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Achieving sustainable development through the SDGs – and beyond

Adopted by world leaders at the United Nations last year, the Sustainable Development Goals (SDGs) set out countries' aims to improve economic, environmental and social well-being by 2030. Attaining sustainable development will, however, require not only follow-up on the SDGs but also rigorous analysis of the structural and systemic challenges confronting the development effort.

● Sustainability goals to get action going – *p11*

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Development, SDT stressed at WTO meet

The WTO General Council meeting on 24 February saw several developing countries underline the need to uphold the development dimension and the principle of special and differential treatment in negotiations at the trade body.

by Kanaga Raja

GENEVA: At the 24 February meeting of the WTO's General Council, a number of developing countries again stressed on the importance of the development dimension and special and differential treatment (SDT) in the work going forward after the 10th WTO Ministerial Conference in Nairobi.

They also expressed dismay over the negotiating process at Nairobi, where only a small group of countries was involved in the decision-making over the Nairobi Ministerial Declaration (NMD), which was presented to members at the end of the extended meeting virtually on a take-it-or-leave-it basis.

The developing countries called for a more transparent and inclusive process going forward.

[At an informal heads-of-delegation (HOD) meeting on 10 February, several developing countries had called for the remaining Doha Development Agenda (DDA) issues to be addressed as a priority and said that the development dimension and SDT were key in moving forward. They also expressed disappointment over the negotiating process in Nairobi. (See *TWE* No. 608.)]

Lessons to be learnt

At the General Council, WTO Director-General Roberto Azevedo, in his report as Chair of the Trade Negotiations Committee (TNC), reiterated that "Nairobi showed that we need to improve the way we work in Geneva. Despite the fact that we succeeded in delivering some important outcomes at the 10th Ministerial Conference, there's no doubt that there are lessons to be learnt."

"Too much was left to negotiate in Nairobi itself. In future, by the time we make the transition from the Geneva process to the Ministerial Conference, we should aim to be in a much more advanced position," he maintained.

To deliver that, he suggested two elements: first, closer contact with capitals to obtain more regular, substantive and updated political instructions; and second, engaging ministers more throughout the process and not just at the end.

On the substantive outcomes of the Ministerial Conference, he said that some of the decisions taken under the DDA specified a number of follow-up actions, including: to "pursue negotiations" on an agricultural special safeguard mechanism (SSM); to negotiate, "in an accelerated time-frame", to find a permanent solution on public stockholding; and to continue holding dedicated discussions on cotton. "All of these follow-up actions now demand our attention," he said.

On Part III of the NMD on future work, Azevedo stressed that "each and every word of the declaration is important. I am not attributing more prominence to one thing over another. But there are two areas which we will need to look into, and which are particularly notable precisely because there is no common view on them. One is the remaining DDA issues. Another is non-DDA issues."

According to the Director-General, there was no consensus about how to address the DDA. Nonetheless, in Nairobi, all members gave a "strong commitment" to advancing negotiations on the remaining Doha issues. "It is important to underline this point, even though members do not currently have a shared view on how it should be achieved," he said, adding that he had requested that the negotiating group chairs begin discussions within their respective groups.

On the non-DDA issues, Azevedo said again members were not of a common view. But it was clear that some wanted to discuss issues outside the DDA. It was not clear yet how that conversation would take place, but there was a clear understanding that if there was a desire to launch multilateral negotiations, that would have to happen with the agreement of all members.

"Progress in these areas must be member-driven. I urge members to talk to each other. That's the only way we can begin to advance."

Referring to the 10 February HOD meeting, Azevedo said many shared his concerns about the process in Nairobi. They agreed that the process at Ministerial Conferences needed to be more predictable and transparent. The responsibility lay with each member. Members also agreed that the preparatory process in Geneva needed to bring agreed or close-to-finished outcomes to ministers for decision, with very few issues left open, if any.

"Different perspectives and views were expressed on the way forward. Some called for us to sustain the momentum from Nairobi and resume work in negotiating groups as soon as possible. Others called for a frank discussion on the key elements of the declaration to attain clarity, or even a period of reflection to build a shared view on how to move ahead."

Some delegations also reiterated their well-known positions on the DDA mandate and non-DDA issues, he added.

Several references were made to the centrality of the development dimension and that special and differential treatment should remain an integral part of future negotiations, and a number of groups also reiterated the need to preserve their envisaged flexibilities.

"What was clear by the end of the meeting is that there is still a lack of clarity among members with regard to how the process should evolve. Therefore, I think members will need to deepen their dialogue with each other about how to advance their work," said Azevedo.

"It is important that we have a rich conversation over the coming months – and that we hear the views of all. I encourage you to talk to each other and to share your views about our next steps in light of the outcomes from Nairobi," he added.

Views of members

A number of countries that did not speak at the informal HOD meeting on 10 February made their statements at this General Council meeting. A few that spoke at the HOD meeting also spoke at this meeting, while the statements of those that spoke at the HOD meeting but did not speak at the General Council were added into the record.

According to trade officials, Peru said that the Nairobi outcome was a successful one but there were lessons to be learnt. Members could not expect that they were going to be able to produce outcomes at the last minute. There should be no restrictions set in advance on the levels of ambition and a sequential approach should not be used when taking up topics.

It said that all issues should be looked at on their merits. There was a need for a process that would involve much more conversation along text-based lines. This was the only way for a transparent and inclusive process to take place. It was very important to implement the Bali and Nairobi commitments. The NMD had given members a challenge in terms of the work programme, and there was a need to look at a full range of issues.

Peru said it would like to see discussions continue on fisheries subsidies and anti-dumping, and that it was open-minded on new issues. It also stressed on a multilateral approach.

Also, Peru said, it was very important that the process be carried forward in a more transparent and inclusive way. It also highlighted the importance of carrying forward the issues of SDT and the development dimension.

Fiji, on behalf of the Pacific Group, said that while there were some good outcomes on least-developed-country (LDC) issues – the services waiver and rules of origin – export competition was also important. For the Pacific Group, it was critically important that an open and equitable multilateral trading system be maintained, one that would allow countries of the region a voice at the table but also to increase trade and address their development concerns.

Chile said Nairobi had proved that the WTO can respond to the demands made of it on the multilateral agenda. For the 11th Ministerial Conference (MC11) in 2017, there was a need for prompt implementation of the NMD. Work was needed in other areas as well, such as domestic support and market access in agriculture – where not much progress had been made – and in other areas where there had been even less progress, such as non-agricultural market access (NAMA) and services, it said.

Saudi Arabia, on behalf of the Arab Group, praised the outcomes at Nairobi particularly on the LDC issues and cotton, as well as on export competition, but said that significant issues remained to be addressed. It was very important for the Arab Group that the development dimension and SDT provisions were retained. There was a need to work in a more transparent and inclusive manner before MC11 and to do so in a cooperative manner, it said.

"Solidarity work programme"

China said there was no question that success at Nairobi was undeniable. But this did not mean that the workings of the WTO had to be rewritten or that the priorities of members had changed.

It said that the areas of NAMA and services deserved special attention. On new approaches, it said it was unclear what those approaches would be. While it was open to new issues, it was important to recognize that compared to the DDA issues, more progress was needed to make these new issues more mature and to make them more consensual.

The NMD provided guidance for future work but the way in which this guidance was laid out was somewhat fragmentary, China said, adding that the issues would not be dealt with in the most cohesive way. It proposed a "solidarity work programme" where members could address the Doha issues according to the Doha mandates, and then with respect to other issues, those that were important to business especially e-commerce and investment could be taken up as well. If they were to be negotiated, it needed to be done by consensus.

China said it was not looking for new modalities for the work programme. It wanted things done in a coordinated and dedicated fashion. It also wanted things done in a direct and balanced way with solidarity. It also stressed on the importance of the faithful and timely implementation of the Bali and Nairobi work programmes.

Nigeria said that there was a need for a more transparent and inclusive process that would make it easier for everyone to come away from the Ministerial Conferences with a more positive approach. This being said, there was a need to build very quickly on the Nairobi outcome.

Nigeria called for more engagement by ambassadors and ministers, and said the negotiating group process should be undertaken in a multilateral way and in a transparent and inclusive manner. The Bali and Nairobi outcomes also needed to be implemented, it said, highlighting the issues of domestic support, fisheries subsidies, SSM and cotton. It underlined as a priority ratification of the Trade Facilitation Agreement.

The DDA was agreed by consensus and it could only be ended by consensus, said Nigeria, and agriculture was a gateway issue and the engine for the entire negotiations.

Chinese Taipei, on behalf of the Article XII group (formerly known as the recently acceded members), referred to the NMD which said that Article XII countries' interests needed to be taken into account. Chinese Taipei added that there should be strict limits on the period of reflection. There was also a need for a transparent and inclusive process.

