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Foreign Investment, Investment Treaties and Development: Myths & Realities

The growing debate on investment agreements has underscored the importance of understanding the nature and effects of foreign investment. The issues of FDI, investment treaties and development are examined in this South Bulletin.

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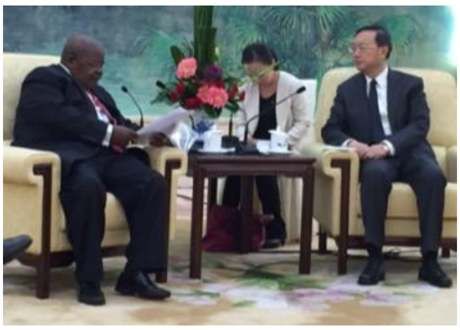

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FDI, Investment Agreements & Development: Myths & Realities

This article by the South Centre's Chief Economist briefly explains the myths and realities of foreign direct investment (FDI). It then analyses how a country's investment policy is being constrained by rules in the WTO and in the bilateral investment treaties (BITs).

The Daily Bell

By Yılmaz Akyüz

Foreign Direct Investment and Development

Foreign direct investment (FDI) is perhaps one of the most ambiguous and least understood concepts in international economics. Common debate on FDI is confounded by several myths regarding its nature and impact on capital accumulation, technological progress, industrialization and growth in emerging and developing economies (EDEs). It is often portrayed as a long-term, stable, cross-border flow of capital that adds to productive capacity, helps meet balance-of-payments shortfalls, transfers technology and management skills, and links domestic firms with wider global markets.

However, none of these are intrinsic qualities of FDI. First, FDI is more about transfer and exercise of control than movement of capital. Contrary to widespread perception, it does not always involve flows of financial capital (movements of funds through foreign exchange markets) or real capital (imports of machinery and equipment for the installation of productive capacity). A large proportion of FDI does not entail cross-border capital flows but is financed from incomes generated on the existing stock of investment in host countries. Equity and loans from parent companies account for a relatively small part of recorded FDI and an even smaller part of total foreign assets controlled by transnational corporations (TNCs). In 2008, retained earnings constituted 60% of outward FDI stock for non-bank affiliates of US non-bank corporations. In the same year, total assets controlled by US affiliates were 8.6 times the net external finance from US sources. Globally, in 2011, retained earnings accounted for 30% of total FDI flows. In the same year, half of the earnings on FDI stock in EDEs were retained, financing about 40% of total inward FDI in these economies. Thus, the notion that FDI is functionally indistinguishable from fresh capital inflows and represents a flow of foreign resources crossing the borders of two countries has no validity.

Second, an important part of FDI involves transfer of ownership of existing firms. Only the so-called greenfield investment makes a direct contribution to productive capacity and involves cross-border movement of capital goods. But it is not easy to identify from reported statistics what proportion of FDI consists of such investment. In particular, statistics provide almost no information on how retained earnings and loans from parent companies, two of the three sources of finance for FDI, are used. Furthermore, even when FDI is in bricks and mortar, it may not add to aggregate investment because it may crowd out domestic investors, as shown by most studies on the effects of FDI on domestic investment. Evidence also shows widespread association between rising FDI and falling gross fixed capital formation (GFCF) in the developing world. All these suggest that the economic conditions that attract foreign enterprises may not always be conducive to faster capital formation and that the two sets of investment decisions may be driven by different considerations.

Third, what is commonly known and reported as FDI contains speculative components and creates destabilizing impulses which need to be controlled and managed as any other form of international capital flows. Many of the changes in financial markets that have facilitated international capital movements have not only increased the mobility of FDI, but also made it difficult to assess its stability. FDI inflows to EDEs are subject to boom-bust cycles and closely correlated with non-FDI (portfolio) flows as they are also influenced by global liquidity conditions and risk appetite. Surges in FDI inflows could generate unsustainable currency appreciations in much the same way as surges in other forms of capital inflows. FDI in property is often motivated by speculative capital gains and subject to severe bubble-and-bust cycles. More importantly, financial transactions can accomplish a reversal of FDI. What may get recorded as portfolio outflows may well be outflows of FDI in disguise: a foreign affiliate can borrow in the host country in order to export capital. Furthermore, foreign banks established in EDEs can be a major source of financial instability. They tend to contribute to build-up of fragility in host countries and transmit shocks from home countries, as seen during the eurozone crisis.

Fourth, the immediate contribution of FDI to the balance of payments may be positive, since it is only partly absorbed by imports of capital goods required to install production capacity. But its longer-term impact is often negative because of profit remittances and the high import content of production and exports by foreign firms. Many countries with a long history of involvement with TNCs face negative net transfers on FDI; that is, their new FDI inflows fall short of profit remittances on the stock of inward FDI. Again, in a large majority of EDEs, export earnings by foreign companies do not cover their import bills and profit remittances. This is true even in countries highly successful in attracting export-oriented FDI such as China.

Finally, superior technology and management skills of TNCs create an opportunity for the diffusion of technology and ideas. However, spillovers are not automatic but need to be extracted through policy guidance and interventions. Foreign firms invest in EDEs in order to exploit their existing competitive advantages such as rich natural resources and cheap labour and infrastructure services rather than to move them up on the technological ladder. TNCs resist passing their technological and managerial know-how to host countries since these give them a competitive edge. The high productivity and competition they bring could help improve the efficiency of local firms, but these can also block entry of these firms into high-value product lines or drive them out of business. They can prevent rather than promote infant-industry learning unless local firms are supported and protected by deliberate policies. They may help EDEs integrate into global production networks, but participation in such networks also carries the risk of getting locked into low-value-added activities.

To sum up, contrary to what is maintained by the dominant corporate ideology, FDI is not a recipe for rapid and sustained growth and industrialization in EDEs. However, this does not mean that FDI does not offer any benefits to EDEs. Rather, policy in host countries plays a key role in determining the impact of FDI on industrialization and development. A laissez-faire approach could not yield much benefit. It may in fact do more harm than good. Successful examples are found not necessarily among EDEs that attracted more FDI, but among those which used it in the context of national industrial policy designed to shape the evolution of specific industries through interventions. In this respect the experience of successful late industrializers, notably in East Asia, yields a number of policy lessons:

- Encourage greenfield investment but be selective in terms of sectors and technology;
- Encourage joint ventures rather than wholly foreign-owned affiliates in order to accelerate learning and limit foreign control;
- Allow mergers and acquisitions (M&A) only if there are significant benefits in terms of managerial skills and follow-up investment;
- Do not use FDI as a way of meeting balance-of-payments shortfalls. The long-term impact of FDI on external payments is often negative even in EDEs attracting export-oriented firms;
- Debt financing may be preferable to equity financing when there are no significant positive spillovers from FDI;
- FDI contains speculative components and generates destabilizing impulses which need to be controlled and managed as any other form of international capital flows;
- No incentives should be provided to FDI without securing reciprocity in benefits for industrialization and development;
- Performance requirements may be needed to secure positive spillovers including employment and training of local labour, local procurement, domestic content, export targets and links with local firms;
- Domestic firms should be nurtured to compete with TNCs;
- Linking to international production networks organized by TNCs is not a recipe for industrialization. It could trap the economy in the lower ends of the value-chain.

Multilateral and Bilateral Constraints on Investment Policy

The experience strongly suggests that policy interventions would be necessary to contain adverse effects of FDI on stability, balance of payments, capital accumulation and industrial development and to activate its potential benefits. Still, the past two decades have seen a rapid liberalization of FDI regimes and erosion of policy space in EDEs vis-à-vis TNCs. This is partly due to the commitments undertaken in the World Trade Organization (WTO) as part of the Agreement on Trade-Related Investment Measures (TRIMs). However, many of the more serious constraints are in practice self-inflicted through unilateral liberalization or bilateral investment treaties (BITs) signed with more advanced economies (AEs) – a process that appears to be going ahead with full force, with the universe of investment agreements reaching 3,262 at the end of 2014 (UNCTAD IPM, 2015). Although there is considerable diversity in the obligations contained in various BITs, the constraints they entail are becoming increasingly tighter than those imposed by the WTO regime.

There are two main sources of WTO disciplines on investment-related policies: the Agreement on TRIMs and specific commitments made in the context of the General Agreement on Trade in Services (GATS) negotiations for commercial presence of foreign enterprises (the so-called mode 3) in the services sectors. In addition to these, a number of other agreements provide disciplines, directly or indirectly, on investment-related policies, such as the prohibition of investment subsidies linked to export performance in the Agreement on Subsidies and Countervailing Measures.

The TRIMs Agreement does not refer to foreign investment as such but to investment generally. It effectively

In order to discuss the issue of investment treaties, the South Centre and the International Institute for Sustainable Development (IISD) hold annually a meeting of developing country investment negotiators. At the last meeting held in Rio de Janeiro, Brazil in November 2015, participants examined the challenges and uncertainties that international investment law faces today, and assessed the implications for emerging and developing economies.

prohibits attaching conditions to investment in violation of the national treatment principle or quantitative restrictions in the context of investment measures. The most important provisions relate to prohibition of domestic content requirements whereby an investor is compelled or provided an incentive to use domestically produced rather than imported products, and of foreign trade or foreign exchange balancing requirements linking imports by an investor to its export earnings or to foreign exchange inflows attributable to investment. By contrast, in TRIMs or the WTO more broadly, there are no disciplines restricting beggar-my-neighbour investment incentives by recipient countries that are just as trade-distorting. Such incentives provide an effective subsidy to foreign investors and can influence investment and trade flows as much as domestic content requirements or export subsidies, particularly since a growing proportion of world trade is taking place among firms linked through international production networks controlled by TNCs (Kumar, 2002).

