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UN adopts resolutions on sovereign debt and vulture funds

Two resolutions adopted recently at the United Nations highlight the pressing need for an orderly system of restructuring sovereign debt. The UN General Assembly has passed a landmark resolution that launches work to set up a multilateral legal framework for sovereign debt workouts. Over at the UN Human Rights Council, another resolution was adopted which condemns the activities of "vulture funds" that threaten to impede restructuring efforts and hurt the realization of human rights in debtor countries.

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Historic UN vote on a multilateral sovereign debt mechanism

The United Nations General Assembly has agreed to work towards setting up a sovereign debt restructuring framework, the current absence of which constitutes a glaring gap in the international financial architecture.

by Bhumika Muchhala

NEW YORK: The United Nations General Assembly on 9 September adopted by vote the crucial draft resolution of the Group of 77 and China, "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes."

A majority of 124 countries voted for the resolution, 11 countries voted against it, while 41 countries abstained from a vote. A total of 176 countries out of the UN membership of 193 were present.

The central action of the draft resolution is to: "Decide to elaborate and adopt through a process of inter-governmental negotiations, as a matter of priority during [the General Assembly's] 69th Session, a multilateral legal framework for sovereign debt restructuring processes with a view to, inter alia, increasing efficiency, stability and predictability of the international financial system as well as achieving sustained, inclusive and equitable economic growth and sustainable development, in accordance with national circumstances and priorities."

The adoption of this resolution is historic due to several key reasons. Firstly, a majority of member states in the General Assembly have voted in the affirmative on one of the most fundamental and longstanding gaps in the international financial architecture, that of a sovereign debt workout framework that is multilateral and that has legal force. The text of the resolution may be read as a proposal that the General Assembly adopt a set of legal principles that should govern all sovereign debt workouts.

The resolution commits the General Assembly to agree on modalities, or the terms and logistics, for commencing open, intergovernmental negotiations on a sovereign debt restructuring framework by the end of 2014.

Subsequently, the resolution commits governments to adopt an outcome on a "multilateral legal framework for sovereign debt restructuring processes" by the end of the 69th session of the General Assembly (by about September 2015).

The resolution was spearheaded by Argentina in the wake of the now well-known litigation launched by "vulture fund" holdout creditors which had bought Argentina's debt at a significant discount during the nation's debt restructuring almost a decade ago and are now demanding the full value and interest of the bonds acquired by them.

Vulture fund litigation not only threatens to sabotage the entire sovereign debt restructuring process, but also prevents indebted countries from using precious foreign exchange resources freed up by debt relief for domestic development needs.

As UN human rights expert on foreign debt Juan Pablo Bohoslavsky stated, "Those who do not participate in a debt restructuring and litigate against the sovereign debtor might get fully repaid, while creditors who accept a 'haircut' will see the value of their bonds significantly reduced. Creditors will thus probably be much more reluctant to conclude debt restructuring agreements with sovereign debtors, meaning that debt crises will last longer and become more difficult to resolve, with less predictable outcomes."

Secondly, the European Union (EU), which usually votes as a bloc, voted on this occasion as separate member states and in sharp division. As had been expected, the United Kingdom and Germany voted against the resolution, as did Ireland, Finland, Hungary and the Czech Republic.

The vast majority of EU member states abstained from voting, which leaves the door open in terms of their national decision to participate in negotiations and discussions with regard to both process and substance. The European countries that abstained were: Italy, France, Sweden, Switzerland, the Neth-

erlands, Spain, Greece, Norway, Portugal, Denmark, Austria, Bosnia and Herzegovina, Bulgaria, Cyprus, Latvia, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Serbia, Slovakia, Slovenia and Ukraine.

Such an explicit division within the EU vote is a unique and significant occurrence, revealing a more complex and fissured political portrait than that presented by the EU in other development finance and global institutions or within the European media itself.

Thirdly, the country grouping JUSCANZ (Japan, the United States, Canada, Australia and New Zealand), which is led by the United States, was also divided. New Zealand abstained from a vote while all the other countries voted against the draft resolution. (Incidentally, New Zealand is running for a seat on the UN Security Council.)

The United States is the only country in the group that explicitly rejected the very prospect of negotiating for a multilateral legal framework. Even Canada and the other states did not explicitly reject intergovernmental negotiations. This reality isolates the United States as the most serious obstacle to ensuring the minimum political space that would allow for intergovernmental discussions to actually take place within the UN.

Almost all developing countries, including the Africa Group countries and the Small Island Developing States (SIDS), voted in favour of the resolution. Countries that were not present included: Ghana, Somalia, Mali, Cameroon, Liberia, Lesotho, Central African Republic, Cambodia, Republic of Macedonia, Micronesia, Marshall Islands, Nauru, Tuvalu and Timor-Leste.

Russia and Azerbaijan voted "yes" on the resolution.

Out of 193 countries in the UN, 176 showed up and 17 were absent. Several absences, particularly in the case of the SIDS, were due to the SIDS conference in Samoa having concluded just the day before on 8 September.

The strong majority vote implies that a very large number of member states at the UN have agreed to embark on a more ambitious track towards sovereign debt workouts than has previously been taken on by the UN. The very optimal scenario is that the General Assembly will eventually adopt a set of legal principles that should govern any and all sovereign debt workouts.

While a General Assembly resolution is not binding, it is a normative statement to which governments ascribe political priority. The theme of debt restructuring stretches back to the Monterrey Consensus, produced in 2002, which called for exactly such a resolution.

Twelve years later, although wheels are finally in motion in the UN on this significant topic of sovereign debt workouts, the primary challenge will be to ensure that negotiations actually take place to establish a multilateral legal framework.

Debate over UN mandate and procedure

There were two key lines of argument by countries that either voted against the resolution or abstained from the vote.

Firstly, they argue that the very subject of sovereign debt restructuring and sustainability is not within the expertise and purview of the United Nations system. Secondly, a procedural argument, or rather complaint, arose regarding the lack of preparatory and discussion time (and the overall "mistiming") surrounding the proposal of the draft resolution by Argentina and the Group of 77 chair (Bolivia).

With regard to the first line of offence that the UN is not the appropriate forum for discussions pertaining to the international financial architecture, and that the International Monetary Fund (IMF) or the Group of 20 (G20) bodies are much better suited, this has been the knee-jerk position taken by most developed countries across various discussions in the UN, including that of the General Assembly Second Committee on macro-policy issues as well as within the sustainable development and post-2015 development agenda contexts.

It reflects developed countries' preference for a course of passive discussion and operational inaction in the UN by handing over all authority and mandate to the IMF-World Bank and G20 nexus.

The EU in particular said that its member states have serious concerns on whether a legally binding convention for debt resolution is the best way to deal with the problem. The EU also reasserted its view that the UN General Assembly is not the best forum for dealing with such a "complicated matter, taking into account, for example, the ongoing work of the IMF, to which the EU is actively contributing."

However, the Group of 77 and China as a whole, Argentina, Brazil, India, China, Egypt, Indonesia, Jamaica and several other countries in the Africa Group and SIDS group made powerful statements defending the legitimacy and mandate of the UN to act on structural and systemic issues.

These countries stressed that the UN's very charter mandates the institution to discuss and act on all issues pertinent to international cooperation, which include finance and trade.

Furthermore, it is the UN that has the balanced and representative, deliberative body that can advance from broad principles on sovereign debt workouts to a proposed mechanism or process.

Financial system issues such as financial regulation, the international monetary system and, in particular, sovereign debt are at the very centre of various UN conferences, such as the 2002 International Conference on Financing for Development which adopted the Monterrey Consensus, the Doha Conference on the follow-up to the Financing for Development agenda in 2008, and the Conference on the World Financial and Economic Crisis and Its Impact on Development in 2009, to name a few.

The General Assembly's Second Committee negotiates a resolution on debt sustainability which is adopted by the Assembly every year; and the UN Economic and Social Council (ECOSOC) holds an annual conference with the Bretton Woods institutions (viz., the IMF and World Bank) in which sovereign debt is prioritized through the HIPC and MDRI debt relief initiatives.

Various UN documents, such as the Rio+20 outcome document "The Future We Want" as well as the recently produced outcome on the Sustainable Development Goals, explicitly mention debt restructuring.

The UN has also produced several proposals for effective and fair debt workout mechanisms, most notably in the UN Conference on Trade and Development (UNCTAD) expert group which has been working on principles for a debt workout mechanism (such as legitimacy and impartiality) as well as guidelines for responsible sovereign lending and borrowing.