Venezuela said it had concerns about MC10. Things had been happening in a transparent way in Geneva, but when members got to Nairobi, that did not continue. There were some delegations that did not want to agree in Geneva because they felt they could influence the outcome in a small group in Nairobi, it charged.

Laos, on behalf of the Association of South-East Asian Nations (ASEAN), said that trade was the lifeblood of the ASEAN countries and that the multilateral trading system was essential for ASEAN. All of ASEAN's integration efforts had been built on WTO commitments. It was important to implement the NMD and there was now a need as a membership to come together because a house divided could not stand.

Ecuador expressed dismay at the lack of transparency at MC10, saying that it was a stark contrast to the "Room W" (a large room at the WTO for meetings of the full membership) process at the WTO. If there was going to be a ministerial declaration, it needed to be something that everybody had been working on. Transparency and inclusiveness were absent in Nairobi. Only a small group were involved in decision-making, it said.

Ecuador said it did not understand why there was criticism of the Doha agenda. In any event, there had been mandates for these negotiations, and no one had actually been adhering to the mandates, it said. It wanted SDT and the development dimension in order to ensure a development outcome from these negotiations.

Turkey said that while Nairobi was a success, the expectations ahead of the Ministerial Conference had been so low that the outcome was perhaps seen as even greater than it was. Transparency and inclusiveness were key.

Nepal said implementing the Bali and Nairobi outcomes was crucial. It stressed on the development dimension, SDT and a more transparent and inclusive process.

Formidable challenges

Indonesia, on behalf of the developing-country G33 grouping, stressed the importance of implementing the Nairobi outcomes. It said there were formidable challenges going forward in trying to reach agreement before MC11. It welcomed the provisions in the Nairobi outcome on public stockholding and the SSM. It however expressed concern that there had been no agreement reached here. Developing countries needed to have recourse to the SSM, it said.

It expressed happiness over the accelerated negotiations mandated on public stockholding. It was also keen to see the ratification of the Trade Facilitation Agreement. It also wanted to see the issue of Special Products for developing countries taken up when the market access negotiations in agriculture resume.

Korea supported the G33 statement. It said the period of reflection should not become a period of inactivity and prolonged uncertainty. The remaining Doha issues needed to be addressed. Simply giving general statements was not helpful. There was also a need for an enhanced role for the negotiating groups. There should be no sequencing of issues. The WTO needed to address the non-Doha issues and they needed to be able to respond to the global trading environment, it said.

Paraguay said that implementation of the Bali and Nairobi outcomes was essential. It added that there was a need to start looking at issues like global value chains and e-commerce and how they may be able to help developing countries. These were priorities for landlocked developing countries.

Morocco, on behalf of the African Group, said that the credibility of the WTO needed to be maintained, and it had been elevated by the outcome in Nairobi.

For the African Group, there were three important areas that needed to be addressed more completely – trade facilitation, agriculture and development. Progress had been made but more needed to be done to build on the work. It stressed on the need for SDT. There was also a need to get deeper into the issues of agriculture, services and NAMA.

Cameroon supported the African Group statement. It also stressed on SDT. While the Nairobi outcome was positive in some respects, it said, it did not produce results that were sufficient in a number of important areas. These included the issue of industrialization which was very important for Cameroon.

Benin, on behalf of the LDCs, supported the G33 and African Group statements. It welcomed the services waiver for LDCs and rules of origin in the Nairobi outcome. It would like to see more on cotton, duty-free quota-free market access for LDC products, and on reducing trade-distorting domestic support. It would also like to see agreements on fisheries subsidies and intellectual property.

Zimbabwe supported the African Group and the G33. It highlighted the need to get legal clarity on export competition, which would be an important part of the implementation of the Nairobi outcome. There was a need for agreements as well on the SSM, public stockholding, domestic support and the development dimension. These issues had not been addressed as completely as they needed to be, it said.

On new issues, it said that the scope of these issues had not been established. They should only be brought to the table with the conclusion of the DDA.

Jamaica supported the G33. It also expressed dismay over the process in Nairobi. The Nairobi outcome and process were not atypical; the lack of transparency had been normal in these meetings. There were two elements – exclusion and brinksmanship – which it said had been ingrained in the WTO's working methods. Jamaica supported a more transparent and inclusive process, emphasizing the need to improve the working methods.

Gabon supported the African Group. The multilateral trading system was extremely important for the development of the country, it said. *(SUNS8189)* ❐

DG shrugs off own responsibility, role in NMD process and outcome

At the WTO General Council, Director-General Roberto Azevedo attempted to deflect criticisms of the murky decision-making methods employed at the Nairobi Ministerial Conference.

by D. Ravi Kanth

GENEVA: The WTO Director-General Roberto Azevedo tried to shrug off at the General Council on 24 February the severe criticisms from several African and Latin American nations about the non-inclusive, opaque process adopted at Nairobi, by saying "I think Nairobi showed that we need to improve the way we work in Geneva."

While making this remark, in effect blaming delegations at Geneva, Azevedo failed "to come clean" on what precisely was his own role, along with that of the chair of the 10th Ministerial Conference, Amina Mohamed, Kenya's Cabinet Secretary for Foreign Affairs, in the adoption of the "grotesquely opaque" green room process that finalized the Nairobi package, including the Nairobi Ministerial Declaration (NMD) that was forced down on the membership, several trade envoys told the *South-North Development Monitor (SUNS)*.

The Nairobi green room talks involved only five members – the United States, the European Union, China, India and Brazil – and the remaining 159 members were kept out of the picture until the five, with Mohamed and Azevedo participating, produced the package.

Several African and South American countries severely criticized the unseemly, non-inclusive green room process adopted at the Nairobi meeting on 15-19 December, in which they were denied their basic negotiating rights.

The "isolationist" and "destructive post-Nairobi work programme as contained in Part III of the NMD was foisted on the members without their engagement," an African trade envoy maintained.

At the 24 February General Council meeting, Azevedo once again shrugged off criticisms about the Nairobi process. He merely said: "I think Nairobi showed that we need to improve the way we work in Geneva."

"Despite the fact that we succeeded in delivering some important outcomes..., there's no doubt that there are lessons to be learnt," he said. What was the reason for adopting the negotiating process at Nairobi? Azevedo's answer: "Too much was left to negotiate in Nairobi itself."

"In future, by the time we make the transition from the Geneva process to the Ministerial Conference, we should aim to be in a much more advanced position," he argued.

Azevedo went on to suggest that "two elements" were essential for delivering outcomes in the future. The two elements were: members "need to be in closer contact with capitals, to obtain more regular, substantive and updated political instructions"; and members "need to engage ministers more throughout the process – not just at the end." Therefore, members "need to look at precisely how this could be achieved," the Director-General argued.

"Mastermind"

According to an African trade envoy who asked not to be quoted, Azevedo's explanation lacked minimal "credibility" and "integrity". Surely everyone knew that he was the "mastermind" behind the Nairobi green room meeting which was chaired by Mohamed, the envoy said.

The Director-General, according to the envoy, was singularly responsible for the situation of there having been "too much … left to negotiate in Nairobi itself." Azevedo was the chair of the Trade Negotiations Committee (TNC) which did not conduct its work properly and discharge its responsibilities in terms of paragraph 46 of the Doha Ministerial Declaration, during the run-up to the Nairobi meeting.

Also, it suited the big players, particularly the US, and the Director-General to manufacture an outcome in an opaque process at Nairobi which was not possible in Geneva, the envoy said. The NMD would not have been possible if there had been an open and inclusive meeting involving all the members, the envoy added.

The constant refrain from several trade envoys was that the Director-General did not convene day-and-night Room W meetings before the Nairobi conference as he did, for example, for the Trade Facilitation Agreement (TFA) negotiations in the run-up to the WTO's 9th Ministerial Conference in Bali in December 2013.

After assuming office in September 2013, Azevedo worked on a war footing to address over 200 square brackets (which indicate lack of agreement among members) in the TFA text. But when it came to finalizing the post-Nairobi work programme, Azevedo left almost everything in a state of utter confusion until the last day of the Nairobi conference on 19 December, trade envoys said.

Instead of convening regular informal TNC meetings, the Director-General chose to conduct negotiations through a group of seven countries involving the US, the EU, China, India, Brazil, Australia and Japan. These G-7 countries along with Azevedo finalized a small package at a meeting hosted by Australia in the first week of September 2015. At that meeting, the US spelt out what would go into the small package: export competition in agriculture, LDC package, transparency (in rules, fisheries subsidies and domestic regulation in services), ratification of the TFA, expansion of the Information Technology Agreement, and two new accessions (Afghanistan and Liberia).

The Director-General, who was present at the G-7 meeting in the Australian mission, said "we [the G-7 members] should focus not on problem areas but on potential deliverables."

"We somehow need to find time for the latter. I will brief the membership tomorrow on the general mood and will also talk to LDCs on deliverables," Azevedo maintained, according to the record of the meeting retained by the participants.