The obligations under TRIMs may not affect very much the countries rich in natural resources, notably minerals, in their earlier stages of development. FDI in mineral resources is generally capital-intensive and countries at such stages depend almost fully on foreign technology and know-how in extractive industries and lack capital good industries. Linkages with domestic industries are usually weak and output is almost fully exported. Domestic content of production by foreign companies is mainly limited to labour and some intermediate inputs. The main challenge is how to promote local processing to increase domestic value-added. However, over time, restrictions over domestic content requirements can reinforce the "resource curse syndrome" as the country wants to nourish resource-based industries, to transfer technology to local firms and establish backward and forward linkages with them.

Domestic content requirements are particularly important for investment in manufacturing in countries at intermediate stages of industrialization, notably in automotive and electronics industries – the two key sectors where they were successfully applied in East Asia. Most industries of EDEs linked to international production networks have high import content in technology-intensive parts and components while their domestic value-added mainly consists of wages paid to local workers. Raising domestic content would not only improve the balance of payments but also constitute an important step in industrial upgrading. Restrictions over domestic content requirements would thus limit transfer of technology and import-substitution in industries linked to international production networks.

However, TRIMs provisions leave certain flexibilities that could allow EDEs to make room to move in order to increase benefits from FDI. First, the domestic content of industrial production by TNCs is not independent of the tariff regime. Other things being equal, low tariffs and high duty drawbacks encourage high import content. Thus, it should be possible to use tariffs as a substitute for quantity restrictions over imports by TNCs when they are unbound in the WTO or bound at sufficiently high levels. Similarly, in resource-rich countries, export taxes can be used to discourage exports of unprocessed minerals and agricultural commodities as long as they continue to remain unrestricted by the WTO regime.

Second, as long as there are no commitments for unrestricted market access to foreign investors, the constraints imposed by the TRIMs Agreement could be overcome by tying the entry of foreign investors to the production of particular goods. For instance, a foreign enterprise may be issued a licence for an automotive assembly plant only if it simultaneously establishes a plant to produce engines, gearboxes or electronic components used in cars. Similarly, licences for a computer assembly plant can be tied to the establishment of a plant for producing integrated circuits and chips. Such measures would raise domestic value-added and net export earnings of TNCs and would not contravene the provisions of the TRIMs Agreement.

Third, export performance requirements can be used without linking them to imports by investors as part of entry conditions for foreign enterprises. This would not contravene the TRIMs Agreement since it would not be restricting trade (Bora, 2002, p. 177). Finally, the TRIMs regime does not restrict governments in demanding joint ventures with local enterprises or local ownership of a certain proportion of the equity of foreign enterprises. In reality, many of these conditions appear to be used widely by industrial countries in one form or another (Weiss, 2005).

Since the TRIMs Agreement applies only to trade in goods, local procurement of services such as banking, insurance and transport can also be set as part of entry conditions of foreign firms in order to help develop national capabilities in services sectors. This would be possible as long as EDEs continue to have discretion in regulating access of TNCs to services sectors. The existing GATS regime provides considerable flexibility in this respect, including for performance requirements. However, the kind of changes in the modalities of GATS sought by AEs, including the prohibition of pre-establishment conditions and the application of national treatment, could shrink policy space in EDEs a lot more than the TRIMs Agreement.

The constraints exerted by most BITs signed in recent years on policy options in host countries go well beyond the TRIMs Agreement because of wide-ranging provisions in favour of investors. These include broad definitions of investment and investor, free transfer of capital, rights to establishment, the national treatment and the most-favoured-nation (MFN) clauses, fair and equitable treatment, protection from direct and indirect expropriation and prohibition of performance requirements (Bernasconi-Osterwalder et al., 2012). Furthermore, the reach of BITs has extended rapidly thanks to the use of the so-called Special Purpose Entities (SPEs) which allow TNCs from countries without a BIT with the destination country to make the investment through an affiliate incorporated in a third-party state with a BIT with the destination country. Many BITs also provide unrestricted arbitration, freeing foreign investors from the obligation of having to exhaust local legal remedies in disputes with host countries before seeking international arbitration. This, together with lack of clarity in treaty provisions, has resulted in the emergence of arbitral tribunals as lawmakers in international investment. These tend to provide expansive interpretations of investment provisions, thereby constraining policy further and inflicting costs on host countries (Bernasconi-Osterwalder et al., 2012; Eberhardt and Olivet, 2012; UNCTAD TDR, 2014).

Only a few EDEs signing such BITs with AEs have significant outward FDI. Therefore, in the large majority of cases there is no reciprocity in deriving benefits from the rights and protection granted to foreign investors. Rather, most EDEs sign them on expectations that they would attract more FDI by providing foreign investors guarantees and protection, thereby accelerating growth and development. However, there is no clear evidence that BITs have a strong impact on the direction of FDI inflows. More importantly, these agreements are generally incompatible with the principal objectives of signing them because they constrain the ability of host countries to pursue policies needed to derive their full potential benefits.

While in TRIMs investment is a production-based concept, BITs generally incorporate an asset-based concept of investment whether the assets owned by the investor are used for the production of goods and services, or simply held with the prospect of income and/or capital gain. This is largely because BITs are fashioned by corporate perspectives even though they are signed among governments. Typically, agreements are prepared by the home countries of TNCs and offered to EDEs for signature. The coverage of BITs includes a broad range of tangible and intangible assets such as fixed-income claims, portfolio equities, financial derivatives, intellectual property rights and business concessions as well as FDI as officially defined by the Organisation for Economic Co-operation and Development (OECD) and the International Monetary Fund (IMF). This implies that all kinds of assets owned by foreigners could claim the same protection and guarantees independent of their nature and contribution to stability and growth in host countries.

It also opens the door to mission creep. Investment agreements may be granted jurisdiction by tribunals over a variety of areas that have nothing to do with FDI proper, further circumscribing the policy options of host countries. Indeed, the expansive scope of investment protection in the North American Free Trade Agreement (NAFTA) has already given rise to claims that patents are a form of investment and hence should be protected as any other capital asset, thereby threatening the flexibilities left in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and access to medicines (Correa, 2013). Similarly, there have been claims by Argentinian bond holders that such holdings should be protected as any other investment under the Italy-Argentina BIT, thereby intervening with the restructuring of sovereign debt (Gallagher, 2012).

The combination of expansive interpretations of investment and "free transfer of capital" provisions of BITs seriously exposes host EDEs to financial instability by precluding controls over destabilizing capital flows. This is also recognized by the IMF. In its Institutional View on the Liberalization and Management of Capital Flows, the IMF (2012) notes that "numerous bilateral and regional trade agreements and investment treaties … include provisions that give rise to obligations on capital flows" (para. 8) and "do not take into account macroeconomic and financial stability" (para. 65) and "do not allow for the introduction of restrictions on capital outflows in the event of a balance of payments crisis and also effectively limit the ability of signatories to impose controls on inflows" (Note 1, Annex III). The Fund points out that these provisions may conflict with its recommendation on the use of capital controls and asks for its Institutional View to be taken into account in the drafting of such agreements.

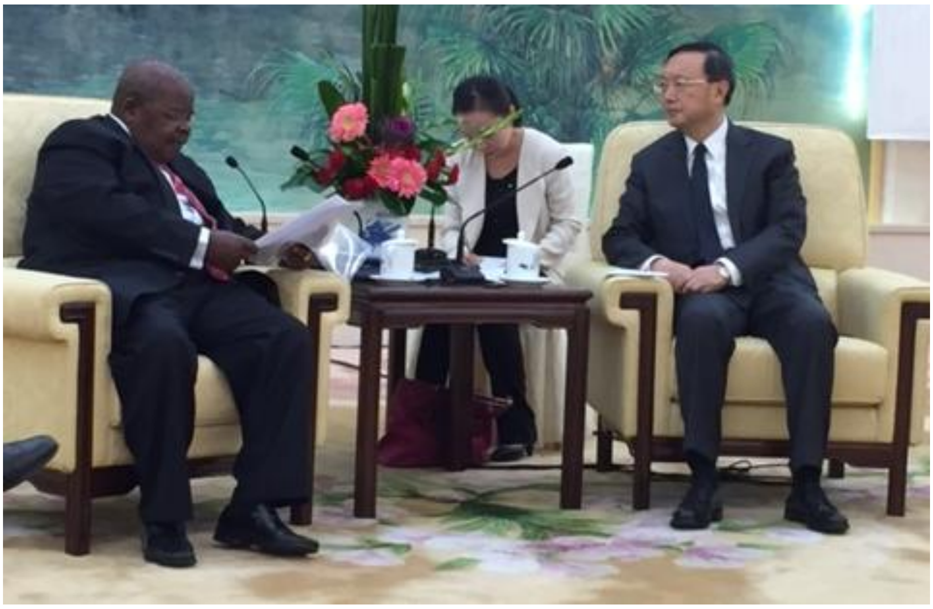
Although the IMF's Institutional View focuses mainly on regulating capital inflows to prevent build-up of financial fragility, prohibitions in BITs regarding restrictions over outflows can also become a major handicap in crisis management. It is now widely agreed that countries facing an external financial crisis due to an interruption of their access to international capital markets, a sudden stop of capital inflows and rapid depletion of reserves could need temporary debt standstills and exchange controls in order to prevent a financial meltdown (Akyüz, 2014). However, such measures could be illegal under "free transfer of capital" provisions of BITs.