In addition to UNCTAD, the UN Commission on International Trade Law (UNCITRAL) also has expertise in international insolvency. While it does not currently deal with sovereign insolvencies, it could do so if requested by the

General Assembly. UNCITRAL could also make concrete recommendations to the General Assembly, which could be debated in the context of the imminent Financing for Development discussions, at which all relevant stakeholders would be represented and at which governments could be jointly represented by their finance and foreign ministries.

The UN indeed has the expertise, agencies and mandate; it only requires the political will to set the wheels in motion for the formulation and operationalization of a set of legal principles that could govern all sovereign debt workouts.

On the procedural issue, the narrative of developed countries was that the timeframe for the draft resolution was "artificial" and "rushed," with "not enough time to discuss."

Norway, which abstained from a vote, said that despite their support for UNCTAD on the work towards a debt restructuring mechanism, the lack of consensus on this resolution ascribed limited value to it.

However, this narrative should be countered by that of the vast majority of countries in the General Assembly, which point out that five informal discussions were held on the draft resolution, during which most developed countries refused to contribute to the talks in a substantive manner.

In the five informal negotiation sessions (that took place in August 2014), several ambassadors from Group of 77 member states made presentations on the resolution, explaining the purpose and objective of their resolution. The developed countries responded with complete silence, explaining only that they did not have a mandate or directions from their capitals to participate in the discussions.

According to some observers, perhaps the developed countries thought that the Group of 77 was bluffing, just "making noise" as a political move.

At the very last session, the US said that they did not believe in a statutory approach to sovereign debt restructuring, only a market-led approach. The US elaborated that there was no need for regulation on a statutory level, because collective action clauses and a contractual approach to debt disputes settled in the courts of the country whose laws govern the contract, were enough.

However, it is to be noted that there is no explicit wording for a statutory approach in the resolution.

The said lack of consensus can be countered by the fact that the vast majority of countries, 124 countries out of a total of 193 in the General Assembly, voted for the resolution. While this admittedly does not constitute a consensus, and while countries such as the US, Germany and Japan that voted against the resolution are a significant obstacle, there is some bearing given to the fact that in terms of one nation, one vote, the resolution passed.

Indeed, the fact that only the US explicitly rejected an intergovernmental negotiation on the draft resolution bears repeating, as even the other 10 countries that voted against the resolution seem willing to engage in some type of intergovernmental process going forward.

UN member states speak out

At the General Assembly, the Group of 77 and China delivered a strong statement that asserted full support for their draft resolution, which they said demonstrated their true commitment to building an international financial system where the rules are fair and pro-development, as well as a genuine global partnership to enable developing countries to achieve sustainable development.

They stressed that the lack of a structured mechanism is a major failure of the current international financial architecture, which leads, among others, to long delays in debt restructuring, unfair outcomes and loss of value for both debtors and creditors.

The G77 said that today it is Argentina that is suffering from protracted holdout bondholder litigations, but many developing and developed countries have suffered before from the exact same predatory behaviour, and others will follow if there is no action.

The G77 reminded the General Assembly that for the last decade the Group has been calling for and presenting proposals towards establishing a legal framework for sovereign debt restructuring processes.

The G77 also reinforced, in alignment with their official stance across all UN processes, that the United Nations is the organization with the central role and legitimacy to deal with development and related issues, including economic and financial affairs, and to decide on the best follow-up and alternatives to meet the needs and challenges of the 21st century.

Brazil, along with several other developing countries, also stressed that development and finance issues have never been a taboo issue for the General Assembly. The resolution adopted builds on the treatment given to debt issues in annual resolutions within the Second Committee and at the ECOSOC meetings with the Bretton Woods institutions and UNCTAD.

Brazil stressed that as the world's first universal development agenda is being launched, the linkage between debt sustainability and sustainable development becomes increasingly clear. This is precisely why sovereign debt sustainability and restructuring has played a critical role in the means of implementation of the outcome document on Sustainable Development Goals produced by the Open Working Group (and adopted by the General Assembly on 10 September 2014).

Brazil further said that the report of the intergovernmental committee of experts on sustainable development financing also refers to debt restructuring, and stresses the fact that collective action clauses are perceived by many in the international community as insufficient to deal with all sovereign debt restructuring cases.

This process, Brazil highlighted, will hopefully address this gap, with the timely support and technical expertise from all organizations within the UN system, especially the IMF, UNCTAD and the UN Department of Economic and Social Affairs (DESA).

Brazil also stressed that they would have liked for this resolution to be adopted by consensus and made a reference to the lack of constructive engagement on the part of the member states that voted against the resolution. In closing, Brazil urged these member states to reconsider their positions during the next General Assembly year.

Academics call for action

Ahead of the General Assembly vote, a letter sent on 25 August by several noted economists, including Nobel laureates Joseph Stiglitz and Robert Solow, to UN Secretary-General Ban Ki-moon encouraged him to support the convening of a meeting to launch a process within the United Nations in order to draft a convention among nations for the restructuring of sovereign debt.

The letter stressed that sovereign debt crises can disrupt development processes in significant ways, and it is

widely recognized that there has to be an orderly way of restructuring debts. The letter elaborated that within virtually all countries, mechanisms have been developed for doing this for private debts through bankruptcy laws, which are now seen as a vital part of a market economy. But unfortunately, there is no comparable mechanism for the debts of sovereigns.

Its absence has, for instance, led to the emergence of destabilizing speculative behaviour in international debt markets, said the economists in their letter. The consequence is that the ability of countries in distress to resolve debt problems in a timely manner has been seriously compromised.

According to the letter, the importance of this lacuna, with its serious repercussions, has repeatedly been recognized, for instance, by the IMF and by the International Commission of Experts on Reforms of the International Monetary and Financial System appointed by the President of the UN General Assembly. The 2009 report of that Commission (in particular Chapter 4), which was endorsed by the UN Conference on the World Financial and Economic Crisis and Its Impact on Development, called upon states to "explore enhanced approaches to the restructuring of sovereign debt ..."

The report was also taken up by Resolution 65/143 adopted by the 65th session of the General Assembly on 20 December 2010. The resolution recognized the "urgent need to enhance the coherence, governance and consistency of the international monetary and financial systems" and reaffirmed "that the United Nations is well positioned to participate in various reform processes aimed at improving and strengthening the effective functioning of the international financial system and architecture".

Another letter from a wider coalition of progressive economists and academics called for the creation of a sovereign debt workout mechanism.

The letter, sent to EU policymakers, stated that proposals for a sovereign debt workout mechanism have been around for more than a century, with renewed emphasis since the beginning of the "third world debt crisis" in 1982.

Throughout this history, the letter said, governments have repeated that it is not the right moment for a reform. However, it has become clear that cyclical debt crises will continue, for which the world will pay a high price in terms of deepening social and economic polarization through adjustment matters and unnecessarily high losses to investors, which are the unavoidable consequence of a delayed insolvency filing.

The academics made an explicit call for decision-makers to create a reliable, rule-of-law-based mechanism for sovereign insolvency under the auspices of an institution that is neither debtor nor creditor. They also offered their support in the design of such a mechanism.

Civil society mobilizes pressure and UN rights expert weighs in

In the run-up to the General Assembly vote, the civil society organizations of the European Network on Debt and Development (Eurodad) sent a joint letter to the EU missions to the UN in New York as well as to each member state's ministries of finance and foreign affairs.

The letter stated that European civil society expected European governments to contribute constructively to promoting the necessary reforms and vote in favour of the draft UN resolution on debt restructuring. With several decades of experience in promoting just solutions for debt crises, European civil society also stood ready to continue a dialogue with governments and international organizations, and contribute constructively to the modelling of a convention on sovereign debt restructuring.

Eurodad's letter further elaborated that when endorsing the Monterrey Consensus more than 10 years ago, all European nations committed "to consider an international debt workout mechanism ... to restructure unsustainable debts in a timely and efficient manner." The failure to implement this commitment had caused or aggravated many avoidable debt crises over the past decade and led to unnecessary economic costs, welfare losses and human suffering. In the wake of the recent financial and economic crisis of 2007, European nations had also borne these costs of debt crises. "Implementation is overdue. It is time for the international community to move from rhetoric to reality."

On 4 September, the Jubilee USA network on sovereign debt issues also sent a letter to the US Ambassador to the United Nations, Samantha Power, urging the US to vote in favour of the resolution.

