

Tel: 60-4-2266728/2266159

Fax: 60-4-2264505

Website: www.twn.my

The contents of this publication may be republished or reused for free for non-commercial purposes, except where otherwise noted. This publication is licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License.

II. Pandemic-period silence procedure at the UN General Assembly

The United Nations General Assembly, for example, adopted decision 74/544 entitled “Procedure for taking decisions of the General Assembly during the Coronavirus disease 2019 (COVID-19) pandemic” on 27 March 2020 which states:²

The General Assembly,

Noting with concern the situation concerning the Coronavirus disease 2019 (COVID-19) and the limitations recommended on meetings within the United Nations premises as precautionary measures aimed at containing the spread of COVID-19,

Authorizes the President of the General Assembly, where, in his view, a plenary meeting of the General Assembly is not practicable due to the coronavirus pandemic, to circulate, after consultation with the General Committee, draft decisions of the General Assembly to all Member States under a silence procedure of at least 72 hours,

Decides that, if the silence is not broken, the decision shall be considered adopted, and the General Assembly shall take note of the decision at its first plenary meeting held after the cessation of the precautionary measures as soon as the circumstances allow, and that this decision on the procedure for taking of decisions of the General Assembly shall be in effect until the end of May unless extended through this procedure.

² The adopted text of the resolution on a modified silence procedure for General Assembly resolutions to at least the end of May 2020 can be found here: <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/03/Covid-19-Draft-decision-24-March-2020.pdf>. The UN General Assembly President confirmed adoption by the General Assembly of this decision by silence procedure on 27 March 2020 in his letter to UN Member States (see <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/03/PGA-letter-dated-27-March-on-COVID19.pdf>). The letter from the UNGA President confirming that the silence procedure was not broken can be found here: <https://www.un.org/pga/74/2020/03/24/procedure-for-taking-decisions-of-the-general-assembly-during-the-coronavirus-disease-2019-covid-19-pandemic/> and <https://www.un.org/pga/74/2020/03/27/conclusion-of-the-silence-procedure-on-the-decision-enabling-the-ga-to-take-decisions-during-the-covid-19-pandemic/>. The UN Secretariat released a step-by-step guide on how the modified silence procedure under decision 74/544 would be implemented (see <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/04/Updated-Rev-marked-2-Procedure-for-decision-via-silence-procedure.pdf>).

Genesis of UN General Assembly decision 74/544

This decision was taken by the General Assembly after a series of increasingly rigorous safety measures and steps made by the General Assembly President over the month of March 2020 in relation to the COVID-19 pandemic, including his letter of 11 March 2020¹ limiting the number of people in in-person meetings and cancelling some meetings and events; his letter of 13 March 2020² cancelling all in-person meetings and starting exploration of virtual meetings; his letter dated 17 March 2020³ postponing or cancelling all in-person meetings of the General Assembly up to 17 April 2020; his letter dated 17 March 2020⁴ to the UNGA's General Committee seeking their advice on how to conduct the proceedings of the General Assembly in light of the pandemic, including adoption of essential decisions under a silence procedure; and his circulation to the General Assembly on 24 March 2020⁵ of a draft decision for the procedure for taking decisions of the General Assembly during the COVID-19 pandemic. In effect, the General Assembly decision to adopt the COVID-19-caused silence procedure for taking decisions was adopted also under the pre-existing silence procedure after the proposal to do so was first discussed by the General Assembly President with the Assembly's General Committee.

The adopted modified silence procedure at the UNGA is to be used until the end of May 2020 unless extended by silence procedure by the UNGA. The original version of the silence procedure draft decision proposed on 17 March 2020⁶ by the UNGA President did not have a deadline. That draft decision was subsequently modified⁷ so that it would last until the UNGA is able to meet again in plenary and then further revised to provide for the end of May 2020 deadline in the draft that was finally adopted⁸. It should be noted, however, that the “silence procedure” per se is not new to the General Assembly. Prior to the suspension of in-person meetings of the General Assembly due to the COVID-19 pandemic, when negotiations among delegations have ended with a resolution on which a tentative agreement (i.e., “agreed ad referendum”) among the UN Member States has been reached, delegations may need to get final approval from their governments. In such a case, the draft resolution is declared by the General Assembly President to be “in silence procedure” for a specified time and if no Member State objects to the draft by the given deadline, the draft text is then considered as agreed and adopted.

¹ See <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/03/COVID-19-Letter-to-Member-States.pdf>

² See <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/03/Covid-19-II-LETTER-TO-MS.pdf>

³ See <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/03/17-March-Letter-to-Member-States-on-COVID19.pdf>

⁴ See <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/03/Letter-to-General-Committee-on-COVID-19.-Revised-Annex-B-II.pdf>

⁵ See <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/03/Covid-19-Draft-decision-24-March-2020.pdf>

⁶ See <https://www.un.org/pga/74/2020/03/18/letter-to-general-committee-on-covid-19/> and <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/03/Letter-to-General-Committee-on-COVID-19.-Revised-Annex-B-II.pdf>

⁷ See <https://www.un.org/pga/74/2020/03/20/letter-to-all-members-of-the-general-committee-covid19/>

⁸ See <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/03/Covid-19-Draft-decision-24-March-2020.pdf>

Under the COVID-19 silence procedure, the General Assembly President or his designated co-facilitators for a particular issue would circulate draft resolutions³ to Member States by email, after which the UN Member States' diplomatic representations in New York would have 72 hours to respond. Under this procedure, if a country supports a resolution, it does nothing – i.e., silence means consent. If it opposes a resolution, it sends an email to object to the draft resolution that was circulated, essentially “breaking silence” – under the adopted procedure, only one objection from any Member State is needed to stop the adoption of the resolution. If silence was broken, the GA President will inform all Member States that silence was broken and then the President can choose to refer the draft resolution and the objections for further consultations and revisions.

During the period that General Assembly is not physically meeting, voting cannot take place. Articles 18(2) and (3) of the UN Charter on voting require that members must be “present and voting”⁴ for their votes to be recorded. This has traditionally meant that the vote takes place during a GA plenary meeting.⁵ With in-person meetings not possible due to the pandemic, this has meant that voting cannot take place. There are currently suggestions from some UN Member States on establishing procedures by which the General Assembly can take decisions by voting without having in-person meetings, with the General Assembly President recently circulating on 23 April 2020 some documents prepared by the UN Secretariat to guide discussions on this.⁶

There were two COVID-19-related resolutions adopted by the General Assembly using the modified silence procedure under decision 74/544. These are resolution 74/270⁷ entitled “Global solidarity to fight the coronavirus disease 2019 (COVID-19)” adopted on 2 April 2020 and resolution 74/274⁸ entitled “International cooperation to ensure global access to medicines, vaccines and medical equipment to face COVID-19” adopted on 20 April 2020.

Following the lead of the General Assembly, the UN Economic and Social Council also adopted new procedures during the pandemic beginning on 3 April 2020 enabling it to take decisions without in-person meetings.⁹

When the UN in New York reopened physical meetings during the last quarter of 2020, UN General Assembly and main commission meetings and decision-making were done using a hybrid modality, in which delegations had a limited physical presence coupled with strict physical distancing protocols during the meeting in which the voting was done. The inclusivity and participation difficulties inherent in virtual meetings have been minimised in the UN New York setting due to the presence of permanent missions to the UN in New York, the relatively disciplined and organised nature of the developing countries' Group of 77 engagement in UN New York processes, and the fact that voting can take place under the UN General Assembly's Rules

³ Under the UN General Assembly's guidelines for the submission of proposals (November 2019), “draft resolution and/or draft decision texts are usually negotiated among delegations well in advance, prior to submission to the Secretariat” for co-sponsorship and eventual adoption or rejection by the General Assembly. See https://www.un.org/en/ga/pdf/guidelines_submit_draft_proposals.pdf

⁴ The phrase “member present and voting” is defined in Rule 86 of the GA's Rules of Procedure as follows: “For the purposes of these rules, the phrase ‘members present and voting’ means members casting an affirmative or negative vote. Members which abstain from voting are considered as not voting.” For the voting majorities required, see Rules 83, 84 and 85. See <https://www.un.org/en/ga/about/ropga/>

⁵ The methods of voting by show of hands, standing, or mechanical means are described in Rule 87 of the UN GA Rules of Procedure. Generally, when mechanical or electronic means are used to record votes, roll-call voting is discouraged. See Rule 87(b) as well as the Introduction to the Rules of Procedure, para. 24 (at <https://www.un.org/en/ga/about/ropga/intro.shtml>), annex IV, para. 84 (at <https://www.un.org/en/ga/about/ropga/annx4.shtml>), and annex VII, para. 2 (at <https://www.un.org/en/ga/about/ropga/annx7.shtml>).