In his concluding statement at the G-7 meeting, Azevedo said: "It does not look certain what we can do in DS [domestic support] and MA [market access]. Adjustment to Rev.4 on Export Competition is needed. Ways of improving Bali decisions on LDCs needed."

Subsequently, the Director-General left the work to the chairs of the negotiating groups while he was busy touring places outside Geneva. He did not con-

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EU-mooted investment court would bring ISDS "back from the dead"

Rather than put an end to the much-criticized investor-state dispute settlement mechanism, the EU's proposed "investment court system" could lock countries into a legal regime which perpetuates the "injustices" of the ISDS framework, a civil society report cautions.

by Kanaga Raja

GENEVA: The investment court system (ICS) proposed by the European Commission for all of the European Union's ongoing and future investment negotiations to get around the massively unpopular investor-state dispute settlement (ISDS) system, would still empower corporations to sue governments over measures to protect the environment, health, workers and other public interests, according to a recently released report.

According to the report, the proposed ICS does not put an end to ISDS. Quite the opposite, it would empower thousands of companies to circumvent national legal systems and sue governments in parallel tribunals if laws and regulations undercut their ability to make money.

It would pave the way for billions in taxpayer money to be paid out to big business. It could curtail desirable policymaking to protect people and the planet. And it threatens to lock EU member states forever into the injustices of the ISDS regime, said the report.

"In a nutshell, the proposed 'new' ICS is ISDS back from the dead. It's the zombie ISDS."

The report, titled "The zombie ISDS: Rebranded as ICS, rights for corporations to sue states refuse to die", was released by some 17 civil society organizations in 11 EU countries. They are Corporate Europe Observatory (CEO); Association Internationale de Techniciens, Experts et Chercheurs (AITEC); Attac Austria; Campact; ClientEarth; Ecologistas en accion; Forum Umwelt & Entwicklung; Instytut Globalnej Odpowiedzialnosci (IGO); PowerShift; Seattle to Brussels Network (S2B); Traidcraft; Transnational Institute (TNI); Umanotera; Vedegylet; Vrijschrift; War on Want; and 11.11.11. The full report is at corporateeurope.org/sites/default/files/attachments/the_zombie_isds.pdf.

According to the report, investor-state cases have mushroomed in the last two decades from a total of three known treaty cases in 1995 to a record high of over 50 new claims filed annually in the past five years. 2015 saw the absolute record high of 70 new ISDS cases.

Globally, it said, 696 investor-state disputes were counted as of 1 January 2016, against 107 countries, but due to the opacity of the system the actual figure could be much higher.

Seventy-two percent of all known cases filed by the end of 2014 were against developing and transition countries. But lawsuits against developed economies are also on the rise – in 2015, Western Europe was the world's most-sued region.

Investors have triumphed in 60% of investor-state cases where there has been an actual decision on the merits of the case, whereas states have 'won' only 40% of the time (even though there isn't anything states can win because they only ever get awards against them).

The report found that award figures may reach up to ten digits. The highest known damages to date, $50 billion, were ordered against Russia, to the former majority owners of oil and gas company Yukos.

The main financial beneficiaries have been large corporations and rich individuals: 94.5% of the known awards went to companies with at least $1 billion in annual revenue or to individuals with over $100 million in net wealth.

Public interest measures targeted

According to the report, the last two decades have also seen a number of multi-million-dollar claims against the alleged damage to corporate profit of legislation and government measures in the public interest. "Developed and developing countries on every continent have been challenged for financial stability measures, bans on toxic chemicals, mining restrictions, anti-smoking legislation, anti-discrimination policies, environmental impact assessments and more."

The report cited several examples of investor-state lawsuits:

- Corporations versus public health – Philip Morris vs. Uruguay: Philip Morris has sued Uruguay on the basis of the latter's bilateral investment treaty with Switzerland. The tobacco giant is challenging compulsory large-scale health warnings on cigarette packs and other tobacco control measures designed to reduce smoking, arguing that they prevent it from displaying its trademarks, causing substantial losses. Philip Morris is demanding $25 million in compensation from Uruguay.
- Corporations versus action on climate change – TransCanada vs. the US: In January 2016, Canadian pipeline developer TransCanada announced its intention to sue the US on the basis of the North American Free Trade Agreement (NAFTA) over President Obama's rejection of the contested Keystone XL oil pipeline from Canada's tar sand fields to refineries in the US. The project, which according to environmentalists would increase carbon dioxide emissions by up to 110 million tons per year, had faced massive citizen opposition. TransCanada wants a stunning $15 billion in damages.
- Corporations versus environmental protection – Vattenfall vs. Germany I & II: In 2009, Swedish energy multinational Vattenfall sued the German government, seeking €1.4 billion in compensation for environmental restrictions imposed on one of its coal-fired power plants. The case, based on the Energy Charter Treaty (ECT, an international agreement for cross-border cooperation in the energy industry), was settled after Germany agreed to weaken the environmental standards. In 2012, Vattenfall launched a second lawsuit via the ECT, seeking €4.7 billion for lost profits related to two of its nuclear power plants. The legal action came after Germany decided to phase out nuclear energy following the Fukushima nuclear disaster.
- Corporations versus black empowerment – Piero Forsti and others vs. South Africa: In 2007, investors from Italy and Luxembourg sued South Africa over its Black Economic Empowerment Act, which aims to redress some of the injustices of the apartheid regime. It requires, for example, mining companies to transfer a portion of their shares into the hands of black investors. The dispute (under South Africa's bilateral invest-

ment treaties with Italy and Luxembourg) was closed in 2010 after the investors received new licences requiring a much lower divestment of shares.

- Corporations versus the environment and community values – Bilcon vs. Canada: In 2008, US concrete manufacturer Bilcon sued Canada on the basis of NAFTA over the rejection of a proposed quarry, following an impact assessment warning of potential adverse social and environmental effects. In 2015, Canada lost the case. Two of the arbitrators ruling on the claim considered the impact assessment as arbitrary, frustrating Bilcon's expectations and therefore violating NAFTA. The third arbitrator disagreed strongly, calling the ruling a "significant intrusion into domestic jurisdiction" and warning that it "will create a chill on the operation of environmental review panels". How much compensation Canada will have to pay is yet to be decided, but it could climb as high as $300 million even though the project never reached the construction stage.
- Corporations versus action against financial crises – investors vs. Argentina: When Argentina froze utility rates (energy, water etc.) and devalued its currency in response to its 2001-02 financial crisis, it was hit by a flood of nearly 30 investor lawsuits and became the most-sued country in the world under investment arbitration. Big companies like Enron (US), Suez and Vivendi (France), Anglian Water (UK) and Aguas de Barcelona (Spain) demanded multimillion-dollar compensation for revenue losses. So far, Argentina has been ordered to pay a total of $900 million in compensation for its financial-crisis-related measures, with several cases still ongoing.
- Corporations versus communities and the environment – Gabriel Resources vs. Romania: In 2015, Canadian mining company Gabriel Resources sued Romania via two of the country's bilateral investment treaties. The lawsuit concerns Gabriel's planned open pit gold mine in the historical village of Rosia Montana. It was halted when Romanian courts annulled several permits and certificates required for the project, following strong community resistance against the mine's potentially disastrous environmental and social impacts. According to media statements, Gabriel could demand up to $4 billion in compensation.
- Corporations against fracking moratoria – Lone Pine v. Canada: In 2011, the government of the Canadian province of Quebec responded to concerns over water pollution by implementing a moratorium on the use of hydraulic fracturing (fracking) for oil and gas exploration. In 2012, the Calgary-based Lone Pine Resources energy company filed a NAFTA-based investor-state lawsuit challenging the moratorium. Lone Pine, which filed the case via an incorporation in the US tax haven Delaware, is seeking $109.8 million plus interest in damages.

The report noted that sometimes, the threat of an expensive dispute has been enough to freeze or delay government action, making policymakers realize they would have to pay to regulate. Canada and New Zealand, for example, delayed anti-smoking policies because of threatened or actually filed investor lawsuits from Big Tobacco.

As the number of investor-state disputes has grown, investment arbitration has become a money-making machine in its own right. Today, there are a number of law firms and arbitrators whose business model depends on companies suing states. Hence, they are constantly encouraging their corporate clients to sue – for example, when a country adopts measures to fight an economic crisis.

Meanwhile, sitting as arbitrators, investment lawyers have been found to adopt investor-friendly interpretations of the corporate rights in trade and investment deals, paving the way for more lawsuits against states in the future, increasing governments' liability risk.

"Speculative investment funds, which have recently started helping fund investor-state disputes in exchange for a share in any granted award or settlement, are likely to even further fuel the boom in arbitration," the report warned.

Opposition

The report noted that the growing number of corporate lawsuits has raised a global storm of objection to investment treaties and arbitration. Public interest groups, trade unions, small and medium enterprises, and academics have called on governments to oppose investor-state arbitration, claiming it fails basic standards of judicial independence and fairness and threatens states' responsibility to act in the interest of their people, economic and social development and environmental sustainability.