The letter noted that the draft resolution was supported by a number of countries that traditionally failed to caucus in debt negotiations or utilize transparent lending and borrowing practices. With passage of the resolution, the intergovernmental process in the UN had the ability to bring these countries to the table to discuss responsible lending and borrowing.

The Jubilee USA network expressed awareness of the concerns of the US as to which forum such a process should operate within, and believed the favourable vote and active participation of the US would serve to help resolve these concerns.

Meanwhile, UN human rights expert on foreign debt, Juan Pablo Bohoslavsky, has said that international human rights law should inform discussions about a multilateral legal framework on sovereign debt restructuring from its inception.

Bohoslavsky was appointed by the UN Human Rights Council in May as Independent Expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights.

He stated that an international legal framework should be seen as complementary to existing UN Guiding Principles on Foreign Debt and Human Rights and on Business and Human Rights, to national legislation limiting vulture fund litigation, and to collective action clauses in sovereign bonds. It would promote more responsible financial behaviour and more orderly, timely and speedy debt restructuring processes.

Bohoslavsky underlined that building broad international consensus around this initiative is crucial and should include all relevant stakeholders, sovereign debtors, multilateral lenders, private financial business and civil society organizations.

Argentina passes important new law

Meanwhile, Argentina continues to persist onward in the now landmark lawsuit against it by the vulture funds, the outcome of which has profound systemic implications for the international financial system.

The US Supreme Court issued a ruling in June declining to hear Argentina's appeal – which was supported by global financial institutions, the UN, various sovereign states and the US Executive itself – and ordering instead that Argentina pay the suing hedge funds $1.33 billion (constituting principal plus inter-

est for holdout bonds).

This was followed by another Supreme Court decision to order the relevant financial institutions, primarily banks, in the US to turn over information to these hedge funds about assets that Argentina holds worldwide, including accounts held by entities of the Government of Argentina and by individual officials.

These rulings resonate well beyond the borders of Argentina and the US. They are in effect a resounding victory for hedge funds to encroach on indebted countries and deepen their financial distress to breaking point. Most critically, the rulings set legal precedents that explicitly favour the predatory and destructive behaviour of vulture funds.

However, on 11 September, the Argentine media reported that the country's lower house of Congress passed a new law that allows for a change in the payment jurisdiction for the nation's bondholders (a majority 93%) who had agreed to the debt swaps of 2005 and 2010, and creates a separate account where payment will be deposited for the 7% of bondholders who did not agree to the swaps. The law also creates a parliamentary commission to investigate and audit the origins of Argentina's foreign debt.

The law, which was passed with 134 votes for, 99 against and 5 abstentions, is explained by the nation's economic experts as an alternative mechanism to open new channels of payment. It is also a response to the situation in which Argentina has found itself, where its agreed-upon debt restructuring was disrupted by the US court ruling, which has prevented the nation from processing the repayments to creditors that it is obliged to undertake and is fiscally able to undertake as well.

With broad support from both government representatives and allies in Buenos Aires, this new law appears to have the potential to improve the rather dire state of affairs in the nation's sovereign debt saga. Furthermore, sovereign debt audits have the potential to identify illegitimate and odious debt, as opposed to legitimate debt.

As for the next steps forward within the United Nations, the real work will start when the intergovernmental negotiations begin. The constructive and active participation of the developed countries, specifically those 11 countries that voted against the resolution, in particular the United States, will be the ultimate challenge. *(SUNS7879)* ❐

Human Rights Council condemns activities of vulture funds

Vulture funds have come under attack at the UN's top rights body, which adopted a resolution stressing that their "predatory" activities undermine the enjoyment of human rights in debtor countries.

by Kanaga Raja

GENEVA: The UN Human Rights Council on 26 September condemned the activities of vulture funds "for the direct negative effect that the debt repayment to those funds, under predatory conditions, has on the capacity of Governments to fulfil their human rights obligations, particularly economic, social and cultural rights and the right to development."

In a resolution (A/HRC/27/L.26) adopted by a vote, the Council requested its Advisory Committee, composed of 18 experts, to prepare a research-based report on the activities of vulture funds and the impact on human rights, and to present a progress report of that research to the Council for its consideration at its 31st session.

The Human Rights Council held its regular 27th session from 8-26 September.

The resolution on the activities of vulture funds was adopted by a vote of 33 in favour, five against and nine abstentions.

Those that voted in favour were Algeria, Argentina, Benin, Botswana, Brazil, Burkina Faso, Chile, China, Congo, Costa Rica, Cote d'Ivoire, Cuba, Ethiopia, Gabon, India, Indonesia, Kazakhstan, Kenya, Kuwait, the Maldives, Mexico, Morocco, Namibia, Pakistan, Peru, the Philippines, Russia, Saudi Arabia, Sierra Leone, South Africa, the United Arab Emirates, Venezuela and Vietnam.

The Czech Republic, Germany, Japan, the United Kingdom and the United States voted against the resolution, while Austria, Estonia, France, Ireland, Italy, Macedonia, Montenegro, the Republic of Korea and Romania abstained.

The vulture fund threat

The draft resolution was introduced at the Human Rights Council by Argentine Foreign Affairs Minister Hector Timerman on behalf of Argentina, Algeria, Bolivia, Brazil, Cuba, Pakistan, Russia, Uruguay and Venezuela.

Pointing out that a total of 74 cosponsors supported this draft resolution, the Argentine Minister told the Council that the issue of foreign debt and its effects on the enjoyment of human rights had been on the agenda of various UN human rights bodies for over two decades.

Since 1990, the Human Rights Commission and subsequently the Human Rights Council, in various resolutions and decisions, had highlighted the challenges represented by the burden of foreign debt on the full enjoyment of human rights, in particular economic, social and cultural rights, he said.

Along these lines, he noted, the UN independent expert on foreign debt, Cephas Lumina, had referred to vulture funds, describing their activities as those that managed to divert a country's financial resources that were saved from debt cancellation, thereby undermining the capacity of governments to guarantee the human rights of their people.

For the most part this had happened in Africa, where the activities of vulture funds had endangered or even removed the capacity of these states to carry out their development and poverty reduction programmes.

The Argentine Minister highlighted the need for financial reform along ethical lines that would produce in its turn economic reform to benefit everyone.

It was not only developing countries that had highlighted the threat of vulture funds to the full enjoyment of human rights. As far back as 2002, the then finance minister (Chancellor of the Exchequer) of the United Kingdom, and subsequently Prime Minister, Gordon Brown, had referred to the severity of the problem in a special session of the UN General Assembly.

According to Timerman, a legal vacuum existed in terms of debt restructuring and it left sovereign states vulnerable to the abuse of speculators.

In some general comments before the vote at the Human Rights Council, Algeria, referring to a report by the independent expert Lumina, said that vulture funds had negative effects on debt relief measures that had been adopted by the international community and these funds had a destabilizing effect on

the economies of countries that were their victims.

Algeria said that among the main messages of the draft resolution was the fact that the international financial system was inadequate today and therefore needed to be reformed; that the debt burden had a major impact on developing countries and their development; and that there was a need to shed an objective light on the activities of vulture funds and their impact on the right to development.

Cuba said that the draft resolution brought before the Council a subject of vital importance to developing countries, namely, the negative effect of vulture funds on the enjoyment of human rights.

Venezuela said that for many years it had been hearing in international fora, in particular in the Human Rights Council, about the negative effects on the enjoyment of human rights of the excessive and unjust debt burden. Today, this was exacerbated by the global crisis of capitalism, it added.

Pakistan said that all countries had a sovereign right with regard to their debt restructuring. Calling for this to not be influenced by political and extraneous pressure tactics, it said that these tactics undermined the capacity of states, particularly developing countries, to fulfil their human rights obligations and to achieve sustainable development.

Pakistan further said that vulture funds reflected the inherent flaws in the current financial system and could be used to challenge the sovereignty of indebted countries through economic pressure and huge financial implications.

The United States said that it would call for a vote on the resolution and would vote "no".

It said that while it remained committed to the stability of the international financial system, this resolution raised serious concerns. Discussions on mechanisms to advance orderly debt restructuring were technical in nature and, if not handled appropriately, risked creating uncertainties which could drive up borrowing costs or even choke off financing for developing countries, it maintained.