⁶ See <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/04/on-voting-process.pdf>. See also <https://www.un.org/pga/74/2020/04/29/alternative-mechanisms-to-hold-elections-without-plenary-meetings/> on elections without plenary meetings; <https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/04/E-voting-28-April-2020-.pdf> on e-voting (excluding elections) during the pandemic; and <https://www.un.org/pga/74/2020/04/23/votes-without-a-meeting-during-the-covid-19-pandemic/> on votes without a meeting.

⁷ See <https://undocs.org/en/A/RES/74/270>

⁸ See <https://undocs.org/en/A/RES/74/274>

⁹ See Economic and Social Council decision 2020/205 of 3 April 2020 entitled “Procedure for taking decisions of the Economic and Social Council during the coronavirus disease (COVID-19) pandemic”, at https://www.un.org/ecosoc/sites/www.un.org.ecosoc/files/files/en/2020doc/President_letter_on_approval_of_silence_procedure_signed.pdf

of Procedure. The same modality also took place for some meetings of the Human Rights Council at the UN in Geneva during the same period. In both locations, there were occasions when delegations undertook negotiations virtually.

III. World Trade Organization meetings during the pandemic

In Geneva, which hosts the headquarters of many UN specialised agencies such as the World Health Organization (WHO), the World Intellectual Property Organization (WIPO), the International Labour Organization (ILO), the International Organization for Migration (IOM), the Human Rights Council, UN Refugees, and the UN Conference on Trade and Development (UNCTAD), and other international organisations such as the World Trade Organization (WTO), in-person meetings have also been suspended since mid-March 2020, in line with Swiss government recommendations prohibiting gatherings of more than five persons in order to limit the transmission of the coronavirus. After a “light” resumption of limited and socially distanced in-person meetings and negotiations during the autumn of 2020 in Geneva, meetings in these Geneva-based international organisations have shifted back to virtual modes since December 2020 to the present (end-February 2021).

At an informal heads-of-delegation meeting of WTO Members held on 17 April 2020, then-WTO Director-General Roberto Azevêdo asked delegations whether they would be comfortable conducting informal meetings and information exchange through virtual platforms and doing formal decision-making through virtual meetings or written procedures until traditional in-person gatherings can resume, citing the UN General Assembly’s COVID-19 modified silence procedure decision.¹⁰ While delegations were generally open to

“Explicit Consensus” as a Decision-Making Device in the WTO

The only times that the “silence means consent” consensus rule under Article IX(1) of the WTO Agreement was deviated from were in relation to the launch of WTO negotiations on the relationship between trade and investment, on competition policy, on government procurement, and on trade facilitation. In the WTO 1996 Singapore Ministerial Declaration¹, the Ministerial Conference declared that “It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas [investment and competition], will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.” This was subsequently followed by the requirement in paragraphs 20, 23, 26 and 27 of the WTO 2001 Doha Ministerial Declaration² for decisions to be taken by “explicit consensus” on modalities of negotiations for the start of negotiations on investment, competition policy, government procurement and trade facilitation. Following this, negotiations on the Singapore issues were not launched at the WTO 2003 Cancun Ministerial Conference due to the lack of “explicit consensus”. However, just under a year later in July 2004, paragraph 1(g) of the General Council’s decision adopted on 1 August 2004³ stated that “the General Council decides by explicit consensus to commence negotiations [on trade facilitation] on the basis of the modalities” set out in Annex D of that decision, and that the General Council agrees that the relationship between trade and investment, interaction between trade and competition policy, and transparency in government procurement “will not form part of the Work Programme set out in that [Doha] Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round”. This decision was taken “on the basis of the general acquiescence” by heads of delegations at an informal meeting that was subsequently formally adopted by the General Council.⁴ In its ordinary meaning and in the context in which the phrase “explicit consensus” was used in both the Singapore and Doha Ministerial Declarations, “explicit consensus”, it seems, would have required that all Members expressly indicate their concurrence with the decision to be made before it will be deemed to have been agreed upon by consensus. This is to be contrasted with the “passive consensus” rule under Article IX(1), footnote 1, of the WTO Agreement in which the failure to raise any objection to the decision to be adopted is presumed to mean that the Member is joining the consensus – even if that Member was absent at the meeting in which the decision was made.⁵

¹ See WT/MIN(96)/DEC, 18 December 1996, at https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm

² See WT/MIN(01)/DEC/1, 20 November 2001, at https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

³ See https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm

⁴ See WTO General Council, Minutes of Meeting – 31 July – 1 August 2004, WTO Doc. No. WT/GC/M/87, 4 October 2004, paras. 107 and 108.

⁵ For more discussion on the meaning of “explicit consensus” as applicable to the Singapore issues in the WTO following the Doha Ministerial Declaration, see Vicente Paolo Yu III, Clarifying the Status of Singapore Issues in the Doha Ministerial Declaration, March

¹⁰ See https://www.wto.org/english/news_e/news20_e/hod_17apr20_e.htm. During this informal virtual heads-of-delegation meeting, many developing countries, including the African Group, Barbados, India, Jamaica on behalf of the African, Caribbean and Pacific (ACP) Group, Ecuador, South Africa, Sri Lanka and Venezuela, disagreed with the Director-General’s suggestions to take decisions through virtual negotiations or written-answer procedures in the course of the COVID-19 pandemic. While a number of developing countries and least developed countries said that they were open to the conduct of informal meetings and exchange of views that would not involve taking any formal decisions, other (mainly developed) countries were open to using virtual platforms for information exchange, substantive negotiations and decision-making (such as in the fisheries subsidies negotiations). See D Ravi Kanth, “Attempts for ‘virtual’ talks, decisions amid COVID-19 rejected”, *South-North Development Monitor (SUNS)*, Issue No. 9104, 21 April 2020, at <http://www.sunsonline.org/> and at TWN Info Service on WTO and Trade Issues, 21 April 2020, at <https://www.twn.my/title2/wto.info/2020/ti200414.htm>

the idea of using virtual meetings solely for information exchange, there was no agreement on using virtual meetings to conduct negotiations and to take formal decisions remotely.¹¹

For the WTO General Council (the WTO's highest governing body when the WTO Ministerial Conference is not in session¹²) to decide on whether to adopt its own modified pandemic decision-making process, it has to ensure that the basic decision-making rules for the WTO's Ministerial Conference and General Council set out by the WTO Agreement are observed. Article IX(1) of the WTO Agreement states, inter alia, that "The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting." Footnote 1 of Article IX(1) of the WTO Agreement explicitly defines consensus for purposes of decision-making by the Ministerial Conference and the General Council as "The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision." That is, under the WTO's decision-making rules, consensus exists if no WTO Member explicitly and formally objects to the proposed decision at the meeting in which the decision is taken – i.e., silence means consent – keeping quiet during the meeting when the decision is being taken means consenting to that decision.

Meetings of the WTO General Council generally are in-person meetings taking place at WTO headquarters in Geneva.¹³ The General Council's rules of procedure seem to assume implicitly that its meetings are in-person and that, therefore, its decision-making by either consensus or voting also takes place in an in-person meeting context.¹⁴ Under the current rules of procedure as written, the only instance in which voting in the General Council can take place remotely is under Rule 34, which states that "where in accordance with the WTO Agreement a vote by a qualified majority of all Members is required to be taken, the General Council may decide, upon request from a Member or the suggestion of the Chairperson, that the vote be taken by airmail ballots or ballots transmitted by telegraph or telefacsimile in accordance with the procedures described in Annex 1 to these Rules." In such a case, after the General Council has decided, presumably in an in-person meeting, that airmail, telegraph or telefacsimile balloting is to take place, Annex 1 of the rules of procedure states that the ballot papers "shall be distributed to representatives of Members present at the meeting and a notice shall be sent to each Member" containing information about the issue, the question to be voted on by "yes" or "no", and the deadline for receipt of the votes.