Where rights of establishment are granted, the flexibilities in the TRIMs Agreement regarding entry requirements noted above would simply disappear. The national treatment clause in BITs requires host countries to treat foreign investors no less favourably than their own national investors and hence prevents them from protecting and supporting infant industries against mature TNCs and nourishing domestic firms to compete with foreign affiliates. It brings greater restrictions than national treatment in

(Continued on page 13)

Productive South Centre Board Meeting, held in Beijing

The South Centre held its 35th Board meeting in Beijing. Below is a brief description of the meeting as well as some highlights of events linked to the Board meeting.



Chinese State Councillor Mr. Yang Jiechi (right) meeting with the South Centre Chairperson Mr. Benjamin Mkapa (left) at the Great Hall of the People in Beijing.

By Yuefen Li

On 10-11 November 2015, the South Centre Board held its 35th meeting in Beijing, China, at the invitation of the Government of the People's Republic of China. The meeting itself was hosted by the Chinese People's Institute of Foreign Affairs (CPIFA), an institute that was set up by Premier Zhou Enlai in 1949 to foster and promote better people-to-people dialogue and understanding between China and the rest of the world.

The Board at its 35th meeting discussed and made decisions on the activities and financing of the South Centre, and looked at the medium- and long-term prospects and institutional and global contexts for strengthening the work of the South Centre in promoting the interests of the developing countries in the global arena.

The highlight of the Board's visit was a meeting with Chinese State Councillor Mr. Yang Jiechi, at the Great Hall of the People in Beijing on 10 November 2015.

The South Centre's Chairman, Mr. Benjamin Mkapa, formerly the President of the United Republic of Tanzania, thanked State Councillor Yang for the warm welcome and the cooperation of China with the Centre.

Both State Councillor Yang and South Centre Board Chairman Benjamin Mkapa recalled the meeting between President Xi Jinping of China and Mr. Mkapa in his capacity as Chairman of the South Centre when President Xi visited Tanzania in March 2013. Mr. Yang said that the meeting "gave a strong impetus to strengthening the cooperation between the South Centre and China."

During the meeting, Mr. Yang stated that "the South Centre, as an important think-tank of developing countries, plays a significant role in boosting South-South cooperation and South-North cooperation. China values the great support the South Centre provides for the participation of developing nations in international development cooperation, and is ready to advance cooperation with the South Centre to maintain close communication and coordination on major issues concerning international development such as the 2030 Agenda for Sustainable Development and help developing nations realize common development and prosperity."

South Centre Chairman Mr. Mkapa mentioned how impressed he was with the new Chinese initiatives to promote South-South cooperation and said: "The South Centre is very happy with this because we were set up precisely to promote South-South cooperation. The South Centre is now the only international inter-governmental think tank and research centre set up

Group photo of the 35th Board Meeting of the South Centre.

by the leaders to serve all the developing countries."

Mr. Mkapa added that "the South Centre is ready to constantly deepen South-South cooperation with China, contributing to the realization of the 2030 Agenda for Sustainable Development."

The 35th Board Meeting of the South Centre in session.

Another highlight was the *Brainstorming Meeting on South-South Cooperation and China* co-organized by the South Centre with the Chinese People's Institute of Foreign Affairs and the Institute of World Economics and Politics/Chinese Academy of Social Sciences on 12 November 2015. Senior Chinese experts elaborated the new Chinese initiatives on South-South cooperation and in creating new regional and international institutions and their potential impact in assisting developing countries in implementing the post-2015 development agenda.

South Centre Chairman Mr. Mkapa said that with its large and growing economy, China has a crucial role in the present and future development of the developing countries. He also praised the new Chinese South-South funds for climate change and for the development agenda, amounting to US$5.1 billion which President Xi announced at the United Nations' SDG summit in September 2015.

The Chairman and Board Members also visited Chengdu as part of the Board's programme in China, upon the invitation of CPIFA, and experienced the cultural and natural diversity of China as examples, in many ways, of the same kind of richness and diversity in terms of culture and nature that may also be found in other developing countries of the South.

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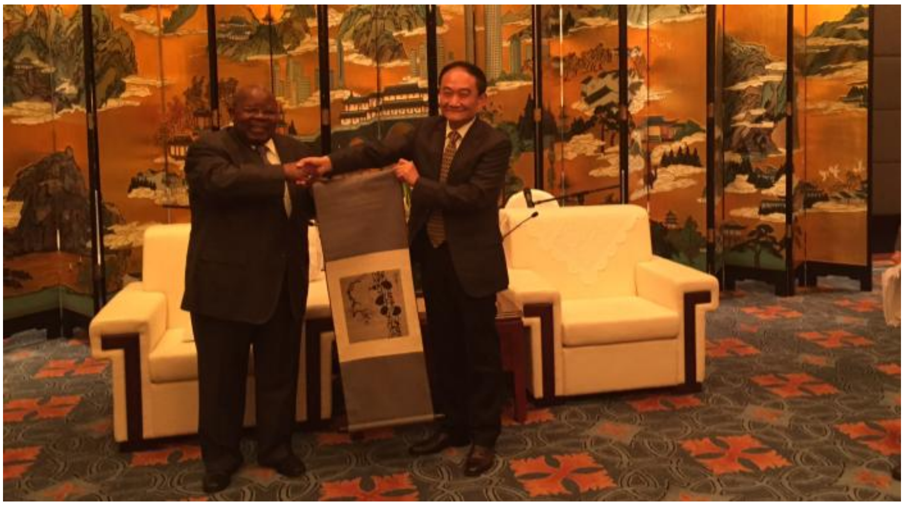

South Centre Chair of the Board Mr. Benjamin Mkapa (left) being greeted in Chengdu by Mr. Zhao Zhenxi, Vice Chairman of the Sichuan Committee of the Chinese People's Political Consultative Conference (CPPCC) (right).

Special Guest to the Board of the South Centre Prof. Deepak Nayyar (left) in conversation with Mr. Zou Zhibo, Vice President of the Institute of World Economics and Politics/CASS (right).

The South Centre Board Members visited Chengdu and experienced the cultural and natural diversity of China.

China's boost to South-South cooperation

Two new Chinese funds totalling US$ 5.1 billion to help developing countries tackle climate change and development problems could be a game changer in South-South cooperation and international relations.

President Xi Jinping (centre) chaired the High-level Roundtable on South-South Cooperation co-hosted by China and the United Nations (UN) at the UN headquarters in New York with participation of developing country leaders and heads of international organizations.

By Martin Khor

China gave a big boost to South-South cooperation when its President, Xi Jinping, made two unprecedented mega pledges totalling US$5.1 billion to assist other developing countries, during his visit to the United States in September.

Firstly, he announced that China would set up a China South-South Climate Cooperation Fund to provide RMB 20 billion or US$3.1 billion to help developing countries tackle climate change. This announcement was made at the White House at a media conference with US President Barrack Obama.

Secondly, at the Development Summit at the United Nations, Xi said that China would set up another fund with initial spending of US$2 billion for South-South Cooperation and to aid developing countries to implement the post-2015 Development Agenda.

The sheer size of the pledges gives a big political weight to the Chinese contribution. President Xi's initiatives have the feel of a "game changer" in international relations.

It is significant that Xi used the framework of South-South cooperation as the basis of the two funds.

In the international system, there have been two types of development cooperation: North-South and South-South cooperation.

North-South cooperation has been based on the obligation of developed countries to assist developing countries because the former have much more resources and have also benefitted from their former colonies as a result of colonialism.

Indeed, developed countries have committed to provide 0.7% of their GNP as development aid, a target that unfortunately is being met by only a handful of countries.

South-South cooperation on the other hand is based on solidarity and mutual benefit between developing countries as equals, and without obligations as there is no colonial history among them.

This is the position of the developing countries and their umbrella grouping, the G77 and China.

Xi himself, at a South-South roundtable he chaired at the UN, described South-South cooperation as "a great pioneering measure uniting the developing nations together for self-improvement, is featured by equality, mutual trust, mutual benefit, win-win result, solidarity and mutual assistance and can help developing nations pave a new path for development and prosperity.

"As the overall strength of developing nations improves, the South-South cooperation is set to play a bigger role in promoting the collective rise of developing countries."

In recent years, as Western countries reduced their commitment towards aid, they tried to blur the distinction and have been pressing big developing countries like China and India to also commit to provide development aid just like them, within the framework of the OECD, the rich countries' club.

However, the developing countries have stuck to their political position: The developed countries have the responsibility to give adequate aid to poor countries and should not shift this on to other developing countries. The developing countries however will also help one another, through the arm of South-South cooperation.

This has increasingly led some of the developed countries to vaguely threaten to reduce their aid commitment, unless some of the developing countries also pay their share. For them, South-South cooperation is just too vague and too small.

This perception has been changed by the two Chinese pledges, both interesting in themselves.

It is noted by many that the $3.1 billion Chinese climate aid exceeds the $3 billion that the United States has pledged (but not yet delivered) to the Green Climate Fund (GCF) under the UN Climate Convention.

Major developing countries have been pressed to contribute to the GCF but they have correctly argued that the GCF is a fund meant for developed countries to meet their historical responsibility to assist developing countries. Developing countries can choose to help one another through the avenue of South-South cooperation.

China has now taken that South-South route by announcing it will set up its own South-South climate fund, with the unexpectedly big size of $3.1 billion, an amount larger than any developed country has pledged at the GCF. Last year, when China initially announced a similar fund, the sum mentioned then was only $20 million.

With such a large amount, the Chinese climate fund has the potential to facilitate many significant programmes on climate mitigation, adaptation and institutional building.