There were already active discussions underway in other, more appropriate fora that took these complex technical considerations into account, it said,

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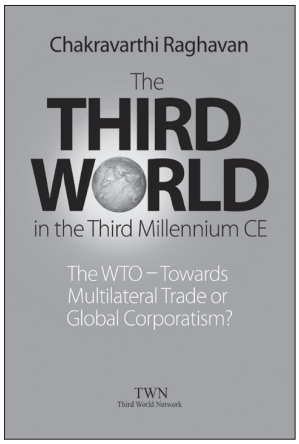
The Third World in the Third Millennium CE

The WTO – Towards Multilateral Trade or Global Corporatism?

By Chakravarthi Raghavan



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THE second volume of *The Third World in the Third Millennium CE* looks at how the countries of the South have fared amidst the evolution of the multilateral trading system over the years. Even at the General Agreement on Tariffs and Trade (GATT) gave way to the World Trade Organization (WTO) as the institution governing international trade, this book reveals, the Third World nations have continued to see their developmental concerns sidelined in favour of the commercial interests of the industrial countries.

From the landmark Uruguay Round of talks which resulted in the WTO's establishment to the ongoing Doha Round and its tortuous progress, the scenario facing the developing countries on the multilateral trade front has been one of broken promises, onerous obligations and manipulative manoeuvrings. In such a context, the need is for the countries of the Third World to push back by working together to bring about a more equitable trade order. All this is painstakingly documented by *Chakravarthi Raghavan* in the articles collected in this volume, which capture the complex and contentious dynamics of the trading system as seen through the eyes of a leading international affairs commentator.

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US and allies 'strike work' on post-Bali, Doha

Negotiations at the WTO seem to have reached a standstill in the wake of the recent failure to push through the controversial Trade Facilitation Agreement. Who are the "intransigent" parties responsible for this state of affairs?

by Chakravarthi Raghavan

GENEVA: The United States and its close allies in other industrialized countries appear to be bent on continuing their campaign to paralyze all negotiations and talks at the WTO – on the other parts of the Bali package, a post-Bali work programme and the Doha Round – by refusing to work on other issues until the US-EU cherished protocol on the Trade Facilitation Agreement (TFA) is agreed to and delivered.

Work on the protocol for incorporating the TFA into the family of WTO agreements has been blocked by India and a few others, in the absence of equivalent progress on implementing the other parts of the Bali package including on food security and the package for least developed countries (LDCs), which at Bali were adopted on a "best endeavour" basis.

At the WTO General Council in July, India had refused any consensus on taking up and adopting the TFA without comparable progress on the food security issue, the LDC package and other parts of the Bali package.

Since then, at various meetings – BRICS, the G20 trade ministers and other such fora, as also at the WTO since meetings resumed after the summer recess – India has stuck to its position, undeterred by the vehement campaign against it in the mainstream media, echoed by several leading sections of the Indian media too.

Since the WTO resumed in Geneva after the December Bali Ministerial Conference, even as work on trade facilitation (TF) moved ahead – with the WTO Director-General and secretariat pushing at breathless speed work on putting into legal language the Bali decision on TF and on a draft protocol on the TFA – there have been no negotiations to move other parts of the Bali package of decisions forward.

And various statements by the US, both in Geneva and elsewhere, leave little doubt that as far as the US and the EU are concerned, they wanted from the WTO and the Doha Round talks only the TFA, and when that is delivered they have no further interest in the Doha Round, the Bali package or the post-Bali work programme, but would talk them out or use them to end the Doha agenda and bring on new issues.

Services stalemate

The tactic of the US, and the moribund "Quad" (the US, the EU, Canada and Japan), was made clear at the WTO's Council for Trade in Services (CTS) in the week of 15 September.

Once upon a time the Quad dictated things in the old GATT and then the WTO. However, after the failure of the WTO's Ministerial Conference at Cancun in 2003, and the partial resurrection of the Doha Round via the July 2004 package agreement at the General Council, evolved by Brazil, India and a few others, it became clear that the old decision-makers could no longer force their will on the trading system. The Quad then gave way to the new grouping of the US, the EU, Brazil, India, China and a few others on an ad hoc basis.

At the CTS, the old Quad met and came to the meeting to act in an orchestrated and coordinated way, with some other industrialized nations and a few developing countries joining them and hanging on to the US' coattails.

The CTS is negotiating on mandated (to begin from 1995) work (including on drawing up disciplines on emergency safeguards and on subsidies) and further liberalization of services trade in all four modes of delivery, negotiations that were actually launched in 2000 and that in November 2001 were rolled into the Doha work programme and its single undertaking.

On 19 September, at the special session of the CTS where the Doha negotiations on services are held, the US and its friends announced that there would be no further discussions or negotiations by them on these until the TFA and its protocol are signed, sealed and delivered to them.

The US blamed the deadlock surrounding this, the rest of the post-Bali work programme and the rest of the Bali package, on what it called the "intransigence" of one member, India, with some of its friends in blocking adoption of the TFA protocol.

China, India, South Africa and a few others insisted they saw no justification and viewed the services negotiations as being on a separate track from the TF issue, and part of the Doha Round single undertaking.

[The US stance on services talks at the CTS has also to be seen in the context of its drive for separate plurilateral negotiations on a Trade in Services Agreement (TISA). The proposed TISA chapter on financial services, for example, aims for liberalization of trade in financial services with very few exceptions. It would restrict the ability of countries to adopt regulations, prudential or otherwise, that come in the way of US financial service providers repeating on a global scale their activities on the US market that created the 2008 crisis. While everyone else has suffered as a result of the crisis, US financial firms and traders, rescued by the state, are continuing on their merry way, garnering more and higher benefits for themselves.]

Interestingly, until the post-Bali development on TF, it is the US that has been consistently intransigent: it has repeatedly said NO as the sole nation holding up the agriculture modalities text of 2008 (which has a provision to address the issues pertaining to public stockholding programmes for food security). The US has blocked the 2008 modalities text since it will curb US support programmes to its farming sector.

The US has also not agreed to ending its cotton subsidies or to providing duty-free, quota-free market access for LDC products. Most other nations, developed and developing, with some product exceptions, have already provided such access unilaterally. The richest nation in the world alone has been refusing to agree to this trade benefit to the globe's poorest nations.

Perhaps the major developing nations and their leaders have to blame themselves for this state of affairs.

As early as 2010, it would appear that US President Barack Obama, in his remarks to the Toronto summit of the

G20 major economies, made clear that he had no interest in concluding the Doha Round, as US calculations had shown that if the Round were concluded, the additional benefit to the US would be no more than a day's worth of exports.

At the time of that summit, Obama's economic honcho who was the sherpa was Michael Froman, the current US Trade Representative, who is carrying on with that policy perspective even now.

The heads of developing nations at Toronto, who presumably had heard Obama, however chose to ignore it, perhaps thinking that after the 2012 presidential elections, Obama would change.

And developing countries have continued to negotiate with the US in the belief things would change. Some of them may share the reported view of WTO Director-General Roberto Azevedo that the US has to be kept engaged at the WTO, and that if this involves giving in to the US and making repeated concessions without any reciprocal benefit, it should be done so that the US will remain engaged and possibly change its views in future. *(SUNS7880)* ❐

No consensus on how to take forward agriculture work

Negotiations on agricultural and industrial goods trade have been held up as the fallout from the trade-facilitation impasse at the WTO continues. *Kanaga Raja* reports, in the following two articles, on the deadlock in the latest round of talks in these two negotiating areas.

GENEVA: The Chair of the Special Session of the WTO Agriculture Committee, at the conclusion of an informal open-ended meeting on 23 September, said that there was no consensus among the members on how to take the work in the Committee forward.

According to trade officials, there were continued differences among members on how to proceed with the work on agriculture under the Bali decisions and in the Doha Round negotiations.

In his concluding remarks at the meeting, the Chair, Ambassador John Adank of New Zealand, said: "Taking all of these views into account, my general conclusion as of now, is that in the absence of a solution to the current impasse, there is no consensus on how work can be taken forward in this Committee."

In his opening statement at the meeting, Ambassador Adank had said that the meeting provided a further opportunity to the members to take stock of their positions concerning the way ahead for the negotiations and the work programme mandated at Bali.

He then proceeded to provide a short report of where members stood just before the summer break as well as developments since then.

Noting that the Special Session did not exist in isolation from the broader work on Doha and Bali follow-up, the Chair said that at the end of July, members failed to meet the deadline set by ministers in Bali for the protocol on the Trade Facilitation Agreement (TFA).