Concerns have also been raised about the glaring absence of investor obligations and the imprecise language of many treaties, opening the floodgates to expansive, pro-investor interpretations of corporate rights by private tribunals.

Proponents of free markets and trade, such as the right-wing US think-tank Cato Institute, have also joined the opponents' camp, arguing that "the ISDS approach of providing ... protections only for foreign investors ... is akin to saying in a domestic constitution that the only rights we will protect are those of wealthy property owners."

Germany's largest association of judges and public prosecutors (with 15,000 members of a total of 25,000 judges and prosecutors in the country) has recently raised similar concerns about granting exclusive rights and pseudo-courts to foreign investors, calling on legislators to "significantly curb recourse to arbitration in the context of the protection of international investors".

The report pointed out that some governments too have realized the injustices of investment arbitration and are trying to get out of the system. South Africa, Indonesia, Bolivia, Ecuador and Venezuela have terminated several bilateral investment treaties (BITs).

South Africa has developed a domestic bill that does away with some of the fundamental and most dangerous clauses in international investment law. So does India's new model investment treaty. Indonesia too seems to be moving in a similar direction.

And in Europe, Italy has withdrawn from the ECT, notably after having been hit and threatened with ECT-based claims in the renewables sector.

According to the report, at a time when both the number of super-sized investor lawsuits and the types of policies being attacked are surging, and more and more governments are trying to change or exit from the investment arbitration system, an even bigger threat looms on the horizon. A number of mega-regional treaties involving close to 90 countries are currently under negotiation which threaten to massively expand the ISDS regime, subjecting states to an unprecedented increase in liability.

In this context, the report cited the Trans-Pacific Partnership (TPP) between 12 Pacific countries including the US and

Japan; the Regional Comprehensive Economic Partnership (RCEP) under negotiation by 16 Asia and Pacific economies; the Tripartite Free Trade Agreement (TFTA) which is being negotiated by 23 African economies; a number of bilateral deals, including the US-China and the EU-China investment treaties; and the proposed Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US.

A recent analysis estimated that while all existing investment agreements cover only 15-20% of the global investment flows, these new treaties would increase this coverage to approximately 80%, multiplying the risk of governments being sued as a result of public policy measures.

"TTIP alone would dwarf all of the existing treaties allowing for investor-state dispute settlement. For example, in one fell swoop, it could multiply the number of US-based corporations that could challenge European environmental, health, and other public safeguards in international tribunals by a factor of eleven."

Enter the ICS

The report charged that in the wake of massive public concern over ISDS, the European Commission is using a new abbreviation – ICS or the investment court system – to rebrand and give cover to a massive expansion of the same much-loathed regime.

The extent of the opposition to the once-arcane ISDS became clear in early 2015, when the Commission published the results of a public consultation on the rights of foreign investors in the EU-US TTIP trade deal currently under negotiation: over 97% of the record 150,000 participants had rejected the corporate privileges. The outcry came from a broad and diverse camp, including businesses, local and regional governments, elected representatives, academics, trade unions and other public interest groups.

Even more people, over 3.3 million Europeans, have signed a petition against TTIP and the already concluded EU-Canada Comprehensive Economic Trade Agreement (CETA) "because they include several critical issues such as investor-state dispute settlement ... that pose a threat to democracy and the rule of law".

Criticism had also mounted in EU member states and the European Parliament. Parliaments in the Netherlands, France and Austria, for example, had adopted resolutions raising serious concerns about investment arbitration in TTIP.

So when, in autumn 2015, the European Commission presented a revised proposal for all of its ongoing and future investment negotiations (including TTIP), it went for a new label. Instead of "the old, traditional form of dispute resolution" which "suffers from a fundamental lack of trust", Trade Commissioner Cecilia Malmstrom promised "a new system built around the elements that make citizens trust domestic or international courts".

The new talk in town was the ICS – the "investment court system" – a system that allegedly would "protect the governments' right to regulate, and ensure that investment disputes will be adjudicated in full accordance with the rule of law," as European Commission Vice President Frans Timmermans claimed.

"The problem is, when you examine ICS it looks like ISDS has risen from the grave," said the report, adding that what the EU is proposing simply copies in many ways the arbitration proceedings of the past.

For example, investor-state lawsuits under TTIP would still operate under the usual ISDS arbitration rules. And the so-called "judges" deciding the cases would be paid according to the most common schedule of fees used in ISDS proceedings – with a lucrative $3,000 per day.

Indeed, with the exception of some procedural improvements – an enhanced selection process of arbitrators (re-labelled "judges") and the establishment of an appellate chamber – the 'new' ICS essentially equals the 'old' ISDS system which can be found in existing investment treaties and the current text of the proposed EU-Canada CETA.

"The ICS proposal contains the same far-reaching investor rights that multinationals have used when demanding multi-billion Euros in compensation for public health and environmental policies. As a result, it contains the same serious risks for taxpayers, public interest policies, and democracy as the 'old' ISDS system."

Inherent dangers in the ICS proposal

According to the report, the European Commission's proposal for an ICS would empower tens of thousands of companies to sue.

The proposal would allow foreign investors operating in the EU and EU-based investors operating abroad to circumvent national legal systems and file lawsuits in international tribunals whenever they think that state actions violate the far-reaching "substantive" investor rights that the EU proposes.

In the context of TTIP alone, tens of thousands of companies would be potential claimants. According to research by US consumer group Public Citizen, a total of 80,000 companies operating on both sides of the Atlantic could launch investor-state attacks if the EU proposal was to be included in TTIP. "So, the EU proposal would significantly expand the reach of the current ISDS system."

The EU's proposal contains the same wide-ranging so-called "substantive" rights for investors as existing treaties, which have been the legal basis for investor attacks against perfectly legitimate and non-discriminatory government policies to protect health, the environment, economic stability and other public interests.

The report further said that the EU proposal paves the way for billions of taxpayers' money to be paid to corporations. Once an investment tribunal finds that a state has violated the investors' super-rights – and being found to be in breach of just one of them is enough – based on the EU proposal, it could order vast amounts of public money paid to compensate the investor.

"As there is nothing in the text that puts limits on how much a company can sue for, the multi-million and billion lawsuits already on the table around the world are set to continue. They can wreak havoc with public budgets, and can be enforced by seizing state property in many countries around the world."

The report said that while under the new EU proposal, investment tribunals could not order governments to reverse or rewrite a law, it doesn't take much to imagine how, by empowering multinationals to claim eye-watering sums in compensation for public decisions, the investor rights could make politicians reluctant to enact desirable safeguards for public health, social well-being, privacy and the environment if those are opposed by big business.

"Indeed, there is already evidence that proposed and adopted laws on health and environmental protection have been abandoned, delayed or otherwise adapted to the wishes of big business because of expensive corporate claims or the threat of litigation."

The EU proposal would allow foreign corporations to challenge everything that sovereign nations can do: laws passed by parliaments, actions by governments and court rulings that allegedly harm their investments – from the local to the federal and even European level.

"In a nutshell, the EU proposal would establish a supreme pseudo-court that would trump all courts of EU member states and the European Court of Justice. But this pseudo-court would be exclusively accessible to foreign investors and its only purpose would be to protect their investments and profit expectations."

The report further charged that the dispute settlement process proposed by the EU is not judicially independent but has a built-in pro-investor bias. Lawsuits would be decided by a tribunal of three for-profit arbitrators (now re-labelled "judges" by the EU) with vested interests. Unlike judges, they would not have a fixed salary but be paid per case – with a lucrative $3,000 per day, on top of a monthly retainer fee of €2,000 per month. So, they would earn more fees as more foreign investor claims were brought.

"In a one-sided system where only the investors can sue, this creates a strong systemic incentive to side with them – because as long as the system pays out for investors, more claims and more money will be coming to the arbitrators. An empirical study of 140 investment treaty cases until May 2010 indeed reveals that arbitrators have vastly extended foreign investors' rights through expansive interpretations of the law."

Relabelling the ISDS system a "court system" and the new arbitrators "judges", as the European Commission is doing, is a serious misnomer. It can never be a true court as long as foreign investors are the only ones who can file lawsuits and as long as the tribunals will not be taking into account environmental protection, human rights or other non-corporate considerations that a regular judge usually has to balance, said the report.

It further argued that the EU proposal would risk eternalizing ISDS. Several countries around the world are currently getting out of investment agreements, which have proven too costly for them. But while many existing treaties could be terminated at any time, it will be practically impossible to exit from the extra rights for foreign investors once they are enshrined in a larger trade pact as proposed by the European Commission.