¹¹ By an email notification dated 1 May 2020, the WTO General Council Chair, Ambassador David Walker of New Zealand, called for a virtual General Council meeting on 15 May 2020 "exclusively for transparency and information-sharing purposes ... aimed at 'exchanging views on the economic and trade impact of [the Covid-19 pandemic], and the trade-related measures taken'". This followed a submission made on 30 April 2020 (restricted WTO document RD/GC/13, RD/TNC/2) by nine Latin American countries (Argentina, Brazil, Colombia, Costa Rica, Guatemala, Mexico, Panama, Paraguay and Uruguay) calling for the WTO to "respond 'urgently, pragmatically, and transparently to the economic and commercial effects of the COVID-19 pandemic ... [and] to propose, in a pragmatic and progressive manner, measures needed to address urgent situations'". These countries in their submission proposed some "working options during 'confinement'" involving the use of "remote technology-based systems" such as videoconferencing platforms for "informal conversations, consultations, debates and exchanges of information" and the establishment of written procedures. The submission indicated that "In general terms and unless Members decide otherwise, videoconferencing would not be a platform for decision-making. However, the use of virtual meetings would allow Members to make progress in consideration of specific issues." Their submission also provided suggestions on measures for the return to face-to-face meetings, logistical considerations for the return of staff and delegations, and health consideration measures. For more information, see D Ravi Kanth, "COVID-19: WTO General Council Chair to convene virtual meet on 15 May", *South-North Development Monitor (SUNS)*, Issue No. 9113, 5 May 2020, at <http://www.sunsonline.org/> and at TWN Info Service on WTO and Trade Issues, 6 May 2020, at <https://www.twi.my/title2/wto.info/2020/ti200505.htm>

¹² See WTO Agreement, Article IV(2), stating "There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. ..."

¹³ Meetings of the General Council are convened by the WTO Director-General. See Rule 2 of the WTO Rules of Procedure of the General Council, WT/L/161, 25 July 1996, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/161.pdf>

¹⁴ See WTO, Rules of Procedure of the General Council, WT/L/161, 25 July 1996, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/161.pdf>. See Rules 33 and 34 of the General Council's Rules of Procedure. Rule 34, for example, states that when decisions are to be taken by vote, the ballot papers for the voting "shall be distributed to representatives of Members present at the meeting and a ballot box placed in the conference room. However, the representative of any Member may request, or the Chairperson may suggest, that a vote be taken by the raising of cards or by roll call" – meaning that the voting takes place in person during the meeting with Members' representatives physically casting their ballot papers, raising their cards, or responding to a roll call.

In short, it seems that the current rules of procedure of the WTO General Council would require that all its decisions be taken by consensus or by vote through in-person meetings. This would most likely include the General Council deciding to change its decision-making procedures to allow for virtual meetings during the COVID-19 pandemic.¹⁵

During 2020, the WTO's bodies have held many virtual meetings, including the General Council, the various committees, and other bodies. These were intended to serve as venues for informal information exchange and discussions among delegations, with no decisions being taken.¹⁶ Originally scheduled for 8-11 June 2020, the holding of the Twelfth WTO Ministerial Conference in Kazakhstan was postponed by the then-WTO Director-General Azevedo and General Council Chair David Walker.¹⁷

However, there have been occasions in 2020 and early 2021 when the General Council has made decisions by consensus despite meeting in a virtual setting. These include the General Council's endorsement at its virtual 22 July 2020 meeting of Turkmenistan's WTO observer status,¹⁸ its adoption at a virtual meeting on 31 July 2020 of guidelines for the final stages of the Director-General selection process,¹⁹ and its special session held virtually on 15 February 2021 to officially consider and agree on the appointment of Dr Ngozi Okonji-Iweala as the new WTO Director-General (to serve from March 2021-August 2025).²⁰ That the General Council took these decisions by consensus despite meeting in virtual settings implies that it (or the WTO Secretariat's legal counsel) sees no legal or procedural bar to the General Council (or WTO bodies such as the DSB, TPRB, the Goods, Services, and TRIPS Councils, or their subsidiary Committees) making decisions by consensus in a virtual setting. It should be noted, however, that the background work leading up to these General Council decisions had already been done mostly prior to the pandemic-induced lockdown (in the case of Turkmenistan's observer status) or did not involve complex and substantive intergovernmental negotiations on policy issues (in the case of the selection and appointment of the new Director-General). Therefore, potentially seeing these as precedents for the General Council or other WTO bodies eventually negotiating and taking decisions in a virtual setting might not be appropriate.

The situation is different with respect to a substantive policy issue such as the proposal submitted in October 2020 by India, South Africa, and many other developing countries for a waiver by all WTO Members of some provisions of the TRIPS Agreement in relation to COVID-19-related medical products, vaccines and medicines. This proposal was discussed by the TRIPS Council in October and December 2020 with no

¹⁵ Rule 39 of the WTO General Council's rules of procedure states that "the General Council may decide at any time to revise these rules or any part of them." In deciding to revise part of the rules of procedure to address the in-person meeting limitations imposed by the COVID-19 pandemic, Rule 34's decision-making processes must first be complied with.

¹⁶ See e.g. D Ravi Kanth, WTO General Council Chair to convene virtual meet on 15 May, TWN Info Service, 6 May 2020, at <https://www.twn.my/title2/unsd/2020/unsd200503.htm>; Agence Europe, To multilateral organization, virtual meetings without decision-making, *Europe Daily Bulletin* No. 12484, 12 May 2020, at <https://agenceurope.eu/en/bulletin/article/12484/28https://agenceurope.eu/en/bulletin/article/12484/28>; WTO, WTO members discuss use of virtual platforms during COVID-19 lockdown, 17 April 2020, at https://www.wto.org/english/news_e/news20_e/hod_17apr20_e.htm; WTO, Communication from the Chairperson of the SPS Committee, 13 May 2020, at https://www.wto.org/library/events/message_chairperson_25052020_e.pdf; World Trade Online, WTO sets mid-May General Council meeting to address pandemic measures, 1 May 2020, at <https://insidetradetrade.com/daily-news/wto-sets-mid-may-general-council-meeting-address-pandemic-measures>; D Ravi Kanth, Opposition at WTO to taking decisions via virtual meetings, TWN Info Service, 20 April 2020, at <https://www.twn.my/title2/wto.info/2020/ti200413.htm>; Alex Lawson, WTO Grapples With Telework Amid Coronavirus Pandemic, 17 April 2020, at <https://www.law360.com/articles/1264851/wto-grapples-with-telework-amid-coronavirus-pandemic>

¹⁷ See WTO, Twelfth WTO Ministerial Conference, at https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm. In the virtual 29 May 2020 General Council meeting, Ambassador Walker stated that "a formal decision about the new date for MC12 will need to be taken by the General Council". See WTO, WTO members discuss Kazakhstan's offer to host 12th Ministerial Conference in June 2021, 29 May 2020, at https://www.wto.org/english/news_e/news20_e/gc_29may20_e.htm.

¹⁸ WTO, Members endorse Turkmenistan's WTO observer status, 22 July 2020, at https://www.wto.org/english/news_e/news20_e/acc_22jul20_e.htm;

¹⁹ WTO, General Council agrees guidelines for final stage of DG selection, 31 July 2020, at https://www.wto.org/english/news_e/news20_e/gc_31jul20_e.htm

²⁰ See WTO, WTO General Council to consider appointment of next Director-General, 9 February 2021, at https://www.wto.org/english/news_e/news21_e/gc_09feb21_e.htm; and WTO, Statement by the Chair of the General Council: Appointment of the next Director-General, 16 February 2021, at https://www.wto.org/english/news_e/news21_e/gc_16feb21_e.htm.

decisions being taken, due to the opposition of developed countries as well as pharmaceutical corporations²¹ and despite calls from many NGOs worldwide, trade unions, EU parliamentarians, and the World Health Organization for such a waiver to be adopted²².