As for the other fund announced by President Xi, the initial $2 billion is for South-South cooperation and for implementing the development agenda just adopted by the UN. The agenda's centrepiece is the sustainable development goals. Xi mentioned poverty reduction, agriculture, health and education as some of the areas the fund may cover.

This new fund has the potential of helping developing countries learn from one another's development experiences and practices and make leaps in policy and action.

Xi also said an Academy of South-South Cooperation and Development will be established to facilitate studies and exchanges by developing countries on theories and practices of development suited to their respective national conditions.

The next steps to implement these pledges would be to set up the institutional basis for the funds, and design their framework, aims and functions. It is a great opportunity to show whether South-South cooperation can contribute as positively as North-South aid.

After all, South-South cooperation is meant to complement and not to replace North-South cooperation.

Of course, aid is not the only dimension of South-South cooperation, which is especially prominent in the areas of trade, investment, finance and the social sectors.

The regional trade agreements in ASEAN, East Asia, and the sub-regions of Africa and Latin America, as well as the trade and investment links between the three South continents, have shown immense expansion in recent decades.

Recently, the world imagination was also captured by the creation of the BRICS Bank, the Asian Infrastructure Investment Bank and the Chinese One Belt One Road programme, which all contain elements of South-South cooperation.

South-South cooperation in aid, however, is symbolically and practically of great importance, as it tends to assist the more vulnerable--- including poor people and countries, and fragile environments including biodiversity and the climate undergoing crisis.

Let's hope that the two new funds being set up by China will give a much-needed boost to South-South cooperation and solidarity among the people.

Martin Khor is the Executive Director of the South Centre. Contact: director@southcentre.int

The Board Members of the South Centre and Chinese experts pose for a group photo during the Brainstorming Meeting on South-South Cooperation and China co-organized by the South Centre with the Chinese People's Institute of Foreign Affairs and the Institute of World Economics and Politics/Chinese Academy of Social Sciences in Beijing.

Implications of Argentina’s Deal with “Super holdouts”: Need for an Urgent Revision to Bond Contracts and for a Debt Workout Mechanism

Argentina’s Senate members voting in favour of the deal with the “holdouts”.

By Yuefen Li

Argentina signed an agreement in principle on 29 February 2016 with four “super holdout” hedge funds including NML Capital Ltd, Aurelius Capital, Davidson Kempner and Bracebridge Capital. Buenos Aires would pay them a total of about $4.65 billion, amounting to 75 percent of the principal and interest of all their claims of Argentina’s bonds that were defaulted on during the 2001 debt crisis. The payment is to be made in cash before 14 April 2016, provided that Argentina's Congress approves the repeal of Argentina's domestic laws, namely the Lock Law and the Sovereign Payment Law, which prohibit the country from proposing terms to the holdouts that are better than those Argentina offered to its creditors in earlier restructurings. This deal would allow the return of Argentina to the international capital market after more than 15 years of exclusion, something that is imperative for the government to try to put the economy on a more sustainable path even though this would mean having to use a substantial part of its foreign currency reserves to pay off the holdout bond holders. Nevertheless, there are systemic implications of this deal to future sovereign debt restructurings which deserve careful examination and remedial actions.

The reason to call the four hedge funds as “super holdouts” is because they are the largest, the most combative and the most tenacious holdout creditors. Argentina floated exchange bonds in 2005 and then again in 2010 after it defaulted during the 2001 debt crisis on its bonds that were valued at nearly $100 billion. Ninety-three percent of the holders of Argentine restructured sovereign bonds accepted the exchange proposals at a considerable “haircut” (i.e. discount rate) of about 65% (that is, they agreed to receive only 35 cents for each dollar of the face value of the restructured bonds). The remaining 7% of the bond holders turned down the offers.

In 2003, NML Capital Ltd which is managed by Elliott first sued Argentina for repayment of 100% of the face value of the bonds they hold. As a result of the suit, U.S. District Judge Griesa issued his *pari passu* ruling which prohibited Argentina from servicing its bonds before paying the holdouts. This led Argentina to default on its debt again in 2014. With it the thirteen year-long litigation saga – considered to be among the most publicized, the ugliest and the most divisive legal battle in history for sovereign debt restructuring – came to a stalemate with both sides refusing to move.

To end the stalemate, the newly elected President of Argentina, Mauricio Macri, made resolving the holdout dispute a priority and in February 2016 offered to pay $6.5 billion to the group of six hedge fund holdouts. Two of the funds accepted the offer but not NML and three other funds which asked for better terms. Hence, we see different degrees of tenacity among holdouts, resulting essentially in different levels of payment to them and compromising inter-creditor equity. Clearly, the deal is a great victory for the “super holdouts”. In addition to the 75% payment in principal and hefty interest accumulated over the years, thirteen years of hefty legal bills will also be picked up by Argentina. Estimates on the returns that the “super holdouts” will make on their investment in Argentina’s bonds range from three to five times what they paid for the bonds in the first place.

The business model of these hedge funds is well known. They seek and buy sovereign bonds issued by States that are going through economic distress for a fraction of the bonds' face value and then holding out by refusing discounted repayment of such bonds when offered by the issuing State, seeking instead to getting paid in full or as close to full as possible for the principal plus interest through litigation or other means including seizing assets. Although the precise information on the prices paid by these "super holdouts" for the Argentinian bonds is not easily available, based on data from the Ministry of Finance of Argentina, Bloomberg estimated that payment on principal would equal to about four times the face value of bonds Elliott holds. Elliott will get back, under the terms of the deal struck on 29 February 2016, $2.28 billion on its $617 million investment in principal.

However, the payment from the deal struck with Argentina may not be the only profit the "super holdout" funds get from their Argentina bonds. It is common for these funds to purchase CDSs (Credit Default Swaps) against the distressed bonds they hold. CDS is a credit derivative which ensures creditors get paid of the premium as well as the interest in times of default and other credit events. This creates a win win business situation for the hedge funds and lose lose dilemma for the sovereigns. With CDSs, the hedge funds would get paid if the borrowers default or the bond prices suffer from a deep decline. They would get paid twice if a defaulted borrower loses legal battle and is forced to pay the hedge funds.

In the case of Argentina, further to the *pari passu* injunction, a "failure to pay" credit event triggered the payment of the CDS on Argentina's debt. Yet, it is not possible to get the CDS positions of the hedge funds involved in the litigation against Argentina. Some observers have suggested that relevant hedge funds against Argentina may also hold CDS on these bonds and thus profit from a default scenario. When being probed at the court room, Elliott's lawyer chose to give an evasive answer.

However, purchasing large quantities of CDSs is the business model of such kind of hedge funds. This creates a conflict of interest as the hedge funds holding CDSs on the particular bond they are litigating in court are in a very good position to trigger default or push the prices of the litigated bonds lower through their litigation tactics. In return, these hedge funds can get paid for their CDS holdings because of the default and sharp price decline. Subsequently, because of the desire to return to the international market, the bond issuers would have to resume negotiation with the same hedge fund which would not give up until they squeeze as much as possible from the sovereign bond issuers.

Nevertheless, it is understandable that the new government of Argentina moved fast to tackle the impasse of the bond holdout problem. The country is facing many severe economic challenges at the moment. Inflation is about 25% and the primary fiscal deficit is more than 5.8 percent of GDP.

To make up the fiscal shortfalls, the government has been borrowing from the central bank, leading to a big drop in its foreign reserves. In the current global economic environment of low aggregate demand and declining commodity prices, it is not very realistic to pin hope on increasing trade revenue to replenish its foreign reserves, especially when its two largest export products - soya and petroleum - are subject to worsening terms of trade and drastic price fluctuation. To mitigate the severe liquidity shortage, Argentina has already utilized its currency swap arrangements with China. The government also has the option of cutting expenditure in order to ease the liquidity crunch, but embarking on a Greek-style austerity programme would be highly unpopular. Inflation has already eroded the real take-home pay of the wage earners and demonstrations for wage increase have been going on for years. To regain access to the capital markets to raise new money is important for mitigating the severe shortage of liquidity and smooth out economic bottlenecks.

The last hurdles to Argentina being able to return to the international capital market to obtain financing are these "super holdouts" as well as the injunction from the U.S. District Court. The deal would therefore clear both obstacles as Judge Griesa has granted the lifting of the injunction upon the repeal of the Argentine domestic laws. As the injunction is an important leverage for the "super holdouts" to get paid, they requested the injunction be lifted after they get paid. The country has already settled some major arbitration cases and disputes in previous years.

However, can we collectively utter a sigh of relief and celebrate the coming to an end of the longest and the most high profile holdout case in the history? Before doing so, we need to contemplate the impact and the implications of such a publicised legal battle that would end by the payment of billions of dollars to "super holdouts".

Firstly, it would not be surprising for creditors involved in future debt restructurings to first look around and find out whether there are big institutional creditors with strong financial and legal positions involved in the same case. If so, the tendency could be to wait for a "me too" chance instead of examining the creditors' own eco-

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Protesters voiced their opposition to the deal outside Congress, but lawmakers voted in favour.

nomic positions and decide whether or not to be cooperative and accept the restructuring proposals. This will then most likely result in a delayed and disorderly debt workout and undermine the objective to quickly rescue the financially distressed governments and restore debt sustainability.

Secondly, huge financial gains for the "super holdouts" could lead to the birth of more "baby NML" making this much specialised profession a more crowded market. With this litigation case being so dramatic and traumatic that even a ship was seized, some creditors could be more combative and more uncompromising in the future. As a result, creditor coordination would turn out to be more difficult than before.