Unlike Red Riding Hood, people in Europe and in countries to whom the EU is currently proposing the ICS shouldn't be fooled, said the report. "The ICS is as dangerous for taxpayers, policies in the public interest and democracy as the 'old' and much-loathed ISDS system. It is arguably even more threatening – because it could forever lock EU member states into a legal regime where private profits trump the public interest and democracy."

Seven reasons to oppose the ICS

The report went on to cite seven key reasons to oppose the proposed ICS in EU trade deals:

(1) The ICS would empower tens of thousands of corporations to sue governments over measures to protect the environment, health, workers and other public interests.

(2) Under the ICS, billions in taxpayer money could be paid to compensate corporations, including for missed future profits that they hypothetically could have earned.

(3) The ICS is a surefire way to bully decision-makers, potentially curtailing desirable policymaking, for example, to tackle climate change, social injustice or economic crises.

(4) The ICS would give exceptionally powerful rights and privileges to foreign investors, without any obligations and without any evidence of wider benefits to society.

(5) Since only investors can sue under the ICS system, there is an incentive for the arbitrators to side with them as this will bring more lawsuits, fees and prestige in the future.

(6) There are severe doubts that the ICS is compatible with EU law as it sidelines European courts and is fundamentally discriminatory, granting special rights to foreign investors only.

(7) The ICS risks forever locking us into a legal straightjacket, as it will be practically impossible to exit from the investor privileges as a part of larger trade deals, let alone a multilateral investment court.

In a nutshell, said the report, the system is fundamentally ill-suited to deal with the key challenges of the current historical moment and of the future. At a time when all attention should be focused on averting a global climate catastrophe and the next economic crisis, there is simply no space for agreements that would make many solutions to these problems illegal.

"Existing treaties that allow private companies to sue governments over laws that impinge on their profits – from tough anti-pollution regulations to stricter rules for banks – should be abolished. Plans for supplemental corporate bills of rights in proposed treaties such as TTIP and CETA should be axed. And so should be the proposal for a world supreme court exclusively for corporations. They are all wildly dangerous for democracy as we know it."

"A failed experiment"

[Meanwhile, in a separate presentation on 11 February in Washington DC, at the National Press Club panel on the proposed inclusion of ISDS in the Trans-Pacific Partnership accord, Lise Johnson, Head of Investment Law and Policy, Columbia Center on Sustainable Investment (hereafter ILPC Center), said that including ISDS in the TPP would be a case of "entrenching and expanding a failed experiment in economic policy".

[In the presentation, Johnson said "the first investment treaty with ISDS was actually not concluded until the late 1960s. Investment treaties with ISDS were not widely negotiated until the 1990s, and ISDS claims only really emerged in earnest in the late 1990s and early 2000s. Thus, we really only have roughly 15 years of experience with this mechanism….

["ISDS is a failed experiment because it does not appear to have achieved three of the commonly stated objectives of the mechanism. It has not led to increased investment flows, nor to a set of predictable international legal rights for investors, nor to an increase in the rule of law in host countries."

[Speaking in the context of the US, Johnson underlined that currently, the US only has an investment treaty with one major capital-exporting state, Canada, meaning that only a relatively small share of foreign direct investment in the US – roughly 10% – is currently protected by a treaty with ISDS. With the TPP, the percentage of covered investment will more than double; and if the trend continues in TTIP as well, the amount of covered foreign direct investment in the US will rise significantly to approximately 70%, and along with it, the US's exposure to costly litigation and liability.

[Referring to the US administration's oft-repeated claim that ISDS has not cost the US anything so far, and that it was yet to lose an ISDS case, Johnson said that in this instance the past cannot be counted on to predict the future. In the cases it has defended, the US has had near-misses in which even the government officials working on the case thought the government would lose.

[“One explanation given for why arbitrators have been reluctant to rule against the US is that, if the US were to lose, it would back away from the system to the ultimate detriment of the arbitrators and counsel who make their living from ISDS cases,” Johnson said. “Thus, at least while the future of ISDS felt uncertain, it has been in the best interest of arbitrators to take it easy on the US.”

[Recent decisions also reflect “significant delegation of authority” under ISDS to arbitrators to interpret and apply the treaty, without any meaningful review or opportunity to appeal the arbitrators' decisions. “The tribunal in a recent case against the US, for example, stated that although all three NAFTA states unanimously agreed that the treaty meant 'X', it didn't consider itself bound to that interpretation and proceeded to disregard it.” This shows that there is no guarantee that tribunals will interpret treaty provisions in a way consistent with the US's understanding of what treaty obligations mean.

[The US, said Johnson, has also lost on key issues (in the ISDS arbitrations), resulting in an expansion of exposure to future claims and damages. And, irrespective of data on wins and losses, the ISDS system is fundamentally flawed: it creates a privileged and powerful system of protections for foreign investors that is inconsistent with, and erodes, the power of domestic law and institutions.

Beyond domestic law

[Johnson referred to the Office of the US Trade Representative's defence of ISDS on the basis that the standards of protection investors receive under it mirror, but do not go beyond, the protections provided under US domestic law. She said there are two key problems with that assertion.

[One, it is not correct that investment treaties do not provide foreign investors any greater rights than under domestic law. The ILPC Center, after undertaking significant research comparing the protections under domestic law with those under investment treaties, has concluded that the protections provided under investment treaties in fact give foreign investors greater rights than they or anyone else have under domestic law.

[In fact, said Johnson, this seems to be why TransCanada, suing the US government over its denial of the permit for the Keystone project, is pursuing its major claim for $15 billion through NAFTA as opposed to through domestic litigation.

[Moreover, ISDS allows investors to challenge actions of officials at any level of government – local, state and federal – and conduct by any branch – executive, legislative and judicial. The fact that a measure is entirely consistent with domestic law is no defence or shield against liability.

[ISDS gives private arbitrators the power to decide cases that, at their core, are merely questions of domestic constitutional and administrative law dressed up as treaty claims. Instead of recourse through local, state or federal domestic institutions, investors are able to take their claims to a panel of party-appointed international arbitrators and ask them to determine the bounds of proper administrative, legislative and judicial conduct.

[In permitting foreign investors to bring claims against the government before international arbitrators, there is no “meaningful appeal” against a wrong finding of law or facts. The decision-makers in ISDS are free of the requirements of independence, impartiality and high ethical standards that are mandatory for US judges. In domestic litigation, if a court issues a decision that is inconsistent with legislative intent, the legislature can pass a law correcting that decision; the legislature, however, has no power to undo or otherwise override an ISDS decision. The procedural rules and remedies are significantly different depending on whether an investor brings its claims through ISDS or through domestic courts, with meaningful impacts on the government's potential exposure to claims and liability. Finally, even if the law looks similar, it is not the same. For example, although the TPP incorporates what superficially looks like the US's test on regulatory expropriations, tribunals are not in any way bound to apply that test in the same manner as US courts.

[Fundamentally, Johnson said, supranational adjudication – where the decisions of a supranational body can penetrate deep into a domestic society – is rare and raises a host of complex legal and policy questions. “Much more consideration of these issues is important before we inadvertently dilute constitutional protections, weaken the judicial branch, and outsource our domestic legal system to a system of private arbitration that is isolated from essential checks and balances. This is not to say that supranational adjudication has no place in the American legal system, but rather that ISDS is an extreme, discriminatory and unnecessary version that will have undue negative effects on our domestic law and institutions.”

[For the text of Johnson's presentation, see citizen.typepad.com/eyesontrade/2016/02/press-club-tpp-isds-remarks.html.– *SUNS*] *(SUNS8185)* ❐

Sustainability goals to get action going

The latest development buzzword is the SDGs or Sustainable Development Goals, adopted by political leaders at the United Nations. What are these SDGs, their significance and limitations?

by Martin Khor

The newest fashionable term coming from the United Nations system is the "Sustainable Development Goals". These are goals that all countries, represented by their top political leaders, have signed up to strive to achieve by the year 2030.

There are 17 goals altogether, and they cover three main aspects – economic, social and environmental, which are the components of "sustainable development." There is also the global partnership for development, in which developed countries pledge to assist the developing countries to fulfil their goals.

The SDGs were adopted at a United Nations Development Summit in New York in September 2015 attended by top political leaders. The summit adopted the 2030 Agenda for Sustainable Development. Its centrepiece is the SDGs, summarized below:

- End poverty in all its forms everywhere (Goal 1); end hunger, achieve food security and improved nutrition and promote sustainable agriculture (Goal 2).
- Ensure healthy lives and well-being for all (Goal 3); ensure education for all (Goal 4).
- Achieve gender equality and empower women (Goal 5).
- Ensure availability of water and sanitation for all (Goal 6); ensure access to sustainable and modern energy for all (Goal 7).
- Promote economic growth, full employment and decent work (Goal 8); build infrastructure, promote industrialization and foster innovation (Goal 9); reduce inequality within and among countries (Goal 10).
- Make cities and human settlements inclusive, safe, resilient and sustainable (Goal 11); ensure sustainable consumption and production patterns (Goal 12).
- Combat climate change (Goal 13); conserve and sustainably use the oceans, seas and marine resources (Goal 14); protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, reverse land degradation and halt biodiversity loss (Goal 15).
- Promote peaceful and inclusive societies, provide access to justice for all and build effective, accountable and inclusive institutions (Goal 16).
- Strengthen the means of implementation and revitalize the global partnership for sustainable development (Goal 17).