It would appear from reactions both in the lead-up to and since July that this had a broader impact on work within this and other bodies tasked with Bali and Doha follow-up, he added.

The Chair recalled that in a message on 2 September, WTO Director-General Roberto Azevedo highlighted the need to re-engage quickly to discuss the situation with a view to finding solutions to the implementation of the Bali outcomes.

The D-G had called on the relevant Chairpersons to immediately begin consulting with members on those issues so that he could report on the outcome of these consultations at a Trade Negotiations Committee (TNC) meeting latest in early October.

"So that is what I have been doing now as well as in bilateral meetings with a range of delegations who were able to meet with me in recent days," said Ambassador Adank.

A meeting of the WTO General Council that was held on 25 July to discuss the TFA was suspended on account of a lack of consensus on the protocol of amendment that, if adopted, would have brought the TFA into legal effect.

At that meeting, India had made a strong statement wherein it had said that the TFA must be implemented only as part of a single undertaking including the permanent solution on food security. India had received support from Bolivia, Cuba and Venezuela, who said that they would have difficulty joining a consensus on the TFA protocol while no progress had been made on the areas of interest to developing countries.

Just a couple of hours or so before the 31 July midnight deadline for the adoption of the protocol, an informal TNC meeting was held at which the WTO D-G reported that "there is no workable solution on the table" at present and that he did not have any indication that one would be forthcoming.

As a result, the General Council meeting suspended on 25 July was formally closed without a protocol being adopted.

Objections

According to trade officials, at the 23 September Agriculture Committee Special Session, some 18 countries including Australia, Japan, Paraguay, the European Union, Canada, the United States and Hong Kong-China voiced objections to the holding up of the trade facilitation text despite agreement at Bali for its adoption by 31 July.

Some reiterated the view that this amounted to a betrayal of trust and had made it impossible to engage in further work in good faith, particularly as the negotiations on trade facilitation had concluded in Bali and what was left was the technical task of cleaning up the text by July.

Some called for the text to be adopted within the next few days, while others called for countries to stick to their commitments with regard to all the Bali decisions, including the deadlines that they contain.

Trade officials said that some other countries called for the impasse to be resolved quickly. Some including the G33 grouping, the Philippines, China and El Salvador said that a work programme to conclude the Doha Round should be agreed by the end of the year.

According to trade officials, India reiterated its position that adoption of the trade facilitation text should be delayed until the end of the year, with a permanent solution on public stockholding for food security purposes to be also agreed by then.

India referred to a statement that it had made at a meeting of heads of delegation (HOD) on 15 September.

(At that informal HOD meeting, according to those present, India's Ambassador to the WTO Anjali Prasad had reiterated India's remarks at the General Council on 25 July, namely that there must be a postponement of the adoption

of the TFA protocol until a permanent solution is found on the issue of public stockholding for food security purposes.

(India told the HOD, amongst others, that it was looking for an accelerated process as well as a dedicated mechanism to discuss and develop the permanent solution on food security and to conclude this by the end of the year, adding that there were already some G33 proposals on the table, including one that was tabled in July.)

At the informal agriculture meeting on 23 September, trade officials said, India countered the charge of bad faith, saying that its accusers were also showing bad faith by rejecting the December 2008 draft deal in agriculture, which was the one currently on the table and was in turn based on the 2004 framework agreement.

According to trade officials, the least developed countries (represented by Uganda) said that the provisions in the Bali decisions for the LDCs should not be held up by the impasse. The LDCs also called for the work programme to be completed by the end of the year.

The G33 drew attention to its proposals on public stockholding, special products and the special safeguard mechanism.

According to trade officials, Argentina stressed that eliminating all forms of export subsidies was becoming more urgent since agricultural prices were falling and pressure to subsidize was increasing. *(SUNS7881)* ❐

No consensus on advancing work on NAMA, says Chair

by Kanaga Raja

GENEVA: The Chair of the Negotiating Group on Non-agricultural Market Access (NAMA) on 22 September said that he would report to the Chair of the Trade Negotiations Committee (TNC) that there is no consensus on continuing work on the NAMA negotiations or on establishing a post-Bali work programme.

The TNC, chaired by WTO Director-General Roberto Azevedo, is scheduled to hold its next meeting on 6 October.

At the informal meeting of the NAMA Negotiating Group, which was called to hear the views of members on the way ahead in the negotiations, the Chair, Ambassador Remigi Winzap of Switzerland, in his concluding remarks, highlighted three positions that emerged at the meeting:

(1) Some members wanted to continue the work;

(2) Some members hoped that consultations to break the current deadlock would be positive and would allow for the continuation of the work; and

(3) Some members said that under the current circumstances, work could not continue as if nothing had happened.

According to trade officials, the United States, Japan, the European Union, Australia, New Zealand, Norway, Canada and Switzerland were of the view that work could not continue because trust had been broken due to the failure to adopt the protocol on the Trade Facilitation Agreement (TFA) by 31 July as was agreed at the Bali Ministerial Conference last December.

On the other hand, China, Egypt, South Africa and India stressed the need to continue work in the other areas of the Doha Development Agenda (DDA), in particular on establishing a work programme to that end. According to trade officials, they said that trade facilitation was not the only item on the agenda and that there were other areas that were also important.

According to trade officials, India also supported China, which said that it did not support the notion to stop work.

China said a TFA was needed but so was a post-Bali work programme. There was a need to re-engage on the work programme, it said, adding that it was urgent to regain confidence.

According to trade officials, India also said that members needed to use this time to continue the work.

"I don't have a clear view on what you want," said the NAMA Negotiating Group Chair, in reference to the report that he would be producing for the upcoming TNC meeting.

According to trade officials, Ambassador Winzap said: "I don't see how I can advance work in NAMA under the circumstances; and if there is no NAMA, there is no Agriculture and no DDA."

The Chair also said that he could not agree with a member (Egypt) that had told him he did not need to be pessimistic in his report to the TNC.

According to trade officials, South Africa said that in his report to the TNC, the NAMA Chair should avoid stating his personal views.

"Uncertain future"

Meanwhile, the WTO Director-General Roberto Azevedo, addressing the Trade and Development Board of the UN Conference on Trade and Development (UNCTAD) on 22 September, warned of a "freezing effect" on WTO work from the impasse on the Bali package.

Azevedo told the Board that "at present, the future is uncertain"; if the impasse was not resolved, "many areas of our work may suffer a freezing effect, including the areas of greatest interest to developing countries, such as agriculture".

Speaking of the Bali package and the post-Bali work programme on the Doha Round, Azevedo said all of this was now at risk because of the missed deadline on trade facilitation.

He had met all WTO members on 15 September and was continuing with his own consultations, "but at this point we don't have a solution." There would be another meeting of all members on 6 October, and at that time they would reassess the situation in the light of this process of consultations. The priority now was to ensure the implementation of the Bali package, he said.

There seemed to be a clear interplay between concerns on the negotiations on public stockholding and the implementation of the TFA. Both public stockholding programmes and trade facilitation were issues addressed by the Bali decisions, he said. There was no formal or legal linkage between these two issues, but "we cannot deny that there is an important political link bringing them together."

"At present the future is uncertain. If we solve this issue, I am confident that we will be able to look ahead and resume our efforts in the broader negotiating agenda.

"If we do not, members will have to think carefully about what the consequences are. It would impact on the TF Agreement itself, and all the other Bali decisions – including those that benefit LDCs, the negotiating function of the WTO. My assessment is that we risk disengagement if we don't solve this impasse shortly," he said. *(SUNS7880)* ❐

Greater flexibilities, policy space needed to meet post-2015 goals

UN development agency UNCTAD has made the case for allowing more room at national level to implement development-oriented economic policies.

by Kanaga Raja

GENEVA: Meeting the global development goals of a post-2015 development agenda will not be feasible without the availability of greater flexibilities in policymaking, the UN Conference on Trade and Development (UNCTAD) has said.

In the chapters of its *Trade and Development Report 2014 (TDR)* focusing on the key theme of policy space and global governance, UNCTAD underscored that in order to pursue rapid and inclusive economic growth and meet future global development goals, developing countries will need sufficient policy space at the national level to undertake the necessary structural transformation of their economies.

"At the international level, the multilateral governance framework will need to be more permissive and coherent if it is to facilitate such structural transformation," it said.