Despite the urgency of the issue, its substantive nature and its economic and social consequences for various WTO Members have meant that the TRIPS Council has not been able to adopt the TRIPS COVID-19 waiver proposal by consensus. Achieving agreement on the proposal has been made more difficult by the lack on in-person negotiations between the proponent WTO members and the opposition. Under the TRIPS Council's rules of procedure, where the TRIPS Council cannot arrive at a decision by consensus, the matter at issue shall be referred to the General Council for decision and voting by ballot at the TRIP Council is not applicable.²³ The critical importance of the TRIPS Council adopting such a waiver, however, is of such a degree that it would be worth looking into whether the TRIPS Council can negotiate and adopt such a decision by consensus through virtual or hybrid modalities as an exceptional measure.

IV. Preparing the post-2020 Global Biodiversity Framework during the pandemic

Parties to the UN Convention on Biological Diversity (CBD) started negotiating the post-2020 global biodiversity framework (GBF) in 2019, with such negotiations originally slated to be concluded with the adoption of the GBF at the 15th Conference of the Parties (COP 15) in Kunming, China, in 2020. The pandemic, however, has forced the postponement of a series of meetings leading up to its final adoption - the 24th meeting of the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA 24) and the 3rd meeting of the Subsidiary Body on Implementation (SBI 3) to the first half of 2021, and the 3rd and final meeting of the Open-ended Working Group of the Post-2020 GBF (OEWG 3) and COP 15 to the second quarter of 2021. These dates are all likely to be further reviewed.

Since the postponement, a number of virtual meetings related to the post-2020 GBF have taken place or are planned, given the continuing pandemic and the uncertainty regarding when face-to-face meetings can eventually be held. These include stakeholder open webinars, thematic dialogue and consultation, a webinar conference, information briefing, and regional webinars.

Informal virtual sessions of SBSTTA 24 and SBI 3 are taking place in February and March 2021. Many of the agenda items of these meetings are on the post-2020 GBF. These informal sessions are “in preparation for” the formal meetings of the Subsidiary Bodies. While no decisions or formal outcomes or conference room papers will be prepared, the sessions are meant to provide opportunities for statements by Parties and observers on the issues on the agenda of SBSTTA 24 and SBI 3. This is understood to be the ‘first reading’ of the documents for the agenda items, which contains the draft recommendations. In formal face-to-face

²¹ WTO, Members discuss intellectual property response to the COVID-19 pandemic, 20 October 2020, at https://www.wto.org/english/news_e/news20_e/trip_20oct20_e.htm; WTO, Members to continue discussion on proposal for temporary IP waiver in response to COVID-19, 10 December 2020, at https://www.wto.org/english/news_e/news20_e/trip_10dec20_e.htm; Patterson Belknap, WTO to Discuss Member Proposal to Waive IP Rights for COVID-19 Technologies, 6 January 2021, at <https://www.lexology.com/library/detail.aspx?g=eea31e26-24d6-4c19-8648-b9589f71df5f>; Life Sciences Intellectual Property Review, WTO declines to waive TRIPS provisions for COVID-19 drugs, 25 January 2021, at <https://www.lifesciencesipreview.com/news/wto-declines-to-waive-trips-provisions-for-covid-19-drugs-433>; Emma Farge, Backers of IP waiver for COVID-19 drugs make fresh push at WTO, Reuters, 19 January 2021, at <https://www.reuters.com/article/us-health-coronavirus-wto/backers-of-ip-waiver-for-covid-19-drugs-make-fresh-push-at-wto-idUSKBN29O2DF>;

²² See e.g. TWN, Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19, at https://twon.my/title2/intellectual_property/trips_waiver_proposal.htm; MSF, MSF urges wealthy countries not to block COVID-19 patent waiver, 3 February 2021, at <https://www.msf.org/msf-urges-wealthy-countries-not-block-covid-19-patent-waiver>; WHO, WHO Director-General's opening remarks at the World Health Assembly, 9 November 2020, at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-world-health-assembly—9-november-2020>

²³ See WTO, TRIPS Council Rules of Procedure, IP/C/1, 28 September 1995, paras (iii) and (iv), at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/1.pdf>, as approved by the General Council, WT/GC/M/8, 13 December 1995, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/M8.pdf>. The General Council's Rules of Procedure can be found here: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/161.pdf>

meetings, a first round of statements by Parties and observers will normally lead to a revised version of the draft recommendations, taking into account the views presented.

The decision as to whether or not to hold formal virtual negotiations is being discussed by the COP Bureau. It is understood that a subsequent review of the informal sessions of the Subsidiary Bodies may lead to a decision that formal meetings may be held virtually. This may have implications for the pending meetings of OEWG 3 and COP 15.

Although the urgency to protect biodiversity and share the benefits equitably has never been greater, it should be noted that this does not translate to a necessity to hold formal virtual negotiations on the post-2020 GBF. What is urgently needed is renewed commitment by Parties to implement their existing obligations under the CBD. The Strategic Plan for Biodiversity (2011-2020), including the Aichi Biodiversity Targets, can still be pursued, as the Targets have not been met. Parties can strengthen their implementation of their national biodiversity strategies and action plans (NBSAPs), at a time when there is more space for domestic action at home.

Preceding these informal virtual sessions, Special Virtual Sessions were also held on some aspects of SBSTTA 24 and SBI 3 in September 2020 in preparation for the meetings. A further Special Virtual Session was held on 'Biodiversity, One Health and the response to COVID-19' in December 2020.

Four briefing webinars to provide information on the SBSTTA 24 documents and selected agenda items of SBI 3 which are relevant to the post-2020 GBF were also held in January 2021.

In addition, an Extraordinary COP to the CBD and Extraordinary COPs serving as the Meeting of the Parties (MOPs) to the Cartagena Protocol on Biosafety and the Nagoya Protocol on Access and Benefit Sharing were held virtually in November 2020 because the budgets for 2021 for the CBD and its Protocols needed to be approved by the end of 2020. This also included the budget for the post-2020 GBF process. The budgets were the only agenda item for the Extraordinary COP and COP-MOPs, and only Parties were able to participate in these virtual meetings.

The Extraordinary COP and Extraordinary COP-MOPs were conducted through the 'silence procedure', which was adopted by the UN General Assembly in March 2020. In accordance with the procedure, a statement with a draft decision was circulated by the CBD Secretariat, on behalf of the President of the COP (Egypt), to the Parties. If no issues or comments are raised by any Party in writing within a certain period of time, the President would declare that agreement has been reached by the Parties on the interim budget for 2021, and close the meetings. Under the procedure adopted by the General Assembly, at least 72 hours must pass without the silence broken, before a decision can be considered to have been adopted.²⁴

During these meetings, the silence was broken and the proposed decision could not be adopted due to a comment that had been submitted by Brazil seeking the insertion of a footnote in the draft decision. The meeting was suspended to allow consultations to resolve the issue. At the resumed meetings, the proposed interim budget for year 2021 was adopted without amendment.

The representative of Brazil made the following statement and requested that it be included in the report on the meeting: "The approval of the budget is without prejudice to the format and organization of work of negotiating sessions of the Subsidiary Body on Scientific, Technical and Technological Advice and the Subsidiary Body on Implementation. We note that there is currently no consensus among Parties to the Convention on the convenience and feasibility of holding formal virtual meetings and negotiations."

²⁴ See Lim Li Lin, State of play of the post-2020 global biodiversity framework, TWN Policy Brief, November 2020, pp. 4-5, at https://www.twn.my/title2/briefing_papers/post2020/Post2020%20BP4_state%20of%20play.pdf

V. Virtual meetings under the UN Framework Convention on Climate Change

Since the start of the COVID-19 pandemic, official sessions of the Conference of the Parties (COP) and subsidiary bodies (SBs) of the UN Framework Convention on Climate Change (UNFCCC) and its Paris Agreement have been postponed.²⁵ The decisions to postpone these sessions were taken by the COP Bureau²⁶ due to the COVID-19 situation and the consequent risks to health and travel arrangements for delegates.