These goals may seem like something obvious which few can quarrel with. In fact, it took a long and arduous process of negotiations to agree on them.

Attached to each goal are targets to enable assessment of whether the country, and the world, are on track.

For example, under Goal 1 on poverty, the targets include that by 2030, extreme poverty would be eradicated and the proportion of people living in poverty would be halved. Countries will implement social protection systems for all, and everyone will have equal rights to economic resources, access to basic services, land, new technology and financial services.

Goal 8 on growth and employment has targets on achieving at least 7% annual growth in least developed countries, achieving higher productivity for all countries, decoupling economic growth from environmental degradation, and achieving full employment and equal pay for equal work.

For Goal 10 on reducing inequality, targets include having income growth of the bottom 40% of the population at a higher rate than the national average, eliminating discriminatory laws and practices, and adopting fiscal, wage and social protection policies to achieve greater equality, and well-managed migration policies.

Goal 12 has targets for the efficient use of natural resources, halving global food waste by 2030, having sound management of chemicals and wastes, promoting sustainable public procurement practices, and phasing out harmful subsidies.

Targets for Goal 15 include that by 2020 there will be sustainable forest management including a halt to deforestation and restoration of degraded forests globally, a halt to biodiversity loss, and integration of ecosystem and biodiversity values into national planning.

Goal 16 has targets to reduce violence, end the abuse of children, promote the rule of law, reduce all forms of corruption, and develop accountable and transparent institutions.

Targets for Goal 17 on global partnership include fulfilment by developed countries of their obligation to provide 0.7% of their gross national income as aid, addressing the external debt problem, transfer of technology, increasing developing countries' exports, policy coordination for global macroeconomic stability, and respect for countries' policy space.

Follow-up process

The effects of the SDGs will depend on the follow-up. At national level, governments agreed to conduct reviews of progress in achieving the SDGs. Since so many ministries and agencies are involved in the issues covered by the SDGs, an SDGs Council (preferably chaired by the prime minister or president) should be set up. It can oversee data collection, draw up implementation plans, coordinate policies and monitor the progress of implementation.

At global level, the UN agencies are gearing up to assist countries. The UN's High-level Political Forum on Sustainable Development will also organize reviews on the progress of SDGs implementation and provide guidance to countries.

This follow-up process is of course important to transform the pledges in the SDGs into concrete results.

While the SDGs are a useful tool to galvanize action to tackle some of the key challenges of our times, there are limitations. By themselves, the SDGs do not provide an analysis of the causes of the problems, the obstacles that need to be overcome and the solutions.

Moreover, a major adverse event, like another global financial or economic crisis, may throw the process of fulfilling the SDGs off-track or perhaps into chaos. Countries facing a fall in exports and government revenue cannot be expected to stay on track with the SDG targets.

The SDG approach must thus be

complemented with all-important analyses of what the structural and systemic issues and challenges of development are and how to overcome the problems.

Reality is complex and qualitative analysis (backed up, of course, with data) is required, and therefore the SDGs should not displace the complex task of analysis with an overly simplistic approach to development.

On the other hand, analysis of a complex problem can be supported by having priority goals and clear targets and indicators.

Thus, the SDG approach should be accompanied by and not replace or downgrade the need for rigorous analysis. A combined approach provides a better chance of getting the world on track to tackling the manifold crises afflicting humanity and the Earth. ❐

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The TPP's threat to multilateralism

Bilateral and plurilateral trade agreements like the Trans-Pacific Partnership are undermining economic multilateralism and, with it, prospects for sustainable global development.

by Jomo Kwame Sundaram

2015 proved challenging for multilateralism, especially in relation to development concerns.

July's third international Financing for Development (FfD) conference in Addis Ababa delivered little real progress. Nevertheless, the September Sustainable Development Goals summit redeemed hopes with an ambitious and universal Agenda 2030.

More recently, the Paris climate change conference in December produced an agreement after the 2009 failure at Copenhagen. However, while most developing countries made commitments in line with climate justice criteria, most OECD economies fell short, typically after failing to meet their commitments made under the earlier Kyoto Protocol. Even if fully realized, the Paris deal alone is not enough to avert climate change disaster as average global temperatures will still rise over 2°C above pre-industrial levels.

The mid-December World Trade Organization (WTO) biennial ministerial meeting in Nairobi was another setback as the US and its allies sought to kill the Doha Round of trade negotiations, thrusting the WTO itself into existential crisis. Ending the Round inconclusively will enable them to renege on commitments made in 2001 to get developing countries back to the negotiating table after the Seattle ministerial disaster.

The US and many other OECD countries have been increasingly unwilling to make any meaningful concessions in multilateral economic negotiations over the last decade.

One big game changer has been recent US-led plurilateral initiatives, following Michael Froman's appointment as US Trade Representative. To make his case to kill the Doha Round, Froman cited the Trans-Pacific Partnership (TPP) Agreement, concluded in October 2015. Meanwhile, the European Union has begun negotiations with the US for a Transatlantic Trade and Investment Partnership (TTIP).

Not surprisingly, most developing countries want the Round to continue, hoping to finally realize the 2001 promises to rectify the previous Uruguay Round outcomes, which have undermined food security and development prospects.

By undermining WTO multilateral trade negotiations, bilateral and plurilateral trade agreements are the very antitheses of what they purport to do, namely advance trade liberalization. In Southeast Asia, the TPP also undermines existing commitments, e.g., to the ASEAN Free Trade Area, and thus the economic bases for regional solidarity and cooperation.

To come into effect, the TPP must first be ratified at the national level. This seems most unlikely to happen soon in the US Congress for varied reasons.

TPP criticisms have been growing among US politicians, not only from all the Democratic presidential contenders but also from some leading Republican aspirants. The TPP has more support from Republicans than Democrats, but the Republican leaders of both houses of Congress have pledged to block it for the time being.

Ironically, a Democratic president has pushed the TPP without strong support from his own party. After touting the TPP as his top foreign policy priority for 2016, it only merited half a minute in President Obama's hour-long final State of the Union address in mid-January.

Real focus not trade

Despite being portrayed as a trade deal, the TPP is not mainly about "free trade". The US and many of its TPP partners are already among the most open economies in the world. The main trade constraints involve non-tariff barriers, such as ballooning US agricultural subsidies, which the TPP does not address.

OECD countries with more competent trade negotiating capacity had delayed agreement at an earlier meeting in Honolulu in mid-2015 before the October deal. The delay was due to squabbling over how to manage trade in particular areas, reflecting influential lobbies.

Thus, in fact, the TPP will actually protect and even advance interests that run contrary to free trade.

The TPP will strengthen monopolistic intellectual property rights (IPRs), well beyond the already onerous provisions of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), especially for big pharmaceutical, media, information technology and other companies, for example, enabling "Big Pharma" to have longer monopolies on patented medicines, keeping cheaper generic drugs off the market, and blocking the development and availability of "similar" new medicines. Meanwhile, growing evidence shows that IPRs hardly promote research but may actually impede or delay innovation.

TPP provisions will also limit competition, raise consumer prices, constrain prudential financial regulation as well as threaten public health and the common good.

Investor-state dispute settlement

The TPP will also strengthen foreign investor rights at the expense of local businesses and the public interest. Its investor-state dispute settlement (ISDS) system obliges governments to compensate foreign investors for the loss of expected profits!

ISDS confers foreign investors with the right to sue national governments for regulatory or policy changes that ostensibly reduce the expected profitability of their investments. It has been and can be invoked even when rules are non-discriminatory or profits come from causing public harm.

ISDS provisions make it hard for governments to fulfil their basic obligations to protect their citizens' health and safety, to safeguard the environment and to ensure economic stability. For example, if a government banned toxic chemicals, it would have to compensate suppliers for lost profits, instead of requiring them to compensate the victims! Thus, the taxpayer will be hit twice – first, to pay for the health and environmental damage caused, and then to compensate the manufacturer for 'lost profits' due to the ban.

This will deter governments from doing the right thing, putting the public at risk.

Foreign corporations insist that ISDS is necessary where the rule of law and credible courts are lacking, but in fact, the US is seeking the same in the TTIP with the EU, impugning the integrity of European legal and judicial systems.

TPP politically driven

It is no secret that the main US motive for the TPP has been to undermine China: in President Obama's words, "With TPP, China does not set the rules in that region, we do."

The broad support for the China-mooted Asian Infrastructure Investment Bank, even from traditional US allies, was a major embarrassment which the White House was desperate to overcome.