According to the *TDR*, which was released on 10 September, the discussions now under way on a post-2015 development agenda are aiming for an ambitious narrative that goes beyond "business as usual" to establish a more universal, transformative and sustainable approach than the one advanced through the Millennium Development Goals (MDGs). As such, it will play a key role in setting new goals and targets for policymakers, at both the national and international levels.

The international community faces three principal challenges in fashioning this new approach, said UNCTAD.

The first challenge is aligning goals and targets to a policy paradigm that can help raise productivity and per capita incomes everywhere, generate decent jobs on a scale needed to meet a rapidly growing and urbanizing global labour force, establish a stable international financial system that boosts productive investment, and deliver reliable public services that leave no one behind, particularly in the most vulnerable communities.

The *TDR* said that the second challenge facing any new development agenda is the massive rise in inequality, which has accompanied the spread of market liberalism. This is important because, in addition to ethical considerations, and unlike the simple textbook trade-off between growth and equality, growing inequality can threaten economic progress and social stability, and undermine political cohesion.

The third challenge is to ensure that effective policy instruments, and the space to use them, are available to countries to enable them to achieve the agreed goals and advance the development agenda.

Integrated policy framework

According to UNCTAD, addressing these three challenges would be a formidable task even under ideal circumstances, but it is all the more daunting now because of changes to the global economic environment resulting from the financial crisis in 2008-09.

The new development agenda is likely to face a harsher external environment in the years ahead. The financial crisis also revealed a set of persistent and highly interrelated economic and social imbalances that will inevitably have a strong bearing on efforts to design new development strategies aimed at tackling issues relating to a growing urban-rural divide, formal and informal livelihoods, access to affordable energy sources that minimize environmental damage, and food and water security.

"Rebalancing on these many fronts will require an integrated policy framework encompassing more viable and inclusive national development strategies, along with changes in the governance of the global economic system to accommodate and support them," said UNCTAD, noting that its *Trade and Development Report* of last year had argued that mobilizing greater domestic resources and building markets at the national and regional levels were likely to be key to sustained growth in many developing countries in the years ahead.

Maximizing the contribution of national resources for achieving the economic and social goals envisaged in the post-2015 agenda will certainly require a more assertive macroeconomic policy agenda. Such an agenda would need to include the use of a broad array of fiscal, financial and regulatory instruments in support of capital accumulation, proactive labour market and incomes policies to generate more decent jobs, and effective control of the capital account to limit potential damage from external shocks and crises.

Building more competitive firms, moving resources into higher-value-added sectors and strengthening national technological capabilities cannot rely on market forces alone; effective industrial policies and dedicated efforts to support and coordinate private- and public-sector activities will also be crucial, the report underlined.

Restoring a development model that favours the real economy – and the constituencies that depend on it for their livelihoods and security – over financial interests, will almost certainly require adding more instruments to the policy toolkit than is currently contemplated by economic orthodoxy.

"There are valid concerns that the various legal obligations emerging from multilateral, regional and bilateral agreements have reduced national policy autonomy by restricting both the available range and the efficacy of particular policy instruments. At the same time, multilateral disciplines can operate to reduce the inherent bias of international economic relations in favour of countries that have greater economic or political power."

Those disciplines can simultaneously restrict (particularly *de jure*) and ease (particularly *de facto*) policy space, said the report. It found that for the more developed countries, globalization *a la carte* has been the practice to date, as it has been for the more successful developing countries over the past 20 years. By contrast, many developing countries have had to contend with a more rigid and structured approach to economic liberalization.

This one-size-fits-all approach to development policy has, for the most part, been conducted by or through the Bretton Woods institutions – the World Bank and the International Monetary Fund (IMF) – whose surveillance and influence over domestic policymakers following the debt crises of the 1980s were considerably extended, giving them greater authority to demand changes to

what they deemed to be "unsound" policies.

Countries seeking financial assistance or debt rescheduling from the Bank or the IMF had to adopt approved macroeconomic stability programmes and agree to "structural" and political reforms which extended the influence of markets – via liberalization, privatization and deregulation, among others – and substantially reduced the economic and developmental roles of the state.

Similarly, said UNCTAD, the Uruguay Round of trade negotiations extended the authority of the World Trade Organization (WTO) to embrace services, agriculture, intellectual property and trade-related investment measures, thereby restricting, to varying degrees, the policy space available to developing countries to manage their integration into the global economy.

"Emphasizing the role of policy, and of the international economic institutions in promoting one set of policies over another, is an important correction to the view that globalization is an autonomous, irresistible and irreversible process driven by impersonal market and technological forces. Such forces are undoubtedly important, but essentially they are instigated by specific policy choices and shaped by existing institutions."

The *TDR* further said that the system that has evolved under finance-led globalization has led to a multiplicity of rules and regulations on international trade and investment that tend to excessively constrain national policy options. At the same time it lacks an effective multilateral framework of rules and institutions for ensuring international financial stability and for overseeing extra-territorial fiscal matters.

"Within this imperfect system, policymakers in developed countries are aiming to tackle a series of interrelated macroeconomic and structural challenges, while those from developing countries are trying to consolidate recent gains and enter a new phase of inclusive development. It is therefore more important than ever before for national policy space to be made a central issue on the global development agenda."

Looking at the origins of the post-Second World War multilateral system and, in particular, at efforts to ensure that the space for a new state-led policy consensus that avoided the mistakes of the inter-war years would be consistent with multilateral arrangements and disciplines in support of a more open, stable and interdependent world economy, the *TDR* contended that the partial efforts to internationalize the New Deal in the 1940s eventually gave rise to a more inclusive multilateral agenda that was championed by the developing world.

"As the international community rethinks its goals for a post-2015 development agenda to succeed the Millennium Development Goals, it is imperative to ensure that effective policy instruments are available to countries to enable them to achieve the agreed goals and advance the agenda."

Proactive trade and industrial policies

UNCTAD argued that recent experience, historical evidence and theoretical insights all point to the role that proactive trade and industrial policies must play in that agenda.

It noted that developed countries adopted a variety of industrial policies during their period of industrialization, and continued to do so after the Second World War in their pursuit of sustained economic growth, full employment and accelerated technological progress. Subsequently, industrial policy was also high on the agenda of many developing-country governments that saw industrialization as key to unlocking under-utilized resources, addressing longstanding structural weaknesses and social deficits, and closing the technological gap with the developed economies.

This post-war policy consensus on the utility of proactive trade and industrial policies also informed the debates about reforming the multilateral trade and financial systems in a way that would allow developing countries the policy space to adopt the measures and instruments they deemed necessary to foster rapid productivity growth and industrial development.

From the early 1980s, industrial policy largely disappeared from the development agenda of many countries, particularly in Africa and Latin America. This was partly a reaction to evidence of specific policy mistakes and abuses, but it was also due to a more ideologically driven debate that blamed government failures much more than market failures for slow economic development and emphasized the need for market liberalization.

Just as important, in several developing economies the debt crisis eroded the ability of states to pursue proactive policies. Not only did they suffer from macroeconomic and fiscal constraints, but they also had to submit to the growing policy conditionality attached to loans extended to them by the Bretton Woods institutions.

According to the *TDR*, many countries reduced or abandoned proactive trade and industrial policies and began to favour unfettered markets and transnational firms, as endorsed by the so-called "Washington Consensus".

Interest in proactive trade and industrial policies has revived since around the turn of the millennium, for a variety of reasons. First, and probably most important, was the accumulation of overwhelming evidence that the most successful developing countries – notably the newly industrializing economies in East Asia followed by China – were the ones that had systematically followed a pragmatic approach to promoting industrial development through a combination of macroeconomic and structural policies as well as measured protectionism while gradually opening up to trade and investment, and effective collaboration between the private and public sectors.

Second, it was increasingly recognized that the policies associated with the Washington Consensus were doing little to support economic upgrading and diversification, which meant that countries would risk falling into a "middle-income trap".

Third, mainstream economists started to accept some of the insights into economic development from classical economics, such as the recognition that economic development has a "structural" dimension, the importance of linkages and learning for accelerating productivity growth, and the key role of demand.

"It is clear that specific policy measures adopted by some of the successful industrializing countries cannot easily be replicated by other countries. This is not only because individual countries' success stories are invariably linked to special economic and institutional conditions that are unlikely to exist in other countries; it is also because changes in the external economic environment affect both the availability and effectiveness of specific policy instruments."

It is well known that export-led industrialization strategies must sooner or later reach their limits when many countries pursue them simultaneously, as

competition among economies based on low unit labour costs and taxes faces a fallacy of composition that leads to a race to the bottom.