Instead, the UNFCCC has resorted to using virtual meetings to keep multilateral discussions and information exchanges among UNFCCC Parties going during 2020. These included virtual meetings by the UNFCCC and Paris Agreement constituted bodies to enable them to continue technical work and informal meetings for the exchange of information among Parties. The two main virtual events organised in 2020 were the June Momentum²⁷ (1-10 June 2020) and the Climate Dialogues (23 November – 4 December 2020)²⁸. The official descriptions of these events as released by the UNFCCC Secretariat are as follows:

June Momentum (1-10 June 2020)	Climate Dialogues (23 November – 4 December 2020)
<p>From 1 to 10 June 2020, a series of online events will be conducted under the guidance of the chairs of the SBSTA and the SBI and with the support of the UNFCCC secretariat. The space the June Momentum is creating has also been made available for events convened by the COP presidency.</p> <p>This series of online events offers an opportunity for Parties and other stakeholders to continue exchanging views and sharing information in order to maintain momentum in the UNFCCC process and to showcase how climate action is progressing under the special circumstances the world is currently facing.</p> <p>This will include advancing technical work under the constituted bodies, as well as providing a platform for information exchange and engagement on other work being done under the UNFCCC, including on adaptation, mitigation, science, finance, technology, capacity-building, transparency, gender, Action on Climate Empowerment, and the preparation and submission of nationally determined contributions. Formal negotiations and decision-making are not envisaged for these events; they will take place at the SB sessions in October of this year.</p>	<p>The objective of the Climate Dialogues is to provide a platform for Parties and other stakeholders to showcase progress made in 2020 and exchange views and ideas across the subsidiary bodies and COP agendas mandated for 2020. As guided by the Bureau at its meeting on 25 August, The Climate Dialogues will also provide a platform for advancing implementation of activities mandated for 2020, to the extent possible and, where necessary, identifying any potential further action that the SB Chairs could undertake to help Parties to prepare for effectively engaging in the work of the subsidiary bodies at the sessions to take place in 2021. Overall, the Climate Dialogues should help to advance work under the subsidiary bodies and the COP in a virtual setting, thereby paving the way for a successful COP 26.</p> <p>The format of events will range from mandated events for 2020, to meetings of and/or events by the constituted bodies, informal consultations by the Presiding Officers with Parties, and a series of technical workshops and/or information events on matters related to the work of the governing and subsidiary bodies.</p>

²⁵ See UNFCCC Secretariat, COP26 Postponed, 1 April 2020, at <https://unfccc.int/news/cop26-postponed>; UNFCCC Secretariat, COP Bureau Reschedules SB52 Climate Change Discussions for October 2020, 1 April 2020, at <https://unfccc.int/news/cop-bureau-reschedules-sb52-climate-change-discussions-for-october-2020>; UNFCCC Secretariat, Message to Parties, Observer States and Observer Organizations – Information regarding SB52, 22 June 2020, at https://unfccc.int/sites/default/files/resource/message_to_parties_and_observers_postponement_of_sbs52.pdf

²⁶ Rule 22.1 of the draft Rules of Procedure (FCCC/CP/1996/2) being applied by the UNFCCC states in part that “At the commencement of the first meeting of each ordinary session, a President, seven Vice-Presidents, the Chairmen of the subsidiary bodies established by Articles 9 and 10 of the Convention, and a Rapporteur shall be elected from among the representatives of the Parties present at the session. They will serve as the Bureau of the session. ...” According to the UNFCCC Secretariat, among the functions of the COP Bureau is that “[t]raditionally, the Bureau is responsible for advising the President and taking decisions with regard to the overall management of the intergovernmental process. The Bureau has overall responsibility for questions of process. Bureau members often consult with their regional groups on issues. The Bureau is not a forum for political negotiations.” See <https://unfccc.int/process/bodies/supreme-bodies/bureau-of-the-cop-cmp-and-cma#eq-2> (This function, however, is not explicitly stated in the draft COP Rules of Procedure but has traditionally evolved in practice). The COP Bureau is also the Bureau for the Paris Agreement’s COP meeting as Members of the Paris Agreement (CMA). Currently, the COP President is Chile (elected in December 2019 at COP25 in Madrid). The membership of the current Bureau can be found here: https://unfccc.int/sites/default/files/resource/Bureau%20members_cop_cmp_cma_web.pdf. The draft Rules of Procedure being applied by the COP is here: https://unfccc.int/sites/default/files/resource/02_0.pdf

²⁷ UNFCCC Secretariat, June Momentum for Climate Change, at <https://unfccc.int/process-and-meetings/conferences/june-momentum-for-climate-change>

²⁸ UNFCCC Secretariat, UN Climate Change Dialogues 2020, at <https://unfccc.int/cd2020>.

Neither the June Momentum nor the Climate Dialogues stood in for the formal official sessions of the SBs or of the COP in 2020. As such, these virtual meetings could not serve as the vehicle for the conduct of official negotiations leading to decision-making among the UNFCCC and Paris Agreement Parties.

In the context of the ongoing pandemic with its associated health risks, travel disruptions, requirements for medical testing and quarantines for travellers, and recurrent lockdowns of cities and communities to prevent or reduce the spread of the COVID-19 virus, the Bureau's decisions in April 2020 to postpone the holding of COP26 and the associated sessions of the SBs (SB52 and SB53) were correctly taken. Going ahead with the physical meetings of these bodies as originally scheduled for June 2020 (SB52) and November 2020 (SB53 and COP26) would have put the delegates' health at risk. Additionally, the travel restrictions in 2020 due to the pandemic imposed by Germany and the United Kingdom on the entry of non-European Union nationals would have prevented most delegations from non-EU Parties from even being able to participate in physical meetings of these bodies. Hence, the postponement by the COP Bureau of SB52 and 53 and COP26 was justified due to *force majeure* and covered by Rule 4.2 of the applied draft Rules of Procedure which exhorts the COP to "endeavour not to hold such a session at a time which would make the attendance of a significant number of delegations difficult".

The postponement of COP26 and SB52 and SB53 has meant that the essential business of official negotiations among the Parties being conducted under the auspices of the SBs and the COP eventually leading to the adoption of decisions by the COP at COP26 did not take place in 2020. This is correct. However, nothing prohibits the COP Presidency, the SB Chairs and the Parties from informally engaging with one another outside of the context of official negotiations and decision-making. Such informal engagements could take the form of informal exchanges of information and views to allow the COP Presidency, the SB Chairs and Parties to obtain a clearer understanding of the different views and perspectives of Parties on various issues that may then be the future subject of in-person negotiations and decision-making at the COP. Such informal engagements, however, would be non-binding and any outcomes that they might have would not constitute any formal basis for the official negotiations and subsequent decision-making. Such outcomes could, obviously, informally inform or be reflected in Parties' official proposals, negotiating positions and possible compromises when in-person official negotiations and decision-making processes resume in the in-person physical COP and SB official sessions.

The legal and practical difficulties associated with having virtual negotiations in the UNFCCC context have been raised by many developing countries, including through the Group of 77 and many of its sub-groups, to highlight their concerns over and opposition to having such virtual negotiations during 2020 and during 2021. These concerns continue to exist, and the experience of many developing countries during the virtual events held in 2020 (the June Momentum and the Climate Dialogues in late November-early December 2020) highlighted the validity of their concerns.