In Southeast Asia, such a realignment undermines the ASEAN commitment to a "zone of peace, freedom and neutrality".

Considering the paltry economic benefits as well as great risks involved, joining developing-country governments are mainly doing so for political reasons while praying that they themselves will not pay high political costs for its consequences.

Concluding the TPP will encourage other plurilateral and bilateral agreements. While such arrangements undermine trade multilateralism, WTO officials and others continue to maintain the pretence of complementarity and coherence.

The threat to abandon the Doha Round will be used by the North to extract more concessions from the South, who still insist that the Round is necessary to realize at least some of their developmental and food security aspirations.

The fading prospects for economic multilateralism – on finance at Addis and on trade in Nairobi – as well as various other recent developments – including the many, typically self-serving political realignments in the "war on terror" – threaten to irreversibly transform contemporary international relations, at the expense of sustainable development and the developing countries. *(IPS)* ❐

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vene the Room W meetings on a daily basis as he did for the Bali meeting. He occasionally held green room meetings, but not sustained Room W meetings involving the entire membership.

Indeed, the conspicuous absence of the Director-General during the Room W meetings in the third and fourth weeks of November last year caused anxiety for people involved with the Nairobi meeting. An authoritative source involved with the Nairobi meeting told *SUNS* on 22 November: "In the run-up to the Bali ministerial meeting in December 2013, Azevedo attended each Room W meeting and also simultaneously held meetings with members in different configurations. However, for Nairobi he has almost abdicated his role despite being the chair for the Trade Negotiations Committee."

"Clearly, there is a danger that the draft ministerial document covering the major issues, including the small package of deliverables and the post-Nairobi work programme, will not be ready by the time ministers start arriving in Nairobi," the source maintained.

Even when it became clear that the chances of securing a substantive agreement on export competition were close to zero because of over 100 square brackets and lack of convergence in other areas, the Director-General, in his capacity as the TNC chair, goaded the negotiating group chairs to bring all the issues to Nairobi.

However, in his formal address to the General Council on 7 December, he had something different to say: "We currently, today, have no deliverables for Nairobi – either on the potential outcomes that we identified, or on the Ministerial Declaration. Beyond the written reports I listed earlier, the General Council has nothing to transmit for the consideration of our ministers in Nairobi."

"Nevertheless, we do still have the chance of delivering some significant elements in the extremely limited time available," Azevedo told the Council meeting.

How was "delivering some significant elements in the extremely limited time available" possible, asked another trade envoy, unless he had a clear idea of the process that would be adopted at Nairobi to ram through an agreement without the involvement of the members at large?

Moreover, he knew that the best format to push the agreement was the G-5 (the US, the EU, China, India and Brazil) and not the normal green room that would involve at least more than 20 countries, the envoy suggested.

Mohamed, when she was the General Council chair in 2005 at the Hong Kong Ministerial Conference, knew the green room meeting involved over 20 countries. Surely it would not be her idea that the Nairobi green room should be limited to five, the trade envoy said.

Several developing-country trade envoys are also angry with Azevedo for his pronouncements that "there is no consensus about how to address the DDA."

As the chair of the TNC, he has no business to declare that "there is no consensus to address the DDA but there is a strong commitment to advancing negotiations on the remaining Doha issues." He seems hell bent on denying an opportunity for the developing countries to pursue the DDA, said an African trade envoy.

In short, despite his best efforts to shift the blame onto the WTO members for the Nairobi outcome, Azevedo must own the responsibility for assisting and navigating the chair of the conference in finalizing the NMD which clearly doesn't represent the interests of an overwhelming majority of members.

It is a different story that the NMD went according to the script the US provided to the Director-General, said a South American trade envoy. *(SUNS8189)* ❐

Tax treaties starve poor countries of funds

A raft of bilateral tax treaties now in force have curtailed developing countries' capacity to tax foreign investors, facilitating tax avoidance by multinational corporations and depriving cash-strapped governments of much-needed revenue. The following is extracted from a new report by international NGO ActionAid which shines a light on this little-known but highly pressing problem.

The what and why of tax treaties

A tax treaty is an agreement between two countries to divide up and limit each country's tax rights. Among other things, tax treaties regulate when a country can or can't tax foreign-owned companies. Sometimes a country's right to apply a specific tax is cancelled altogether. Once signed, tax treaties apply until they are terminated or renegotiated. Even though some treaties are very old, they are still as powerful as they were when they were first agreed.

There are currently more than 3,000 tax treaties in force. About half of the world's current tax treaties are between a developed country and a developing country. The major boom in negotiations over such treaties started about 20 years ago, and continues to this day. Even so, development issues are not mentioned in treaty texts and are not an express consideration during treaty negotiations.

Tax treaties decide how much, and even if, countries can tax multinational companies and other cross-border activity. They provide certainty to international business by indicating which taxes will be limited when making money overseas. This certainty is often provided through restrictions on the rights of lower-income countries to tax different types of income.

In the overwhelming majority of cases, these tax treaties override any national law. If a tax treaty rate is lower than the rate set in national law, companies that are able to use the tax treaty route will very often pay less tax than similar local companies. As a result, vital tax revenue is lost. When the world's poorest countries are affected, the consequences are serious.

Tax treaties can also prevent double taxation – paying tax in two jurisdictions on the same income or transaction. Paying tax twice on the same income or transaction is not fair. If there is a risk of double taxation, however, this problem is mostly already dealt with through national laws in the wealthier country (where the corporation is usually based). In many cases, wealthy countries do not tax income earned abroad. If tax is payable under the laws of both countries, national laws in wealthy countries ensure that the tax due to the wealthier country is reduced to take account of tax already paid in the lower-income country.

Although transparency varies between countries, there is commonly no parliamentary scrutiny and a lack of meaningful opportunities for public input into treaty negotiations or contents.

What's the problem?

Tax treaties between rich and poor countries risk damaging tax revenue in poor countries. The best-known problem with tax treaties is that they can open up opportunities for treaty shopping – the use of tax treaty networks to reduce tax payments. In fact, treaty shopping by multinationals is just part of the picture. Even where corporations are not doing this intentionally, treaties still reduce overall corporate taxation collected globally.

Tax treaties reduce the revenue collected by poor countries, create an unfair distribution of tax rights, and in some instances facilitate double non-taxation.

Lower-income countries collect less tax

As Luzia Januario of the Angola General Tax Administration put it when asked why potential corporate investors in Angola would support tax treaties: " In addition to ensuring predictability, businesses like tax treaties because of the opportunity of having their tax burden reduced."

Tax treaties reduce the overall amount of corporation tax payable in lower-income countries. Tax treaties do not create new tax rights; they only limit the tax rights of countries which sign the treaty. There are multiple opportunities in all treaty negotiations for different clauses to limit those tax rights to a greater or lesser extent. Companies may take advantage of the taxing restraints imposed by tax treaties through creating a corporate structure in which international investments are owned by corporations based in countries with favourable treaties.

By setting up a conduit company in the Netherlands, for example, an American corporation investing in specific African countries can get tax breaks thanks to tax treaties that the Netherlands has signed with those African countries. This corporate structuring can be legal but is always opportunistic.

About one-third of the world's foreign-owned firms are owned via tax havens or special purpose entities – a low-transparency corporate structure. One reason for this is to obtain tax treaty benefits.

In 2004, Uganda signed a tax treaty with the Netherlands that completely took away Uganda's right to collect tax when a corporation pays out certain earnings (i.e., dividends that meet certain criteria) to owners (i.e., shareholders) resident in the Netherlands. A decade later, as much as half of Uganda's foreign direct investment is owned from the Netherlands, at least on paper. As a result, the treaty effectively rewards Dutch-owned corporations with a big non-discretionary tax break that they might have earned only by setting up a conduit company in the Netherlands. The Netherlands has offered to renegotiate treaties with developing countries to include anti-abuse clauses. If incorporated within the Uganda-Netherlands treaty, this may reduce opportunistic use of tax treaties for tax minimization purposes. For now, the result of the current treaty is a reduction in Uganda's tax revenue, money that is urgently needed to provide essential public services for Uganda's people.

The total cost of tax treaties to developing countries has not been established. The Dutch Centre for Research on Multinational Corporations (SOMO) has estimated that developing countries lost €770 million in 2011 as a result of treaties with the Netherlands, and the International Monetary Fund (IMF) estimates that US tax treaties cost non-OECD countries around $1.6 billion in 2010. These two estimates only focus on two types of losses: lost dividend taxes and lost taxes on interest payments.

Tax treaties also cause many other losses, such as lost profit tax contributions and lost tax on capital gains, royalty and services fees, but the size of these losses is harder to estimate. A 2014 study estimated that worldwide, average tax rates that global businesses face when repatriating income are reduced by 9% because of tax treaties, and that another 6% drop is possible if these businesses engage in treaty shopping, i.e., choosing indirect investment routes to take advantage of favourable tax treaties. ActionAid hopes that the availability of the recently released ActionAid tax treaties dataset (see www.actionaid.org/tax-power) will encourage more research in this area.