At the present juncture, said UNCTAD, when developing countries' opportunities to increase exports of manufactures to developed countries are likely to remain weak for some time, the limitations of such a growth strategy are becoming even more obvious. A rebalancing of developing countries' growth strategies towards a greater emphasis on domestic and regional demand could reduce this risk.

Trade and investment agreements

The *TDR* went on to discuss the impacts of the various trade, investment and comprehensive economic partnership agreements on national trade and industrial policy space, highlighting in this regard areas where provisions in Uruguay Round (UR) agreements and regional trade agreements (RTAs) have constrained such policy space for developing countries, as well as areas where flexibilities remain intact.

It examined the constraints faced by developing countries in adopting the trade and investment policies they deem to be the most suitable for structural transformation, focusing in particular on the multiplicity of trade agreements (multilateral, bilateral and regional) and how they restrict national policy space.

"Multilateral agreements maintain some flexibilities and incorporate some special and differential treatment (SDT) for least developed countries (LDCs); however, they typically limit or forbid the kinds of policies that played an important role in successful processes of structural transformation in the past," it said.

This process of limiting national policy space began with the UR agreements, which included several rules that were not directly related to trade flows. Subsequent bilateral and regional trade agreements have increasingly included rules that can be important for the design of comprehensive national development strategies, such as government procurement, capital flows, trade in services, and environmental and labour issues. Many of them have also included disciplines concerning intellectual property rights and investment-related measures that are more stringent than those already incorporated in multilateral agreements.

Analyzing several UR agreements such as the Agreement on Trade-Related Investment Measures (TRIMs), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the General Agreement on Trade in Services (GATS) and the Agreement on Subsidies and Countervailing Measures (SCM), the *TDR* argued that the UR agreements have reduced the policy space available to WTO member states, even as the multilateral trade regime has preserved policy space in some areas.

In terms of constraints, the UR agreements have placed restrictions on the imposition on foreign investors of performance requirements on exports, on domestic content and on technology transfer, all of which have historically been very important in promoting late industrialization. They also make it more difficult or costly for domestic producers to undertake reverse engineering and imitation through access to technology that is covered by patent or copyright protection, said the *TDR*.

However, the *TDR* added, WTO members retain the possibility of using tariffs to protect certain sectors, and have some flexibility in the use of both intellectual property and regulatory measures concerning foreign direct investment. Perhaps most importantly, WTO members can continue to use certain kinds of subsidies and standards aimed at fostering structural transformation that involves the generation of new productive capacity by helping to promote R&D and innovation activities.

Turning to RTAs, the *TDR* said that since the early 1990s, a wave of RTAs (i.e., regional trade agreements with reciprocal commitments between two or more partners) has eroded a considerable degree of policy space that was preserved under the multilateral trade regime. This has happened by strengthening enforcement, eliminating exceptions or demanding commitments not included in the UR agreements. RTAs also have increasingly incorporated investment provisions, which, traditionally, were dealt with in separate bilateral investment treaties (BITs).

Regarding the scope of RTA provisions, the *TDR* said the evidence shows that they have become more comprehensive over the past 20 years, and many are now formally described as comprehensive economic partnership agreements.

It also seems that North-South agreements generally contain a larger number of both WTO-plus (i.e., more stringent provisions than those already covered by the multilateral trade regime) and WTO-extra (i.e., deal with provisions that go beyond current multilateral trade agreements) provisions than either North-North or South-South agreements.

Regarding TRIPS-plus commitments, the *TDR* noted that RTAs generally include more stringent enforcement requirements or provide fewer exemptions (such as allowing compulsory licensing only for emergency situations). They also prohibit parallel imports and extend obligations to cover additional intellectual property issues (such as life forms, counterfeiting and piracy) or exclusive rights to test data (such as those relating to pharmaceuticals). Furthermore, they may contain more detailed and prescriptive provisions, and reduce the possibility for states to tailor their intellectual property laws to their specific domestic environments or adapt them to changing circumstances.

Rethinking industrial policy

Turning to industrial policy, the *TDR* said that in recent years there has been a global revival of interest in such policies. A number of developing countries, including the largest ones, have reassessed the benefits of industrial policy for structural transformation and economic growth.

Reassessments of the potential benefits of industrial policy have not been limited to developing countries only. Many developed countries have begun to explicitly acknowledge the important role that industrial policy can play in maintaining a robust manufacturing sector, with the associated benefits in terms of productivity growth, innovation and employment creation.

The wide variation across countries in the pace and scale of development of their manufacturing activities indicates that country-specific factors – such as resource endowments, size of the domestic market, geographical location and institutional development – are likely to have a strong bearing on the timing and extent to which labour shifts towards more productive activities, both across and within economic sectors.

According to the *TDR*, evidence shows that the impact of developed economies' GDP growth on their imports is becoming smaller, and that the positive effect of their income growth on developing-country exports is also weak-

ening. The challenges that developing countries face in achieving structural transformation under favourable global demand conditions are even greater when they are unable to rely as much as before on growing manufactured exports to developed countries to support such transformation.

"This may require a rebalancing of their growth strategies by according greater importance to domestic and regional demand, with the ensuing need to align their production structure more closely with their demand structure, as discussed in *TDR 2013*. In other words, the current global economic situation increases the policy challenges facing developing countries and necessitates the deployment of creative industrial policies."

Addressing the issue of production networks and the role of industrial policies, the report said that taken together, international production networks may provide opportunities for countries at an early stage of structural transformation to accelerate industrial development in some sectors. But participating in such networks should not, in most cases, be seen as the only element in a country's industrial development strategy.

"Developing countries that have achieved some degree of industrial development will need to weigh very carefully the costs and benefits associated with renouncing remaining policy flexibility when participating in international production networks, particularly in terms of the extent to which this contributes to economic and social upgrading."

Moreover, the importance of international production networks may well shrink to the extent that there is a prolonged period of slow growth in developed countries and/or a decline in the positive effects from their income growth on developing-country exports. This is more than a transitory phenomenon, said the *TDR*.

The benefits that developed-country enterprises reaped from offshoring have declined as a result of higher transportation costs following the rising price of oil since the early 2000s. This may reinforce tendencies towards re-shoring manufacturing activities back to developed countries and efforts in those countries to strengthen their own manufacturing sectors.

On the other hand, said the *TDR*, the importance of South-South production networks, which are currently poorly developed in most developing regions, will increase if developing countries rebalance their growth strategies by giving greater importance to domestic and regional demand. The main point is that none of these shifts provides a rationale for renouncing policy space to the benefit of developed-country firms.

Strengthening global trade governance

"Implementation of effective policy strategies with a view to meeting the global development goals that are likely to emerge from discussions on a post-2015 development agenda will not be feasible without the availability of greater flexibilities in policymaking," UNCTAD underlined.

Building sustainable and inclusive growth paths will certainly require devising a more effective macroeconomic policy mix and addressing the major systemic issues in the financial system. However, improving the governance of global trade will need to be part of a more comprehensive and integrated package to help preserve the policy space for proactive trade and industrial policies, and should complement the macroeconomic and financial reform agenda.

On the steps that could be taken towards strengthening global trade governance in support of development, the *TDR* suggests that the most important would be a strengthening of multilateral mechanisms. Multilateral rules provide a compass for national policymakers to ensure the consistency of rules across countries.

Capitalizing on the new momentum from the WTO's Bali Ministerial Conference in December 2013, the Doha Round negotiations should progress in a manner that would justify its being dubbed a "development round".

The *TDR* said that steps in this direction would include an emphasis on implementation issues (paragraph 12 of the Doha Ministerial Declaration). They would also need to maintain the principle of a single undertaking (as stated in paragraph 47 of the Doha Declaration), rather than moving towards a variable geometry whereby a range of mandatory core commitments is supplemented by plurilateral agreements among only some members.

"The most important benefit from all this may well be simply maintaining the public good character of multilateral rules and precluding powerful countries from coercing others into competitive liberalization that may be ill-suited to their development prospects."

Second, said UNCTAD, refocusing trade negotiations on multilateral agreements would imply a reconsideration of WTO-plus and WTO-extra provisions, as well as allowing greater flexibility in the application of the UR agreements. This could respond to a number of recent developments. In the area of intellectual property protection, for example, the role of patents in promoting innovation (i.e., the commonly cited basic rationale for the adoption of strict rules on such protection) has increasingly been challenged.