Thirdly, it is highly likely that these hedge funds would look for more weak links in the bond contracts further than *pari passu* and prepare themselves for the next target. The tremendous influence of these hedge funds, their legal tactics and the demonstrated tenacity have already led to efforts to strengthen the contractual clauses to reduce chances of holdout and rushing to the court. These include the tightening of the language of the collective action clause (CACs) and *pari passu* clause as well as the strengthening of sovereign immunity. However, there are other boilerplate/general clauses which could be subject to innovative interpretations like what happened to pari passu.

Fourthly, even though the legal battle between NML and Argentina is coming to an end, the impact of the powerful 2012 injunction on pari passu may still linger on. The question on whether the conditional lifting of the injunction granted by Judge Griesa would make the injunction disappear for good remains to be seen. The injunction prevents Buenos Aires from servicing its bonds until it settles with the holdouts. As Professor Anna Gelpern mentioned, this is a powerful financial weapon. It would certainly favour the holdouts if the borrower does not have close to infinite financial resources to fight lengthy legal battles. If holdouts can still use this injunction as recourse, chances of borrowers to win the legal battle would be significantly diminished. Outstanding bonds without improved language of CACs and pari passu is eye boggling. The newly revised CACs and pari passu clauses will take a long time to phase in depending on the maturity of the bonds. With the slow recovery from the global financial crisis and low commodity prices, some developing countries are facing debt sustainability challenges, making them eventual easy targets for litigation-oriented hedge funds.

How can the potential negative systemic impact from this case be mitigated and make future debt workout timely and orderly?

Current efforts have concentrated on making it more difficult for holdouts to rush to the court room through strengthening current contract clauses. This is necessary and welcome. However, this may be far from sufficient. The financial incentives to be "super holdouts" are immense. Additionally, NML and other holdout hedge funds have done everything within the law. The "super holdouts" have every right to purchase bonds at the secondary market as bonds are transferable and the secondary market is needed to make bonds liquid. Herding behaviour can make bonds undervalued. But buying them at a fraction of their face value is not a crime.

While the purchase of sovereign bonds on the secondary market at discount rates may be legal, one can say that the business model of specializing in purchasing hugely undervalued bonds for the purpose of resorting to litigation and other means to force the distressed governments to pay the full face value is not ethical because it is at the expense of the ordinary tax payers and the well being of a sovereign state.

Academia and institutions have used the strategy of "name and shame" hoping the "super holdouts" would give in. Apparently, it has not had much impact. Argentina's unsuccessful pleadings in the U.S district and supreme courts were supported by the Pope, Nobel Prize winners, countries like France, Mexico and Brazil, international intergovernmental institutions like the IMF, the United Nations and the South Centre, NGOs and ordinary citizens. None managed to persuade the hedge funds to give up.

Three approaches may be of value to consider for the purpose of reducing the recurrences of the NML-style "super holdouts".

One approach is to reduce incentives for holdouts. It is common business practice for goods and services bought at huge discount in retail stores or via internet to have clear stipulations that they are either not refundable or cannot be changed or returned. People take it for granted that it is a lawful and correct business practice. To buy things at Christmas sales and go back to the stores and request for refund of the full original price of the products would be considered as unethical. Why then is it so unlawful to reject the request of the "super holdout" to get paid 100% when the bonds were bought at a fraction of their face value? Because sovereign bond contracts often do not explicitly mention that bonds bought at a discount will be redeemed by the government at the discounted rate rather than at face value, the issuing State then gets bound to respect the bond contract and pay it at face value.

In the absence of a multilateral legal framework on sovereign debt restructuring mechanism, reducing incentives may be done through revising the contractual terms for the bonds. In the case when the bonds were bought at a steep discount, there could be a contractual clause to limit the margin of returns to minimize the likelihood of litigating for 100% repayment. Consideration could be given to add a clause to bond contracts to the effect that "in case of a debt restructuring, the bondholders would be paid back no higher than X% of the purchase price of the bond." The percentage could be a range and take into consideration the past holdout cases together with haircut levels of historical debt restructuring incidences. The range or specific percentage should allow sufficient profit margin and avoid the possibility of moral hazard of strategic default. In this way, secondary market operations would not be disrupted and hopefully the incentives for super holdout could be diminished.

Other ways of reducing incentives for super holdout should be examined. For instance, the statutory penalty interest rates of some of the bonds Elliott holds are exorbitantly high. According to the Wall Street Journal, these bonds would bring 10-15 times of return to Elliott. These kinds of arrangements give insane incentives to holdout bond holders.

Another way out is to explore whether it is really beneficial for the stability of the international financial market not to regulate hedge funds specialized in debt holdout. At a time of increased social responsibilities for the institutions of the real economy, more regulations in the banking sector and more specific codes of conduct for various business sectors, should there also be some regulations and codes of conduct with respect to these hedge funds? Apparently, conflict of interests and lack of transparency do exist in their purchases of CDSs, hence, there should be efforts to investigate into this relatively closed and opaque business.

Finally, there have been repeated international efforts to establish an international debt workout regime or legal framework to cope with systemic issues relating to the "too late and too little" phenomenon for debt restructurings as well as the holdout problem. The IMF tried in 2003. The United Nations General Assembly set up an Ad Hoc Committee mandated to create a multilateral legal framework for sovereign debt restructurings in September 2014.

As one outcome, in 2015 the Committee formulated the 'Basic Principles on Sovereign Debt Restructuring' based on years of research and consensus building in UNCTAD. However, political resistance from the developed countries has made it difficult for the United Nations to push the work to a more inclusive and substantive phase. The Argentina case has proved once again the need of a debt workout mechanism.

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FDI, Investment Agreements...

(Continued from page 5)

TRIMs because it would apply not to goods traded by investors but to the investor and the investment.

Further, provisions on expropriation and fair and equitable treatment give considerable leverage to foreign affiliates in challenging changes in tax and regulatory standards and demanding compensation. In particular, the concept of indirect expropriation has led states to worry about their ability to regulate. The fair and equitable treatment obligation has also been interpreted expansively by some tribunals to include the right of investors to a stable and predictable business environment.

The large majority of outstanding BITs do not make any reference to performance requirements of the kind discussed above, but a growing number of them signed in recent years incorporate explicit prohibitions (Nikièma, 2014). Some BITs go beyond TRIMs and bring additional prohibitions for performance requirements both at pre- and post-establishment phases. Others simply refer to TRIMs without additional restrictions. Still, this narrows the ability of governments to move within the WTO regime because it allows investors to challenge the TRIMs-compatibility of host-country actions outside the WTO system. This multiplies the risk of disputes that host countries can face since corporations are much more inclined to resort to investor-state arbitration than the states do in the WTO system. The MFN clause could entail even greater loss of policy autonomy in all these areas, including performance requirements, by allowing foreign investors to invoke more favourable rights and protection granted to foreign investors in agreements with third-party countries.

While investment agreements entail a considerable loss of policy autonomy, they do not appear to be serving the intended purpose and accelerating the kind of FDI inflows sought by policy makers in host countries. Evidence suggests that BITs are neither necessary nor sufficient to bring significant amounts of FDI. Most EDEs are now wide open to TNCs from AEs through unilateral liberalization or BITs or free trade agreements (FTAs), but only a few are getting FDI with significant developmental benefits and most of these countries have no BITs with major AEs. Econometric studies on the impact of BITs on FDI flows are highly ambivalent. While a few studies contend that BITs affect FDI flows, they do not examine whether BITs have led to the kind of FDI inflows that add to industrial dynamism in host countries. The majority of empirical studies find no link between the two (UNCTAD, 2009, Annex and UNCTAD TDR, 2014, Annex to Chapter VI). Similarly, survey data show that the providers of political risk or in-house counsel in large US corporations on investment decisions do not pay much attention to BITs (Yackee, 2010).

Conclusion

Policy space in several key areas affecting the contribution of FDI to the pace and pattern of industrialization might be somewhat constrained by the WTO Agreement on TRIMs, but it is still possible for EDEs to encourage positive spillovers without violating the WTO commitments. However, many of the more serious constraints are in practice self-inflicted through investment and free trade agreements. There are strong reasons for EDEs to avoid negotiating the kind of BITs promoted by AEs. They need to turn attention to improving their underlying economic fundamentals rather than pinning their hopes on BITs in attracting FDI. Where commitments undertaken in existing BITs seriously impair their ability to use FDI for industrialization and development, they can be renegotiated or terminated, as is being done by some EDEs, even if doing so may entail some immediate costs.

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Climate Change Battles in Paris: An analysis of the Paris COP21 and the Paris Agreement

The UN Climate Change Conference (known as COP21) in December 2015 adopted a historic Paris Agreement which attracted a lot of congratulations but also some criticisms. This article describes the battles in Paris, mainly between developed and developing countries, on many of the key issues. It also analyses the outcomes of these issues within the Paris Agreement and how these outcomes emerged from the battles among the Parties.

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Laurence Tubiana, COP 21/CMP 11 Presidency; UNFCCC Executive Secretary Christiana Figueres; UN Secretary-General Ban Ki-moon; COP 21/CMP 11 President Laurent Fabius, Foreign Minister, France; and President François Hollande, France, celebrate the adoption of the Paris Agreement .

By Meenakshi Raman

The Paris Agreement adopted by the 21st Conference of Parties (COP21) under the United Nations Framework Convention on Climate Change (UNFCCC) on 12 December, was the outcome of major battles on a multitude of issues, especially between developed and developing countries.