Developed and developing countries rarely publish evidence-based analysis of the impact of tax treaties. This means that countries enter into treaties without being able to scrutinize their potential impact on either revenue or economic development. According to Bwalya Mutumba, a tax justice campaigner with ActionAid Zambia: "The public and the community at large in most cases only discover that a treaty is in place after it has already been agreed and signed. The government has not taken deliberate efforts to raise awareness of the public on tax treaties."

While referring to the need to prevent double taxation, countries which sign tax treaties (whether they are rich or poor) often do so to reduce the tax paid by international business as a means of competing with other countries. Tax caps in tax treaties have been promoted internationally as a way to attract more investment. The relationship between treaties and investment, however, has repeatedly been questioned, and the evidence suggests that any benefits that tax treaties might bring cannot be assumed. What is certain is that handing out long-term tax cuts to foreign-owned firms comes at a cost. ActionAid has uncovered various instances of multinationals relying on tax treaties to lower their tax burden. IMF experts have recently raised a warning flag and urged developing countries to treat tax treaties with considerable caution.

Imbalance in taxing rights

In addition to supressing overall tax paid by multinationals, the balance of taxing rights created by tax treaties is not fair.

In practice, lower-income countries face a heavier burden than wealthier countries. Tax treaties carve up tax rights between two countries that could claim the right to tax a multinational – the country where the (foreign-based) corporation makes money (called "source-based taxation") and the country where the internationally active corporation is based (called "residence-based taxation"). Foreign companies from wealthier countries have a rapidly increasing business presence in lower-income countries. Those from lower-income countries generally own negligible amounts in wealthier countries. The right to tax the foreign income of its resident corporations is next to useless to the poorest countries. Such countries therefore rely overwhelmingly on the right to tax foreign-owned firms making money within their borders. This (source-based) right to tax foreign corporations making money locally is severely restricted in most tax treaties.

Under current treaty norms, wealthier countries face some restrictions on taxation of the earnings of their residents made overseas, but in recent decades wealthier countries have increasingly chosen not to tax their businesses operating overseas. For this reason, the taxing restrictions imposed on wealthier countries do not have as much impact. When lower-income countries sign tax treaties with wealthier countries, it is the lower-income countries that lose more.

If the (wealthier) country where the corporation is based does choose to tax its businesses operating overseas, and the treaty allows the lower-income country to keep its right to levy tax on the foreign multinational, any tax collected by the lower-income country will generally be recognized by the wealthier country, leading to a reduction in tax payable in the wealthier country. For example, a British corporation operating in a lower-income country can claim royalty tax relief from the British government on royalty withholding tax paid overseas. In other words, allowing lower-income countries to keep these rights means that the poorer country (rather than the wealthier country) collects the revenue, with no impact on the multinational corporation's bottomline.

In contrast, restrictions on the lower-income country's taxing rights mean that the wealthier country, and not the lower-income country, collects the money. The heavy restrictions that most treaties impose on the taxing rights of lower-income countries effectively result in a transfer of revenue from the lower-income country to the wealthier one.

Both the European Parliament and the OECD have recently acknowledged the unequal distribution of tax rights created by tax treaties. On 2 July 2015, at a conference hosted by the Dutch Ministry of Foreign Affairs, Mr Saint-Amans, Director of the OECD's Centre for Tax Policy and Administration, said in relation to the balance of taxing rights: "Source/residence [-based taxation] is an extremely important debate that should take place and developing countries should probably have more source taxation, I have no doubt." Joining the chorus, the European Commission has said that, given the importance of source-based taxation to low-income countries, European member states should reconsider aspects of their tax treaties that restrict those taxing rights in order to ensure fair treatment of developing countries.

Foreign companies have doubled their foreign direct investment (foreign ownership of firms) in the world's poorest countries in just two decades. This means that revenue losses to the poorest countries – which are created by unequal taxing rights in tax treaties – are growing over time. While the impact of unfair treaties is progressively increasing, the need for revenue to fund the promotion of human rights and vital public services remains urgent.

The OECD and UN model tax treaties

The OECD model tax treaty is the global standard setter when it comes to international treaty norms. When relied on in treaties between lower-income countries and wealthier countries, it squeezes the tax rights of lower-income countries.

The United Nations has made a push for a fairer sharing of taxing rights through the UN model tax treaty, but ActionAid's tax treaty dataset shows that many of the rules that the UN has proposed are still commonly not used in treaties between wealthy countries and lower-income countries.

To rebalance the unequal distribution of tax rights, ActionAid is recommending that treaty negotiators adopt the UN model terms (see box) as the minimum standard, ensuring that developing countries are given a fairer slice of the taxation pie in future.

Double non-taxation

There are various examples where companies have been able to rely on tax treaties to ensure that they don't pay tax even once. Double non-taxation happens when a corporation manages to avoid paying tax in both the country where the foreign-owned firm operates, and also in the country that the firm is owned from.

Europe's Competition Commissioner Margrethe Vestager recently noted in relation to McDonald's international operations: "The purpose of double taxation treaties between countries is to avoid double taxation – not to justify double non-taxation."

Yet European tax treaties repeatedly cause double non-taxation. Under Uganda's deal with the Netherlands, Uganda is blocked from taxing money that investors bring home from Uganda but this money is routinely not taxed in the Netherlands either, so these investors face double non-taxation on their return. Similarly, the UK's treaty with Malawi bans Malawi from taxing investor income (i.e., dividends) being sent to the UK, but the UK regularly doesn't choose to use its right to tax that income either.

Not paying tax twice on the same income is a reasonable ask. But tax treaties that contribute to tax not being paid anywhere are unsustainable, especially when income is made in some of the world's poorest countries.

Treaties are not compulsory

Governments often face considerable pressure to negotiate tax treaties. "Frequently," says former Australian tax treaty negotiator Arianne Pickering, "developing countries commence negotiations for a tax treaty primarily because they feel pressured to do so by another country. The pressure may come in the form of diplomatic or political representations, from the tax administration or revenue officials from the other country or directly from taxpayers resident in that country."

The "taxpayers" referred to above will generally be multinational corporations. Even so, lower-income countries do not have to sign unfavourable international tax treaties that take away their taxation powers. A number of countries continue to trade and invest with other countries without a tax treaty in place. Even without a tax treaty between them, Brazil and the US enjoy a significant trade and investment relationship. In 2014, there was $112 billion worth of US investment in Brazil, making the US the second biggest investor in Brazil. Brazil also does not have a tax treaty in place with Germany, Switzerland or the UK, each of which still has billions of dollars invested in Brazil.

The OECD has recently recognized tax treaties with low- or no-tax jurisdictions as a concern, proposing guidance to assist countries to justify their decisions not to enter into treaties with these countries. Where disadvantageous treaties are already in place, lower-income-country governments have the power to close the tax loopholes and stop the inequity that treaties with aggressive tax breaks create. Tax treaties are voluntary; they can be renegotiated and cancelled. Some countries are reevaluating the strength of their negotiating hand.

Speaking in 2014, Moses Kaggwa, commissioner for tax policy at the Ugandan Ministry of Finance, Planning and Economic Development, said: "We have stopped negotiations of any new agreement until we have a policy in place that will not only offer guidelines but give clear priorities of what our interests and objectives are."

Nigeria, Rwanda, South Africa, Zambia, Malawi and Mongolia have all recently either cancelled or renegotiated tax treaties. Mongolia, a country with abundant natural resources, is one of the countries in ActionAid's tax treaty analysis that is tied by the highest number of very restrictive treaties. Commenting on Mongolia's recent treaty cancellations, Mongolia's Vice Finance Minister Surenjav Purev stated in 2013: "We started to question why these countries would have greater advantages in Mongolia than us."

The ActionAid tax treaties database allows an easy comparison of how Rwanda's renegotiated treaty with Mauritius dramatically improved its taxation position with respect to Mauritian companies operating in Rwanda (see table).

A comprehensive global review of tax deals between lower-income countries and wealthier countries is badly overdue. This should highlight particularly the role that treaties with tax havens play. ❐

The above is extracted from the ActionAid report "Mistreated: The tax treaties that are depriving the world's poorest countries of vital revenue". The full report with references is available at www.actionaid.org.

Rwanda's successful renegotiation with the tax haven Mauritius

Rules in the Rwanda-Mauritius tax treaty	2001 treaty	2013 treaty
How long is a construction site free of profit taxes?	12 months	6 months
How long does Rwanda have to wait to tax business services?	12 months	6 months
Can Rwanda tax dividends that are sent to Mauritius?	No	Yes, at 10%
Can Rwanda tax international interest payments?	No	Yes, at 10%
Can Rwanda tax royalty payments?	No	Yes, at 10%