According to the *TDR*, it may be advisable for developing countries to maintain a flexible system of intellectual property protection while being given appropriate technical support to make full use of the available flexibilities in order to support technology adoption and innovation at all stages of structural transformation.

A reconsideration of WTO-plus and WTO-extra provisions would also imply renouncing investment provisions that go beyond the TRIMs Agreement. Arguments that international production networks provide a rapid path to structural transformation, and that joining such networks requires a hands-off approach to international business, have recently given new impetus to making such provisions more restrictive.

"Yet, for countries at early stages of structural transformation, it is far from clear how adopting far-reaching investment provisions would allow, or even foster, the developmental gains to be had from their industries joining such networks, particularly beyond the benefits of increased low-skill employment and initial experience in producing manufactures."

The risk of being trapped in some low-level niche of the value chain, and not being able to upgrade, may be too high for countries to give up the possibility of using instruments that in the past have proved to be effective in supporting industrialization and overall production, UNCTAD concluded. *(SUNS7878)* ❐

Tackling the proliferation of patents

A rise in patent numbers due to low standards of patentability can unduly restrict legitimate competition.

by Carlos M. Correa

GENEVA: The steady increase in patent applications and grants that is taking place in developed and some developing countries (notably in China) is sometimes hailed as evidence of the strength of global innovation and of the role of the patent system in encouraging it.

However, such an increase does not correspond to a genuine rise in innovation. It points instead to a major deviation of the patent system away from its intended objective: to reward those who contribute to technological progress by creating new and inventive products and processes.

The increase in the number of patents reflects, to a large extent, the low requirements of patentability applied by patent offices and courts. Patents granted despite the absence of a genuine invention detract knowledge from the public domain and can unduly restrain legitimate competition.

Low standards of patentability encourage a large number of applications that would not otherwise be made, leading to a world backlog estimated at over 10 million unexamined patents.

This problem affects various sectors. For instance, Nokia is reported to hold around 30,000 patents relating to mobile phones, a large part of which are likely to be invalid, while Samsung holds more than 31,000 patent families. A study covering various fields of clean energy technologies, including solar photovoltaic, geothermal, wind and carbon capture, found nearly 400,000 patent documents.

The proliferation of patents is particularly high and problematic in the pharmaceutical sector, where large companies actively seek to acquire broad portfolios of patents in order to extend patent protection beyond the expiry of the original patents on new compounds.

These "ever-greening" strategies allow them to keep generic producers out of the market and charge prices higher than what would otherwise exist in a competitive scenario.

For example, the basic patent for paroxetine, an antidepressant, expired in the late 1990s, whereas "secondary" patents will extend up to 2018.

Ever-greening strategies by one company often force others to follow the same pattern as a defensive approach. The proliferation of "secondary" or "spurious" patents can impose significant costs on patients and public health systems.

Defining patentability norms

Several measures can be applied at the national level to avoid the proliferation of patents on trivial developments in full consistency with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), because they fall within the policy space that World Trade Organization (WTO) members have retained to design and apply their patent laws.

The most important policy that governments may implement is the rigorous application of the requirements of patentability, based on a thorough examination of patent applications. The TRIPS Agreement neither defines the concept of "invention" nor how such requirements need to be interpreted.

Thus, national laws may differentiate inventions from discoveries, and require that the former result from an inventive activity, thereby excluding pre-existing subject matter that is merely found, such as natural substances.

While some patent offices grant patents on the basis of legal fictions on novelty, there is no reason to follow such practices in other jurisdictions.

An example of this practice by some patent offices is to admit what are known as "selection patents", whereby one of more items that were previously disclosed is independently claimed.

Such patents provide an effective means of ever-greening, because protection can be extended for the full length of a new patent, i.e., normally 20 additional years, despite the fact that novelty was actually lost when such items were first disclosed.

While some large patent offices, such as the US Patent and Trademark Office, the European Patent Office and the Chinese Patent Office, seem to apply a lax inventive-step standard, thereby allowing for the granting of a large number of "low-quality" patents, there are strong public interest arguments to follow a different approach, particularly in developing countries.

A strict application of the industrial applicability/usefulness requirement, when provided for by the national law, may also contribute to preventing the grant of unwarranted patent rights.

This is the case, in particular, for claims on new medical uses, which are equivalent to claims over methods of treatment that have no industrial application or technical effect. The lack of industrial applicability may be a sufficient ground to reject such claims.

Given the policy space left by the TRIPS Agreement to adopt their own definitions of the patentability standards, and to do so consistently with their legal systems and practices, governments can follow different methods to ensure that patents are granted only when there are sufficient merits under the applicable law.

Governments may introduce specific standards in the patent laws themselves. A notable case is the Indian Patents Act, as amended in 2005, which incorporated in section 3(d) specific standards to assess patent applications in the field of chemicals and pharmaceuticals.

In a case brought by Novartis (a Swiss pharmaceutical company) against the rejection of its patent application relating to a beta crystalline form of imatinib mesylate, the Indian Supreme Court held that the claimed invention failed in both the tests of invention and patentability.

The definition of the standards of patentability can also be made through regulations, including patent offices' guidelines. A good example is provided by the guidelines on the patentability of pharmaceutical products and processes adopted by the Argentine government in 2012 to limit the ever-greening of pharmaceutical patents.

Finally, it is worth noting that in applying patentability standards, patent offices can differentiate, in line with the TRIPS Agreement, among fields of technology in order to take into account particular features of specific sectors and public policy objectives, for instance, in relation to the promotion of generic drugs.

Measures to accommodate these differences constitute a necessary response to the diversity of technologies and, consequently, a condition sine qua non for an intrinsically balanced system of protection that remains neutral in its effects on competition. *(IPS Columnist Service)*❐

Carlos Correa is the South Centre's special adviser on trade and intellectual property issues. The above is taken from his paper "Tackling the Proliferation of Patents: How to Avoid Undue Limitations to Competition and the Public Domain", published by the South Centre. The paper can be found at www.southcentre.int/research-paper-52-august-2014/.

(continued from page 7)

adding that the issue the resolution purported to address fell outside the scope and mandate of the Human Rights Council and did not belong in this forum.

Italy, on behalf of the European Union members of the Human Rights Council, said that there should be no doubt over its solidarity with countries that had faced or were still facing economic and financial crisis. However, in its view, the Council was not the appropriate forum for discussing issues related to financial policy.

France, announcing its intention to abstain on the vote, said that the effectiveness of international mechanisms for the restructuring of sovereign debt was a core concern for it. It said its stance and position of *amicus curiae* in the dispute between Argentina and litigious creditors before the US Supreme Court clearly demonstrated France's commitment.

However, it considered that the issue of sovereign debt restructuring did not fall within the mandate of the Human Rights Council. The issue should be discussed within the competent international bodies, which was already the case, it said, citing as examples the International Monetary Fund and the Paris Club.

Unjust system

In the resolution that was eventually adopted, the Human Rights Council noted the concern expressed in the declaration that heads of state and government of the Group of 77 and China issued at their June summit in Santa Cruz de la Sierra, Bolivia, that reiterated the importance of not allowing vulture funds to paralyze the debt restructuring efforts of developing countries, and that these funds should not supersede the state's right to protect its people under international law.

The Council affirmed that debt burden contributes to extreme poverty and hunger and is an obstacle to sustainable human development, to the realization of the Millennium Development Goals and to the right to development, and is thus a serious impediment to the realization of all human rights.

The Council also noted that "the international financial system does not have a sound legal framework for the orderly and predictable restructuring of sovereign debt, which further increases the economic and social cost of non-compliance."

It expressed its concern about the voluntary nature of international debt relief schemes which has created opportunities for vulture funds to acquire defaulted sovereign debt at vastly reduced prices and then seek repayment of the full value of the debt through litigation, seizure of assets or political pressure.

Condemning the activities of vulture funds, the Council reaffirmed, in this context, that "the activities of vulture funds highlight some of the problems in the global financial system and are indicative of the unjust nature of the current system, which directly affects the enjoyment of human rights in debtor States."

It called upon states to consider implementing legal frameworks "to curtail predatory vulture fund activities within their jurisdictions".

The Council encouraged all states to participate in the negotiations aimed at establishing a multilateral legal framework for sovereign debt restructuring processes, as referred to in UN General Assembly resolution 68/304, and invited states participating in the negotiations to ensure that such a multilateral legal framework will be compatible with existing international human rights obligations and standards. *(SUNS7884)* ❐

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