Developing countries by and large had these negotiating objectives. They wanted (a) to defend the Convention and not let it be changed or subverted; (b) to ensure that the Agreement is non-mitigation centric with all issues (including adaptation, loss and damage, finance and technology, besides mitigation) addressed and in a balanced manner; (c) to ensure differentiation in all aspects be reflected, with the principles of equity and common but differentiated responsibilities (CBDR) and respective capabilities; (d) to ensure that developed countries enhance the provision of finance and technology transfer' (e) to ensure that 'loss and damage' is recognised as a separate pillar apart from adaptation and (f) legally binding provisions, especially on the developed countries.

The United States and allies (especially those under the Umbrella Group) wanted the opposite. They mounted an onslaught on the Convention, seeking to weaken the provisions and their obligations; they wanted to redefine differentiation so as to blur the different obligations of developed and developing countries; and they wanted a legal "hybrid" (in terms of what clauses are and are not legally binding), mainly to suit the US administration's relations with the US Congress which is hostile to the climate change issue.

COP21 was a battleground that involved an onslaught (with both defensive and offensive interests) of the US and its allies versus the resistance and offensive by the Group of 77 and China, and especially the Like-minded Developing Countries (LMDC) (which includes India) that had comprehensive negotiation positions and a well operating machinery.

A major concern was how the French Presidency of COP 21 would behave, in light of the polarised positions.

Towards the end, an important meeting took place between the LMDC and the French Presidency (who were crafting the final compromise), during the night of Friday, 11 December, where the LMDC presented its "super-redlines". Among them included that the purpose of the Agreement is to enhance the implementation of the Convention in accordance with the principles and provisions of the Convention; reflection and operationalisation of equity and CBDR across all elements; clear differentiation between developed and developing countries on the mitigation efforts; commitment by developed countries on provision of finance, technology transfer and capacity-building with no transfer or extension of obligations to developing countries to provide finance.

The LMDC conveyed the message that with 30 countries in its grouping representing more than 50% of the population of the world and 70% of the poor, it wanted the COP to be a success but that the outcome must be balanced, and not depart from its super-redlines. In the end the French took the LMDC points, and got the US to agree.

The COP 21 Presidency was generally viewed as playing a fair and difficult role in securing a delicate and balanced outcome, except for an inci-

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Developing country negotiators gathered for an informal meeting in the corridors of the conference. The G77 made a unified call on developed countries to maintain their commitment to provide finance, technology transfer and capacity building.

dent in the final plenary that somewhat marred the process.

This is the 'should incident' where the US wanted the word "shall" to be replaced with the word "should" in Article 4.4 of the Agreement that related to the mitigation efforts of Parties. The US wanted developed and developing countries to be treated in a like manner legally, as the original version referred to "shall" for developed countries and "should" for developing countries." Instead of raising the issue from the floor of the plenary, the US request was accommodated by the COP Presidency by what was termed a "technical correction" and the word "shall" was then replaced with "should" and was read out by the Secretariat. This was viewed with dismay by some LMDC delegations, but as there was no formal objection, the US-inspired amendment stood.

Another incident was when Nicaragua put up its flag in the final session of the Paris Committee that adopted the Paris agreement but it was ignored by the Chair. After the agreement had passed, the Minister of Nicaragua made a strong statement protesting against his being ignored earlier.

Highlights of the Paris Agreement

To understand the COP21 outcome, a reflection on the key clauses of the Paris Agreement and the decision that adopted it is important. Below is an initial assessment of the issues that form the context of the clauses, and the final outcome, with an assessment as to whether the views of developed or developing countries (or both) prevailed.

Given that the Agreement is a new legal instrument, it will have to be ratified by Parties for it to come into effect. It will enter into force after at least 55 Parties to the Convention, accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification or acceptance. (The Agreement is expected to come into effect post-2020.)

The Agreement (12 pages) was adopted as an annex of a decision (19 pages) of COP21.

Purpose of the Agreement (Article 2)

Article 2 of the Agreement states in sub-paragraph 1 that: "*This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:*

(a) Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production;

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development."

Sub-paragraph 2 states that "*This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC), in the light of different national circumstances."*

The purpose of the Agreement was a major area of contention between developed and developing countries.

In the four years of negotiations, the common refrain of developing countries under the G77 and China was for the Agreement not to "rewrite, replace or reinterpret the Convention." The G77 and China, including its sub-groupings especially the Like-minded Developing Countries (LMDC) and the African Group constantly stressed that the purpose of the Agreement is to enhance the implementation of the Convention on the elements of mitigation, adaptation, finance, technology transfer, capacity-building, and transparency of action and support.

Developed countries, on the other hand, appeared to focus more of their attention on the 'objective' of the Agreement, which was perceived by developing countries as a mitigation-centric approach linked only to the temperature goal, with an attempt to weaken the link to the Convention provisions and the obligations of developed countries under the Convention, especially on the means of implementation (finance, technology transfer and capacity-building).

Hence, the reference to "enhancing the implementation of the Convention" is seen as a positive win for developing countries.

Although limiting temperature rise well below the 2 degrees Celsius goal above pre-industrial levels is clear, reference to the pursuit of efforts to limit the increase to 1.5 degrees Celsius is seen as a major victory for many developing countries, especially the Small Island Developing States, the Least Developed Countries, Africa and the ALBA countries.

Developing countries also wanted the focus to also be on adaptation and finance and to ensure that the global response is in "the context of sustainable development and efforts to eradicate poverty".

Several senior developing country delegates did express their unhappiness over the reference to "finance flows" in the Article 2(1)(c) of the Agreement rather than a reference to the provision of financial resources from developed to developing countries, the commitment language of the Convention.

A major win for developing countries is Article 2.2 that states that the Agreement will be implemented to reflect equity and the principle of CBDR-RC, in the light of different national circumstances.

A key issue throughout the Durban Platform process and at COP21 was whether and how the principle of CBDR-RC will be operationalised in all the elements of the Agreement.

Developed countries had been insisting that the agreement must reflect the "evolving economic and emission trends" of countries in the post-2020 timeframe, while developing countries continued to argue that given the historical emissions of developed countries, developed countries continue to bear the responsibility in taking the lead in emission reductions and in helping developing countries with the provision of finance, technology transfer and capacity-building as provided for under the UNFCCC.

At the COP in Lima in 2014, where the issue of differentiation was also hotly contested, Parties underscored their commitment to reaching an ambitious agreement in Paris that reflects the principle of CBDR-RC, in light of different national circumstances. This was eventually the 'landing-zone' arrived at in the Paris Agreement.

Nationally Determined Contributions (NDCs) (Article 3)

Article 3 (previously known as Article 2bis during the negotiations) states that, *"As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement."*

Article 3 symbolizes the 'battle' over the nature of the agreement to ensure that the NDCs are not viewed only as being 'mitigation-centric' (Article 4 refers to the element of 'mitigation', Article 7 to 'adaptation', Article 9 to 'finance', Article 10 to 'technology development and transfer', Article 11 to 'capacity-building' and Article 13 to a 'transparency framework for action and support').

The LMDC was the major proponent for all Parties to regularly prepare, communicate and implement their intended NDCs (INDCs) towards achieving the purpose of the Agreement. It also proposed that INDCs will represent a progression in light of Parties' differentiated responsibilities and commitments under the Convention.

It was an uphill task during the negotiations to get developed countries to see the viewpoint of the LMDC in this regard. The proposal was to ensure that the contributions of Parties are viewed in a comprehensive manner, reflecting the respective obligations they have under the provisions of the Convention, and not to confine the contributions only to mitigation as desired by the developed countries.

Mitigation (Article 4)

The following sub-paragraphs of Article 4 are among the main highlights in relation to mitigation:

"1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of GHGs as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

"2. Each Party shall prepare, communicate and maintain successive NDCs that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."

The US was against any reference that each Party shall implement the NDCs that it has communicated, as this would make it an obligation for the US and others to implement the emissions reduction target communicated. To accommodate the US 'problem', all Parties have to do is to "pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions." What this means is that there is an obligation to take the measures necessary, **with the aim of achieving** the emissions reduction target, but not to achieve the target itself (emphasis added).

"3. Each Party's successive NDC will represent a progression beyond the Party's then current NDC and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

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Demonstrators outside Le Bourget, the venue of the conference, called for a fair, transparent and more ambitious agreement.

"4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances."

Article 4.4 was another major paragraph of contention between developed and developing countries. Many developing countries wanted the nature of the mitigation efforts to be differentiated between developed and developing countries, reflecting the existing provisions of the Convention that are based on historical responsibility and CBDR.

The US and its allies in the Umbrella Group were opposed to any form of differentiated efforts, preferring that Parties "self-differentiate" among themselves, while recognising that those who have undertaken absolute emission reduction targets before should continue to do so in the post-2020 timeframe.

While this sub-paragraph continues to provide the policy space for developing countries in undertaking any type of enhanced mitigation efforts (including relative emission reduction targets which are economy-wide and non-economy wide actions), over time, developing countries will have to move to economy-wide targets, in light of their different national circumstances.

The term "over time" is not precisely defined and there is also no reference that developing countries have to undertake "absolute" emission reduction targets, which was what developed countries and some developing countries were pushing for during the negotiations.

Adaptation (Article 7)

In sub-paragraph 1 of Article 7, Parties agreed to "*establish the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal referred to in Article 2.*"

Developing countries had been pushing for a long term goal or vision on adaptation to ensure that there is parity between adaptation and mitigation and to avoid having only a mitigation centric-goal linked to the temperature goal. This goal also links the adaptation response to the temperature goal.

