

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 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 organizations usually meet.

The inability to convene in-person meetings has impacted on the ability of international organizations 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 organizations, 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 each other, work directly on the text together with each other 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 specialized 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 Sanya Reid Smith and Meena Raman*

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:¹

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.

Under the Covid-19 silence procedure, the General Assembly President or his designated co-facilitators for a particular issue would circulate draft resolutions² 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.

As the General Assembly is currently not physically meeting, voting cannot take place. Article 18(2) and (3) of the UN Charter on voting require that members must be “present and voting”³ for their votes to be recorded. This has traditionally meant that the vote takes place during a GA plenary meeting.⁴ With in-

¹ 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>).

² 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

³ 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/>

⁴ The methods of voting by show of hands, standing or mechanical means are described in Rule 87 of the UNGA 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/anx4.shtml>), and annex VII, para. 2 (at <https://www.un.org/en/ga/about/ropga/anx7.shtml>).

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.⁵

So far, there have been two Covid-19-related resolutions adopted by the General Assembly using the modified silence procedure under decision 74/544. These are resolution 74/270⁶ entitled “Global solidarity to fight the coronavirus disease 2019 (COVID-19)” adopted on 2 April 2020 and resolution 74/274⁷ 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.⁸

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 taken by the General Assembly President over the month of March in relation to the Covid-19 pandemic, including his letter of 11 March 2020ⁱ limiting the number of people in in-person meetings and cancelling some meetings and events; his letter of 13 March 2020ⁱⁱ cancelling all in-person meetings and starting exploration of virtual meetings; his letter dated 17 March 2020ⁱⁱⁱ postponing or cancelling all in-person meetings of the General Assembly up to 17 April 2020; his letter dated 17 March 2020^{iv} 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 2020^v 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 2020^{vi} by the UNGA President did not have a deadline. That draft decision was subsequently modified^{vii} 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 adopted.^{viii} 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.

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

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

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

^{iv} 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>

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

^{vi} 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>

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

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

⁵ 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.

⁶ See <https://undocs.org/en/A/RES/74/270>

⁷ See <https://undocs.org/en/A/RES/74/274>

⁸ 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

III. World Trade Organization meetings during the pandemic

In Geneva, which hosts the headquarters of many UN specialized 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 organizations 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.

At an informal heads-of-delegation meeting of WTO Members held on 17 April 2020, 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.⁹ While delegations were generally open to 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.¹⁰

For the WTO General Council (the WTO's highest governing body when the WTO Ministerial Conference is not in session¹¹) 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."

⁹ 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>

¹⁰ 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.twn.my/title2/wto.info/2020/ti200505.htm>

¹¹ 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. ..."

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.¹² 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.¹³ 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

“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 Declaration,ⁱ 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 Declarationⁱⁱ 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, paragraph 1(g) of the General Council's decision adopted on 1 August 2004ⁱⁱⁱ 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 delegation at an informal meeting that was subsequently formally adopted by the General Council.^{iv} 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.^v

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

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

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

^{iv} 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.

^v 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 2002, at https://www.iatp.org/sites/default/files/Clarifying_the_Status_of_Singapore_Issues_in_t.htm

¹² 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>

¹³ 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.

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.

In short, it seems that the current rules of procedure of the WTO General Council generally 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.¹⁴

IV. 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 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,¹⁵ 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

¹⁴ 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.

¹⁵ 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.

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.¹⁶

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 has been the role of individuals tasked to help 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 organizations 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.

V. 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 organizations 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

¹⁶ 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.

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.

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 organizations 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.
- 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 connection 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 organizations 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 organizations, developing-country groups often rely on the physical facilities and interpretation facilities of the international organization'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).¹⁷ 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.

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.

VI. Conclusion

To conclude, in the context of international negotiations, including in the UN and in the WTO as well as in others, negotiations through virtual meeting modalities would not be sufficient for the conduct of open-ended, dynamic and substantive negotiations on issues that will have substantive policy impacts and implications at the domestic and international levels for countries.

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.

¹⁷ See, e.g., <https://privacyinternational.org/learn/what-governments-do> and <https://privacyinternational.org/learn/what-companies-do>