However, the COP25 and COP26 Presidencies, the chairs of the subsidiary bodies, the UNFCCC Executive Secretary, and the UN Secretary-General have called for Parties to consider the holding of virtual official sessions of the subsidiary bodies and for the conduct of Party negotiations virtually in order for conclusions to be agreed to and draft decisions prepared in time for adoption at the rescheduled COP26 to be held in Glasgow in November 2021.²⁹ The common refrain for these calls is that addressing the climate change crisis on an urgent basis requires the successful holding of COP26 through the adoption of the implementing rules for some of the provisions of the Paris Agreement (such as on Article 6, common time frames for Nationally Determined Contributions, or NDCs, or specific technical details for the enhanced transparency framework) that had not been settled at COP24 in Katowice in 2018 or COP25 in Madrid in 2019. The UN

²⁹ See e.g. Michelle Langrand, Negotiations for COP26 need to begin virtually, UN chief says, *Geneva Solutions News*, 9 February 2021, at <https://genevasolutions.news/climate/negotiations-for-cop26-need-to-begin-virtually-un-chief-says>; United Nations, 2021 a 'crucial year' for climate change, UN chief tells Member States, 8 February 2021, at <https://news.un.org/en/story/2021/02/1084132>; Chloe Farand, Antonio Guterres calls for preparatory UN climate negotiations to be held online, *Climate Change News*, 8 February 2021, at <https://www.climatechangenews.com/2021/02/08/antonio-guterres-calls-preparatory-un-climate-negotiations-held-online/>

Secretary-General stated that he had “directed UN officials around the world to make offices and venues available to allow for all countries to participate in virtual negotiations”.³⁰

In a letter sent out to developing country UNFCCC negotiating groups dated 24 February 2021, the UNFCCC Executive Secretary noted that the UNFCCC secretariat “has facilitated access to reliable Internet connectivity by making arrangements for participants [of the UNFCCC June Momentum for Climate Change and November Climate Dialogues in 2020] to use venues such as UNDP offices or hotel conference rooms and by providing technological support and assistance” and “offered the support of the secretariat to facilitate remote coordination meetings of your group in the absence of in-person meetings”, while also reiterating that “the United Nations Secretary-General has offered United Nations offices globally as possible venues to facilitate the remote participation of Parties in meetings to advance the UNFCCC process. We will work with our United Nations counterparts to ensure that this option is readily available to the members of your group, should you request our support.”

It should be noted, however, that there is nothing in the Paris Agreement or anywhere else in the UNFCCC that would prevent any Party from enhancing its level of ambition for undertaking climate action. If any Party feels that the pandemic has slowed down the pace of climate change action, such Party can always, for example, “at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition ...”.³¹ Hence, rather than pegging their increased climate ambition to COP outcomes, the EU or the US, for example, could hence unilaterally communicate adjusted NDCs in 2021 that would substantively enhance and scale up their level of ambition if they so wish in order to give substance to their stated concerns over the urgency of the climate crisis. Doing so could help encourage other Parties to also subsequently communicate adjusted and enhanced NDCs.

VI. The importance of in-person meetings in international negotiations

International negotiations involving parties with widely varied positions and perspectives, especially those involving both developed and developing countries, are generally highly complex and the development and shaping of text that can cover various positions and eventually reflect compromise agreement or consensus will generally require direct in-person interactions among negotiators. In turn, these negotiators are bound to also observe and carry out the negotiating instructions of their capitals in a dynamic manner in response to the flow of the negotiations.

This is generally why developing countries in various international fora in which binding commitments are being negotiated, such as the UN climate change negotiations and the WTO negotiations, have often consistently called for negotiating procedures which are transparent, participatory and text-based, in order to allow for their negotiators to participate effectively and ensure that their perspectives are reflected in any negotiated outcomes. Even in international fora that are negotiating outcomes that would not be necessarily binding in the treaty law sense, but which would represent an international political commitment or resolution or which would have operational implications on the institutions tasked to carry out such outcomes, developing countries have generally pushed for such open, transparent and participatory negotiating modalities to be used to ensure their effective participation.

For example, WTO decisions on negotiating new rules or disciplines will result in legally binding and enforceable rules subject to dispute settlement once they enter into force as part of the covered agreements under the WTO Agreement. Hence, for developing countries, their potential economic and policy impacts are much higher and more sensitive with respect to policy space and development implications. This is why it is extremely important that negotiations on WTO rules and disciplines be done in a transparent and fully participatory manner, particularly with the actual physical presence of negotiators negotiating in person in

³⁰ Fiona Harvey, Antonio Guterres says Covid pandemic must not halt preparatory work for key summit in Glasgow, *The Guardian*, 8 February 2021, at <https://www.theguardian.com/environment/2021/feb/08/un-chief-urges-leaders-start-cop26-climate-negotiations-online-covid>

³¹ Paris Agreement, Art. 4.11.

order to be able to work out technical details directly that may have major economic and political implications when made operational. In-person meetings help ensure inclusivity and transparency in terms of the text being negotiated and the outcomes of the negotiations.

Although UN General Assembly resolutions (other than those on the UN budget and administrative operations of the UN) are generally not binding and not enforceable,³² they often have political force and effect, in the sense that voting for or against a General Assembly resolution often is used as a benchmark for determining the willingness of a UN Member State to support one or the other side of the debate over a particular issue of international concern which may, in turn, have international or domestic political repercussions on such country. However, unlike negotiated outcomes that result in legally binding treaty text, countries will generally have much greater flexibility to figure out whether and how to implement UN General Assembly resolutions and their level of legal or political enforceability tends to be less.³³

In international policy negotiations in which meaningful and effective universal participation is important, such as those in the WTO and the United Nations, the ability of all Member States to access and participate in the negotiations must be enabled and ensured. This is a condition *sine qua non*, otherwise the legitimacy of the negotiated outcome will be lost.

Another aspect that often has been of crucial importance to developing countries when it comes to the shaping of negotiating modalities is the role of individuals tasked with helping to facilitate the negotiators in drafting the textual outcome. In interactive and in-person negotiating meetings, and particularly in cases where draft texts are proposed and are negotiated and amended transparently on-screen and in full view of the participants, transparency and legitimacy are often enhanced as the parties will see how the text is shaped and compromises are discussed openly. In negotiating meetings where facilitators draft text and the parties simply react to the facilitators' texts, transparency and legitimacy often degrade and the role of the facilitators as primary interlocutors and decision-makers in shaping the outcome becomes enhanced.

There have been suggestions that for the duration of the enforcement of the pandemic's physical distancing response measures, international organisations could continue to carry out international negotiations through non-in-person meetings using alternative means, including the "silence procedure" adopted by the UN General Assembly or through the use of modern telecommunications technology (such as tele- or video-conferencing).

While the practical difficulties engendered by the physical distancing requirements of the pandemic response measures are clearly evident in relation to the holding of in-person international negotiating meetings, the need to ensure that negotiations which could result in outcomes that may have long-term policy implications on developing countries are undertaken in a transparent and effectively participatory manner remains paramount. This would be particularly the case when the matters being negotiated are clearly of a substantial and substantive policy nature, or will have international or domestic policy implications, or when it is clear that the views of the parties involved in the negotiations are divergent and intensive and in-depth discussions are required.

The need for interactive and in-person negotiations might be less in cases where the issues are procedural in nature or where there is clearly already consensus on the outcome. The need for in-person modalities would also be less in cases where, in the context of international negotiations, the meeting is only for the purpose of disseminating information – i.e., to provide information rather than to initiate or continue substantive discussions or to share and then informally discuss negotiating proposals – to the parties rather than for the substantive negotiation and discussion of issues.

³² Articles 10 and 14 of the UN Charter refer to General Assembly resolutions as "recommendations", and the International Court of Justice has often pointed out the recommendatory nature of General Assembly resolutions.

³³ For example, despite more than four decades of UN General Assembly resolutions calling for the lifting of the imposition by the US of unilateral coercive economic measures (e.g., trade embargo and financial sanctions) against Cuba, these measures have continued to be in place up to the present, causing high levels of economic damage against the people of Cuba. Another example is the disregard by a number of States for implementing annual UN General Assembly resolutions calling for respect of the right to self-determination by the people of Palestine, the establishment of an independent State of Palestine, and an end to the occupation of Palestine.

VII. Important considerations in relation to virtual in lieu of in-person negotiations

The UN General Assembly's pandemic "silence procedure" modality has since allowed it to act on and adopt resolutions despite the lack of in-person plenary and committee meetings. In the WTO, such procedures, as pointed out above, are currently being explored and discussed. For these international organisations and for many others, the use of virtual or online conferencing is also being explored or already implemented.

However, as pointed out above, the use of virtual meetings to discuss and agree on international decisions or resolutions that could have substantive policy impacts or implications has to be looked at carefully from the perspective of ensuring transparency and full and effective participation of all the parties in order to ensure that the adopted outcome is a legitimate compromise or agreed text of the participants.