In relation to the global goal on adaptation, developing countries had during the negotiations proposed "an assessment of the adequacy of support" from developed countries to developing countries as well as the "recognition of increased adaptation needs and associated costs in the light of mitigation efforts…"

What eventually found its way in the adaptation section (in sub-paragraph 14 of Article 7) is the reference to the global stocktake (in Article 14) which states that the stocktake "*shall*" "*review the adequacy and effectiveness of adaptation and support provided for adaptation*" *as well as* "*review the overall progress made in achieving the global goal on adaptation…*"

According to sub-paragraph 3, *"the adaptation efforts of developing country Parties shall be recognised…"*, with the modalities to be developed for such recognition.

Developing countries during the negotiations wanted to ensure that the adaptation efforts they are undertaking with or without international support are recognised as their contribution to climate action.

Loss and Damage (Article 8)

One major victory for developing countries is the recognition of 'loss and damage' as a separate article to the Paris Agreement, distinct from 'adaptation'. Developing countries had been arguing very hard for 'loss and damage' to be separately recognised.

(The term 'loss and damage' refers broadly to the entire range of damage and permanent loss associated with climate change impacts in developing countries that can no longer be avoided through mitigation nor can be avoided through adaptation.)

The anchoring of 'loss and damage' as a distinct article in the Agreement came at a costly price when a deal was made behind closed doors between the US, European Union and some Small Island Developing States and Least Developed Countries in the final hours, prior to the draft agreement being released to Parties for consideration and adoption.

The compromise reached is found in paragraph 52 of the decision text which provides that Parties agree *"that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation."*

According to one source, the deal was between the US, EU, and five small island states. It seems that most developing countries were completely unaware of the deal being done. The deal might have also been linked with getting reference to 1.5 degrees °C in the long-term temperature goal in the Paris Agreement in Article 2.1 (a).

According to several experts who have been following the UNFCCC negotiations, the clause in paragraph

Developing countries' vulnerable population are the most affected by the impacts of climate change.

52 on exclusion of liability and compensation does not preclude financial resources from being allocated to developing countries seeking funds to address the adverse impacts related to loss and damage.

Finance (Article 9)

Prior to the final outcome in the Paris Agreement, the thrust of the developed countries position on the issue of finance was to increase the scope of countries (to include developing countries) who should be 'donors' of climate finance by proposing terms in the text like 'all Parties in a position to do so' should provide financial resources or that the mobilisation of climate finance is a "shared effort" of all Parties.

Deforestation of a tropical forest .

The key sub-paragraphs on finance which were agreed to are:

"1. Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention."

This paragraph continues to ensure that developed countries are not absolved from their existing financial commitments under Articles 4.3 and 4.4 under the UNFCCC.

However, the G77 and China, had during the negotiations, pressed for the provision of these resources to be "new, additional, adequate, predictable, accessible and sustained" but these terms did not find place in the Agreement, except for a reference in sub-paragraph 4 on "the provision of scaled-up resources" (see below). Sub-paragraph 2 states that "*Other Parties are encouraged to provide or continue to provide such support voluntarily.*"

Instead of the reference to "all Parties in a position to do so" also having to contribute to climate finance (which was opposed to by many developing countries), the above paragraph was agreed to, which stresses the "voluntary" nature of such support.

Sub-paragraph 3 provides that "*As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds through a variety of actions,… and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance should represent a progression beyond previous efforts."*

Many developing countries including the LMDC preferred the reference to the provision of financial resources by developed countries instead of the focus on the "mobilisation" of climate finance. The Paris Agreement provides for both the provision of support by developed countries and the mobilisation of climate finance.

In the earlier version of the draft agreement (version 2 issued on Dec. 10 by the COP 21 President), there was reference that the provision and mobilisation of climate finance "shall represent a progression beyond previous efforts from a floor of USD 100 billion per year…" and "towards achieving short-term collective quantified goals for the post-2020 period to be periodically established and reviewed…".

It is notable that the reference to the USD 100 billion per year as a floor did not make it to the Agreement but is found in paragraph 54 of the COP 21 decision which states as follows: *"Also decides that, in accordance with Article 9, paragraph 3, of the Agreement, developed countries intend to continue their existing collective mobilization goal through 2025 in the context of meaningful mitigation actions and transparency on implementation; prior to 2025 the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall set a new collective quantified goal from a floor of USD 100 billion per year, taking into account the needs and priorities of developing countries."*

In Cancun in 2010, Parties had agreed to developed countries mobilising USD 100 billion per year by 2020. With the Paris Agreement, a five year extension has been obtained to reach this target and a new quantified goal will be set for the period after 2025. Senior developing country negotiators also point out that the mobilisation of existing climate finance as stated above, is conditional on "meaningful mitigation actions and transparency on implementation", which was actually previously agreed to under the Copenhagen Accord (in 2009) and later affirmed in the decision in Cancun.

Developed countries, with the US in particular, were against the indication of any quantified target on the scale of resources in the Paris Agreement.

Developing countries, through the G77 and China on the other hand, pressed for clear "pathways to annual expected levels of available resources towards achieving short-term collective quantified goals for the post 2020 period to be periodically established and reviewed" and for "financial resources to be scaled up from a floor of USD 100 billion per year, including a clear burden-sharing formula, and in line with needs and priorities identified by developing country Parties…".

Technology Transfer (Article 10)

In the negotiations on technology transfer, the LMDC had called for the establishment of a global goal on the transfer of technologies by developed countries and know-how as well as for the provision of financial resources for collaborative research and development of environmentally sound technologies and enhancing accesses of developing countries to such technologies that match their technology needs.

There was also a proposal from India for developed countries to provide financial resources to address barriers related to intellectual property rights (IPRs) and facilitate access to technologies.

The African Group proposed a technology framework to be adopted that will provide direction and guidance in relation to technology assessments, including in identifying options for enhancing access and to address barriers.

These proposals were opposed by developed countries.

The real value for developing countries is the establishment of the technology framework that includes "the assessment of technologies that are ready for transfer" (as reflected in paragraph 68 of the COP 21 decision).

In addition, there is now a link established between the Technology Mechanism and the Financial Mechanism to allow for collaborative approaches in R and D and for facilitating access to technologies, which somewhat reflects the call by India to provide financial resources to address barriers related to IPRs and facilitate access to technologies.

The IPR issue has been a long-standing battle between developed and developing countries under the UNFCCC process, with strong opposition by developed countries led by the US in particular, to even mention the word 'IPRs'.

Transparency of action and support (Article 13)

With a 'bottom-up' system in place for countries to nationally determine (not multilaterally determined) their contributions to climate change efforts under the Agreement as advanced primarily by the US, there was a push by developed countries to have a common and unified system in place (which is not differentiated between developed and developing countries) on 'transparency of action'- which is a 'top-down' rules-based system in providing clarity on the content and information regarding those efforts.

Developing countries on the other hand were pressing for a transparency framework which is differentiated between developed and developing countries and better rules on 'transparency of support' which relates to information from developed countries on the means of implementation (finance, technology transfer and capacity-building).

The main bone of contention therefore was whether such a transparency framework should be differentiated between developed and developing countries.

What was agreed to is a transparency framework with flexibilities taking into account the different capacities of countries and builds on the existing transparency arrangements (that is currently differentiated between developed and developing countries).

Global Stocktake (Article 14)

During the negotiations, the main issue around the global stocktake was around its purpose and scope. (Stocktake is a 'code'for taking stock of the implementation by Parties collectively of their progress). The idea was for a periodic stocktake of the implementation of the Agreement and there were options as to the purpose of the stocktake: whether to assess the overall/aggregate/collective progress towards achieving the objective of the Convention or the Agreement's long-term goal.

On the scope, for developed countries, the stocktaking was primarily for considering the aggregate effect of the mitigation contributions of Parties in light of the long-term mitigation goal linked to the temperature goal, while for developing countries, it was to consider the overall implementation of obligations of Parties (consistent with the differentiated responsibilities), in relation to mitigation, adaptation and the means of implementation.

Under the Agreement, the global stocktake, which will be conducted every 5 years, is to be comprehensive, considering mitigation, adaptation and the means of implementation and support, and undertaken in the light of both equity and the best available science. This will avoid a mitigation-centric process which also takes into account considerations of equity. Thus the developing countries' viewpoints prevailed in this clause.

In a related matter, in the COP 21 decision under the section on intended nationally determined contributions (INDCs), paragraph 17 notes with concern "*that the estimated aggregate greenhouse gas emission levels in 2025 and 2030 resulting from the INDCs do not fall within least-cost 2 ˚C scenarios but rather lead to a projected level of 55 gigatonnes in 2030, and also notes that much greater emission reduction efforts will be required than those associated with the INDCs in order to hold the increase in the global average temperature to below 2 ˚C above*

Environmentally-unfriendly products and consumption patterns contribute to resource wastefulness and climate change.

pre-industrial levels by reducing emissions to 40 gigatonnes or to 1.5 ˚C above pre-industrial levels by reducing to a level to be identified in the special report referred to in paragraph 21 below."

In paragraph 20, Parties agreed that a facilitative dialogue among Parties will be convened in 2018 *"to take stock of the collective efforts of Parties in relation to progress towards the long-term goal referred to Article 4(1) of the Agreement* [which relates to the long-term temperature goal and the mitigation goal) *and to inform the preparation of nationally determined contributions (NDCs) pursuant to Article 4, paragraph 8, of the Agreement* (which relates to the communication of the NDCs).

The "facilitative dialogue" above appears to be an ex-ante process to inform the preparation of the NDCs, and is only about mitigation, unlike the global stocktake.