A key consideration that also needs to be highlighted when it comes to assessing which negotiating modality – i.e., in-person negotiations or the "silence procedure" approach – works best for arriving at agreed outcomes for the parties is the way in which communications take place during the negotiations. This can affect the quality and level of interactivity of the communication among the parties, the extent to which rapport is developed and hence the level of cooperation among them, the extent of information shared, the level to which the parties understand the issues involved, the parties' willingness to achieve a result, and finally the content of the outcome.

Academic studies on negotiations have highlighted that the process of negotiation involves exchanging messages and cues, both verbal and non-verbal, among the parties involved and that successful negotiation often depends on the parties' respective abilities to read and act on these cues in a dynamic way to eventually lead to agreed outcomes. This is particularly important in light of the multicultural context in which international negotiations take place, with negotiators coming from different national and cultural backgrounds with different languages and widely varied ways of expressing themselves. This requires that the negotiators must be able to see, hear and understand each other as broadly as possible in order to avoid misunderstandings arising from mistranslated or misunderstood statements or cultural mannerisms or behavioural and speech patterns.

In any communication, and particularly in the context of international negotiations, the negotiators receive and also look for contextual cues (such as the other negotiators' gestures, posture, facial expressions and tone of voice) in order to be able to understand what the other parties are saying and that such understanding is what the other party meant. Absent these cues, miscommunication and misunderstanding can often occur. Additionally, the lack of these contextual cues that can build rapport among the negotiators, a sense of "we are in this together", can create distrust, increase competition, exacerbate contention, reduce accountability, and induce a fear of deception, thereby possibly leading to a breakdown of the negotiations and resulting in no outcome. This is the reason why in-person meetings are crucial to the success of international negotiations, as only in-person meetings can provide the broad contextual environment for such verbal and non-verbal cues to be perceived.

In intergovernmental negotiations, the building of trust among the negotiators is crucial. For those negotiators coming from societies or cultures in which communal and collective relationships are of greater importance, such as in most developing countries, trust is indispensable. This is particularly the case in processes, such as in the UNFCCC and the WTO, where there is a trust deficit existing largely between developed and developing countries. This deficit can be addressed and trust developed only based on wide-ranging discussions of ideas and concepts in person among negotiators and the generation of common views and perspectives based on their shared experiences and the identification of similar realities, problems, and solutions. It is the actual shared experience of constant in-person interaction through long hours of sitting across or beside each other, seeing each other eye to eye and discussing sensitive political and policy issues and their country positions that ultimately generates greater understanding, common approaches, and in the end greater legitimacy, credibility, and acceptance of the negotiated outcome. Virtual setting negotiations do not provide the right atmosphere that creates such bonds of shared experience and confidence among negotiators coming from countries with widely varying circumstances and priorities and which then lays the basis for solid and credible agreed negotiated outcomes.

It has been suggested in various quarters that international negotiations can take place through virtual means, i.e., not through in-person meetings, to allow international organisations to continue their work during the pandemic, but these can have significant downsides. These include:

- Challenges in access to adequate telecommunications hardware or software – Given the different economic, policy and technological circumstances of individual delegates, delegations and governments, there will be unequal levels of access to the telecommunications hardware or software used to engage in virtual meetings. At the individual level, delegates might not have high-quality or institutional-grade Internet or telecommunications access in their homes to allow for high-speed and high-data-bandwidth audio and video conferencing. In capitals, there might be instances where telecommunications hardware or software applications might not be available for individuals to acquire or download due to domestic or international interdictions. These unequal levels of access to the needed telecommunications hardware or software significantly degrade the ability of those with less ability to connect to effectively and meaningfully participate in virtual meetings, which means that they will have less of a voice in international negotiations. Low-speed or low-bandwidth Internet connections often affect developing countries more than developed countries due in many cases to telecommunications infrastructure constraints as well as technology availability. Even in situations where participants are located in the same city, local connectivity infrastructure constraints could also result in dropped calls, frozen screens, inadvertently muted speech, and other technical difficulties resulting in more difficult communications and interaction.
- Difficulties in seeing the physical personal negotiating context for verbal and non-verbal cues – Virtual meetings (whether by teleconference, videoconference or email) restrict the ability of the participants to fully see and interact with the other participants, whether because one sees only the face on-screen but not the overall body language, or because the poor or weak Internet or telecommunications connections or technologies being used or any background noise or images being transmitted can limit or degrade the transmission of audio and video signals, thereby making it difficult to hear or see the other participants fully. Eye contact among negotiators, usually so important in terms of developing rapport and gauging non-verbal cues, is not possible when using teleconferencing or instant message- or email-based conferencing and usually not possible when doing videoconferencing due to the physical placement of cameras on the top of the screens of computers or videoconference equipment. These difficulties are particularly prominent in terms of audio- or text-only communications rather than audio-video communications – audio-only phone conferences do not provide the participants with the visual reaction cues from the other participants nor allow participants to see how their proposals are being reflected in textual changes in real time, while text-based communications such as e-mail can often be misunderstood due to different writing styles, use of words, non-fluent use of language, or failure to adequately convey nuance or emotional content. There could also be environmental or background distractions that degrade the ability of participants connecting remotely to concentrate fully on the discussion.
- Difficulties in technical connections – There are often technical difficulties that come up when doing virtual meetings, whether it is in terms of connecting to the call, maintaining good and clear audio and video signals, suddenly losing connections while in the midst of the meeting, signal transmission time lags which can impose unnatural gaps in the conversation flow among the participants, and other similar technical difficulties. In some instances, the lack of technical support personnel can make it difficult for participants who may be technologically challenged to effectively participate. These technical difficulties can adversely affect effective participation in virtual meetings by all participants.
- Multiple time zones – International negotiations may also often involve participants in their homes (e.g., in capital cities) connecting from multiple time zones, coming all the way east from the central Pacific and Oceania to all the way west on the west coast of the Americas and the eastern Pacific – even to the extreme of having a 23-hour time difference among the participants (e.g., in virtual meetings involving participants coming from Samoa and Hawaii). This could mean that some participants will either be staying up very late in the night or waking up very early in the morning, with consequent

impacts on their ability to meaningfully concentrate and effectively participate in the discussions. In effect, this could hand a built-in negotiating advantage to those participants who are in the regular working hours of their time zone during the virtual meeting as they would be more alert and could have the ability to obtain technical support if needed.

- Difficulties with respect to simultaneous interpretation and document translation into multiple languages – One of the major advantages in having official in-person meetings in the UN and other international organisations with the facilities to do so is the fact that particularly in meetings where decisions are to be taken, there are often simultaneous and real-time professional interpretation services available. This allows for much greater interactivity and engagement by those delegates who may not be fluent in the primary negotiating language (which often is English). Additionally, draft texts of proposals which are to be placed for decision also get translated into the official languages before the actual meeting in which the decision is to be made takes place. While the state of the technological development of the software and technical specifications for real-time simultaneous interpretation and machine-based translation of documents have been improving steadily, there remains a huge gap in quality, accuracy, adaptability and speed between in-person professional interpretation and document translation during meetings and their digital alternatives. Additionally, in various international organisations, developing country groups often rely on the physical facilities and interpretation facilities of the international organisation's secretariat to undertake internal group meetings to prepare their group negotiators for subsequent substantive negotiations with other parties. These are services that might not be available virtually for various reasons to these groups.
- Privacy and security issues – While many virtual meeting applications and services highlight their security features, it is now a given that data that is transmitted over the Internet, satellite or telephone lines may be intercepted and listened to or read by those countries or persons that are technologically equipped to do so (or are physically with one of the remote participants listening in).³⁴ Additionally, the ease of recording virtual meeting conversations using current software can easily result in leaks of sensitive information during the negotiations. There is also the possibility that third parties that should not be part of the negotiations could hack into the virtual meeting if security protocols are not secure enough.
- Decreasing Party involvement and transparency – In virtual setting negotiations, where the parties are not able to informally interact and draft negotiated texts together or directly see how the negotiated texts reflect their textual proposals, the role of facilitators and the secretariat will become more significant and the role of country negotiators become less significant. As both the facilitators and the secretariat tend to become outcome-oriented in a bid to ensure that the virtual negotiating process arrives at an agreed outcome, the possibility increases that the facilitator and the supporting secretariat would seek to push the agreed outcomes in one way or another depending on what their perceptions or bias may be or drop perceived areas or issues of controversy or contention to achieve consensus. While this possibility is also present during in-person facilitated negotiations, alert negotiators in in-person settings can sometimes mitigate this possibility – something that would not be possible in virtual settings in which the facilitator would be the one with “hands on the keyboard” in writing the negotiated textual outcome.

It is clear from the downsides enumerated above that virtual meetings under current circumstances and technological conditions have significant inherent limitations that could preclude them from generating the level of participation, interactivity, personal rapport and connection, and open-ended and dynamic discussion needed to ensure that the outcomes are transparent, meaningful and legitimate.

³⁴ See, e.g., <https://privacyinternational.org/learn/what-governments-do> and <https://privacyinternational.org/learn/what-companies-do>

VIII. Principles for negotiations

However, given the fact that most intergovernmental normative negotiations were suspended or postponed in 2020 and the continuing uncertainties with respect to when COVID-19 vaccines will be made widely available across the globe as to produce global-level herd immunity³⁵, the pressure this year (2021) on international organisations to resume their essential business of intergovernmental negotiations using virtual means as a means of producing multilateral normative outcomes will grow. In this context, it would be important to put in place certain principles that should be observed when international organisations decide on when to use virtual modes to engage in intergovernmental negotiations and decision-making.

These principles would include the following:

- Context-specific – Launching virtual negotiations should be context-specific. This means that such modality should not be used for all issues within the scope of an intergovernmental organisation’s mandate but should be used judiciously and selectively only when appropriate to do so and agreed upon by the organisation’s intergovernmental membership. Issues that could be amenable to virtual negotiations could include:
 - Issues which are primarily administrative in nature, such as organisational budgets or work plans;
 - Substantive policy issues on which there had already been prior in-person negotiations taking place before the pandemic and on which a significant degree of intergovernmental agreement had already been reached;
 - Substantive policy issues which are substantively complex or detailed or on which there continues to be a significant divergence of views among governments could be dealt with using virtual negotiations only on a limited basis – i.e. the default preference for such policy issues should be that they can be negotiated only through in-person modalities. However, in cases where the near-term urgency of the situation requires that a multilaterally-negotiated agreement be obtained with respect to a particular substantive policy issue³⁶, then such issue should be taken up sequentially with sufficient time being provided to ensure that all perspectives are heard and duly reflected, with frequent breaks to allow negotiating groups of parties to coordinate and discuss with one another. If the substantive policy issue is part of a broader package of other substantive policy issues that need to be dealt with by parties, any agreement reached through virtual negotiations on that policy issue should be on an ad referendum basis and subject to subsequent agreement on the other policy issues in the package (e.g. “nothing is agreed until everything is agreed”);

³⁵ Equitable and rapid COVID-19 vaccine global distribution is severely hampered by many factors, including the hoarding by developed countries of currently available vaccines to vaccinate their populations twice over, export restrictions being put in place by countries with respect to COVID-19 vaccines and medical equipment, intellectual property rights barriers that prevent developing country pharmaceutical manufacturers from producing COVID-19 vaccines patented by developed country vaccine makers, as well as cost. See e.g. Jessica Davis Pluss, Akiko Uehara, and Pauline Turuban, Calls intensify for Big Pharma to break monopolies on Covid-19 vaccines, Swissinfo.ch, 4 March 2021, at <https://www.swissinfo.ch/eng/calls-intensify-for-big-pharma-to-break-monopolies-on-covid-19-vaccines/46414146>.

³⁶ This could, for example, be the TRIPS COVID-19 waiver proposal; or immediate debt relief for developing countries as a means to combat the economic impacts of the pandemic or of climate change. Not all substantive policy issues should be the subject of virtual negotiations. Only those issues which are deemed by the international organisation’s membership to be of sufficient criticality or urgency, particularly to address a key global issue such as addressing the pandemic, should be subjected to virtual negotiations. In cases where a substantive policy issue is one of implementation of existing treaty obligations such as, for example, in the UNFCCC with respect to the enhancing or implementation of NDCs or in the CBD with respect to the implementation of previously-agreed biodiversity targets, doing so would not most likely not require having virtual negotiations as these can be achieved through national-level actions.

- Ensure inclusivity, transparency and participation, to the maximum extent possible, during virtual negotiations – The credibility and legitimacy of virtual intergovernmental negotiations as a means for developing and agreeing on multilateral policies and actions depends on the extent, inclusiveness, effectiveness, and transparency of participation among all the participants concerned. Absent this criterion, virtual negotiations and their outcomes are likely to be illegitimate, with future implementation then likely to suffer. This means that:
 - Stable Internet connectivity and ICT access should be provided by the international organisation to all participants of the intergovernmental negotiations. This would include making the international organisation's country offices, if any, open to the governmental participants from capitals; financially supporting such participants to access secure commercial Internet connections (such as in hotels or commercial business centres); providing such participants with the needed hardware or software to have Internet connectivity (including those who may not be able to otherwise have such hardware or software due to sanctions that may be imposed unilaterally by developed countries on their countries);
 - Geographical time zone proximity for the participants matters. To avoid situations in which some participants of virtual negotiations are disadvantaged due to them being in places whose time zones would mean that they would be participating outside of the normal working hours in their time zone, international organisations should seek to ensure that virtual negotiations preferably take place among participants who are in the same or nearby geographical time zones. For virtual negotiations in which the participants are spread over the 24 time zones around the world, more innovative solutions should be found, such as shifting virtual meeting times among the time zones so as to provide participants whose participation may have been hampered in one virtual meeting due to their time zone to then be able to fully participate in a subsequent meeting by having such meeting in their or in a nearby time zone.
- Virtual negotiations must be based on agreed-upon rules of procedure – The intergovernmental deliberations and decision-making of international organisations are governed by adopted rules of procedure. These rules of procedure should also apply to any virtual meetings, deliberations, negotiations, or decision-making that may be undertaken by the deliberative bodies of the international organisation. This will ensure that the rights, privileges, and procedural protections for the parties that are provided for in the regular rules of procedure with respect to in-person meetings will be extended and applied to virtual negotiations. Doing so will provide the participants with a semblance of procedural continuity and ensure that any decisions taken through virtual means will be procedurally legally valid.

IX. Conclusion

To conclude, in the context of international negotiations, including in the UN and in the WTO as well as in other forums such as the UNFCCC and the CBD, substantive negotiations through virtual meeting modalities cannot replace the conduct of in-person dynamic and substantive negotiations on issues that will have substantive policy impacts and implications at the domestic and international levels for countries. This is because virtual negotiations and meetings have significant constraints with respect to transparency, inclusiveness, and extent of effective participation that tend to affect developing country participants more than their developed country counterparts.

Digital communication tools and media can support making negotiations more efficient and, in these pandemic times, allow negotiators of governments to stay connected and exchange information with one another during the period that in-person meetings are not possible or severely restricted. But their logistical and technological limitations, the varying abilities of human participants to process information and fill in information gaps resulting from virtual communication glitches, the potential for decreasing the ability of government negotiators especially from developing countries to effectively shape negotiated outcomes, as well as increasing even more the relative power imbalance between developed and developing countries in international negotiations, would all suggest that if in-person negotiations cannot be held in the period preceding the major international conferences that had been postponed to 2021 (e.g. WTO Ministerial

Conference 12, UNFCCC COP26, CBD COP15, UNCTAD 15, Oceans Conference 3), informal exchanges of information, including technical work whenever possible, using virtual means among the Parties should be continued. These can be used to identify divergences and convergences and discuss and clarify technical options or issues that Parties may need clarity on.

However, the negotiation and adoption of substantive policy outcomes should be postponed until such time that official and formal in-person negotiations can once again take place. Only open, transparent and fully participatory in-person negotiations would allow for meaningful equality of participation and access to such negotiations by developing countries and ensure that any negotiated outcomes can also reflect their views and perspectives.

Vicente Paolo Yu is a *Senior Legal Adviser of the Third World Network*.