The EU has been a major proponent of a review process every five years to assess if Parties' mitigation contributions are on track in meeting the long-term mitigation goal and for enhancing (or ratcheting up) the contributions of Parties accordingly.

Many developing countries, especially from the LMDC were worried about such a ratcheting up process due to concerns that with developed countries not doing their fair share of the effort (taking into account their historical emissions), the pressure would be on developing countries to plug the emissions gap to limit the temperature rise. Due to this concern, they had been opposed to any ex-ante process to review the INDCs prior to their communication by Parties.

Clearly, the EU has got its way, against the concerns of the LMDC.

Conclusion

The developing countries started the Paris talks with some clear objectives and principles. Though some aspects were diluted, it got its red lines protected, though it did not get some of its offensive points accepted (for example, clearer targets on finance or a reference to IPRs as a barrier to technology transfer). Some of the important points gained by developing countries were that

- The Paris agreement is not mitigation-centric as desired by developed countries, although in some aspects mitigation does gets pride of place.

- The developing countries to a significant extent successfully defended the Convention and stopped the plans of developed countries to drastically rewrite the Convention.

- Differentiation between developed and developing countries was retained in the main, although weakened in some areas.

- The principles of equity and CBDR were mentioned in a specific clause in the important Article 2 on purpose of the Agreement, and operationalised in some key areas of the Agreement.

- Sustainable development and poverty eradication as important objectives of developing countries were referred to as the context of actions by developing countries in some key areas.

- Developed countries should take the lead in mitigation and finance is referred to in the agreement.

- Although the temperature goal is to limit temperature rise to well below 2 degrees °C from pre-industrial levels, the reference to pursuing efforts to limit temperature rise to below 1.5 degrees °C (this 1.5 degrees °C as the target was called for by small island states, LDCs, Africa and ALBA countries) is significant.

True, the Paris Agreement also means that big pressures will be put on developing countries, and especially the emerging economies, to do much more on their climate actions, including mitigation. But these enhanced actions need to be taken, given the crisis of climate change that very seriously affect developing countries themselves.

The Agreement also fails to provide actions that fulfil the 2 degrees Celsius pathway, let alone 1.5 degrees. The emissions gap between what countries in aggregate should do and what they pledged to do in their INDCs up to 2030 is very large. This has led many commentators to condemn the Paris COP21 as a failure.

However another perspective is that COP21 is only a start, and the Agreement represents an agreement internationally to enhance individual and collective actions to face the climate catastrophe. A real failure would have been a collapse of the Paris negotiations, Copenhagen-style, or an outcome that only favours the developed countries with the rewriting of the Convention.

The Agreement, from this perspective, has laid the foundation on which future actions can be motivated and incentivised, a baseline from which more ambitious actions must flow. There are mechanisms in place in the Paris agreement, such as the global stocktake, that can be used to encourage countries to raise their ambition level.

International cooperation, however inadequate and flawed, remains intact from which much more cooperation can flow in future.

The outcome represented by the Paris Agreement, that a bottom-up approach is taken on enabling each country to choose its "nationally determined contribution" with presently very weak or even no compliance, was the only possibility, given the state of many governments (including the United States) generally not being ready or willing or able to undertake legally binding targets.

It can be expected that developed countries will pile pressure on developing countries, especially emerging economies, and also try to shift or avoid their obligations. For the developing countries, they should invoke the overall context of what will make a low carbon pathway a reality--- finance, technology transfer, capacity building plus adaptation, loss and damage, all in context of sustainable development and poverty eradication. They must also remain firm and united in the negotiations and other processes ahead, starting from now, even before the signing and ratification of the Agreement.

Meenakshi Raman is Senior Legal Advisor and Coordinator of the Climate Change Programme of the Third World Network. ***The contribution of Martin Khor, Executive Director of the South Centre, is gratefully acknowledged. This article has also been published in the Economic and Political Weekly, January 9, 2016.***

The grant of patents and the exorbitant cost of "lifesaving" drugs

By Germán Velásquez

The important relationship between the examination of patents carried out by national patent offices and the right of citizens to access to medicines hasn't always been well-understood.

Too often these are viewed as unrelated functions or responsibilities of the state. And the reason is clear: patentability requirements are not defined by patent offices, but frequently by the courts, tribunals, legislation or treaty negotiators.

This is the case when patent policy is implemented in isolation from, rather than guided by, public health policy.

Given the impact of pharmaceutical patents on access to medicines, patent offices should continue to align their work in support of national health and medicine policies, using the freedom permitted by the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) to define patentability requirements.

The TRIPS Agreement requires all World Trade Organization (WTO) member states to incorporate into their legislation universal minimum standards for almost all rights in this domain: copyright, patents and trademarks.

A patent is a title granted by the public authorities conferring a temporary monopoly for the exploitation of an invention upon the person who reveals it, furnishes a sufficiently clear and full description of it, and claims this monopoly.

As with any monopoly, it may lead to high prices that in turn may restrict access. The problem is compounded in the case of medicines, when patents confer a monopoly for a public good and essential products needed to prevent illness or death and improve health.

According to the TRIPS Agreement, the patentability requirements used by national intellectual property offices require a product or manufacturing process to meet the conditions necessary to grant patent protection, namely: novelty, inventive step and industrial applicability (utility).

These three elements, however, are not defined in the TRIPS Agreement and WTO Member States are free to define these three criteria in a manner consistent with the public health objectives defined by each country.

It is widely held that patents are granted to protect new medicines to reward the innovation effort. However, the number of patents obtained annually to protect truly new pharmaceutical products is very low and falling.

Moreover, of the thousands of patents that are granted for pharmaceutical products each year, a few are for new medicines - e.g. new molecular entities (NMEs).

All of the above led the World Health Organization (WHO), in collaboration with the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Programme (UNDP) and the International Centre for Trade and Sustainable Development (ICTSD), to develop, in 2007, guidelines for the examination of pharmaceutical patents from a public health perspective.

The guidelines were intended to contribute to improving the transparency and efficacy of the patent system for pharmaceutical products, so that countries could pay more attention to patent examination and granting procedures in order to avoid the negative effects of non-inventive developments on access to medicines.

The major problems can be identified in the current use of the patent system to protect pharmaceutical innovation: reduction in innovation, high prices of medicines, lack of transparency in research and development costs, and proliferation of patents.

A study carried out by the journal Prescrire analysed the medicines that were introduced to the French market between 2006 and 2011, arriving at the conclusion that the number of molecules that produced significant therapeutic progress reduced drastically: 22 in 2006; 15, 10, 7, 4 in the following years up to 2011, which was a year in which Prescrire declared that only one medicine of significant therapeutic interest was brought to the market.

Given that France is one of the largest pharmaceutical markets in the world, the reduction in innovation confirmed that France is a good indicator of the global situation.

Oncologists from fifteen countries recently denounced the excessive prices of cancer treatments, which are necessary to save the lives of the patients, and urged that moral implications should prevail; according to them, of the 12 cancer treatments approved in 2012 by the United States Food and Drug Administration, 11 cost more than 100,000 dollars per patient per year.

Since the 1950s, there have been some references to the costs of Research and Development (R&D) for pharmaceutical products.

According to some sources, the average cost of research for a new pharmaceutical product has increased from 1 million dollars in 1950 to 2.5 billion dollars for the development of a single product.

During the summer of 2014, a number of European countries, including France and Spain, spent many months negotiating with the company Gilead on the price of a new medicine for hepatitis C known as Solvaldi.

The price fixed by Gilead was 56,000 Euros per patient for a twelve-week treatment, or 666 Euros per tablet.

According to the newspaper Le Monde, the price of each tablet was 280 times more than the production cost. In France, it is calculated that 250,000 patients should receive this medicine, the cost of which would represent 7 per cent of the annual state medicine budget.

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South Centre statement to the UPOV Consultative Committee on the issue of interrelations with the FAO-ITPGRFA

Below is the South Centre statement made at the UPOV Consultative Committee meeting on 17 March 2016. The statement was made by Viviana Munoz Tellez, head of the Centre's Development, Innovation and Intellectual Property (DIIP) Programme.

The South Centre recognizes the importance of both formal and informal seed systems and ensuring equity in farming systems, particularly in developing countries.

I appreciate the opportunity for the South Centre, an intergovernmental organization of developing countries, to make an intervention to the UPOV Consultative Committee on this issue. We applaud this effort towards promoting the participatory and inclusiveness of the process.

South Centre is here today because we recognize the importance of both formal and informal seed systems and ensuring equity in farming systems, particularly in developing countries. There is an urgent need for countries to take measures to protect and promote farmers rights, in accordance to Article 9 of the FAO ITPGRFA and toward achieving the United Nations (UN) agreed Sustainable Development Goals (SDGs).

Countries through the SDGs are committed to tackling hunger not only by increasing agricultural productivity but also the incomes of small-scale food producers, in particular women, indigenous peoples, and family farmers, as well as by ensuring sustainable food production systems and resilient agricultural practices adapted to climate change.

Countries are also committed through the SDGs and international agreements to maintain the genetic diversity of seeds, and ensure access to and fair and equitable sharing of benefits from the utilization of genetic resources and associated traditional knowledge.

Protecting farmers' practices with respect to saving, using, exchanging and selling seeds and other propagating material is central to achieving these objectives.

The issue of interrelations of UPOV and the ITPGRFA is crucial to advance the realization of farmers' rights.

The result from the discussion on interrelations should be to facilitate the enactment and implementation of legislation by members of UPOV Union and contracting parties of the FAO ITPGRFA that promotes the full and fair exercise of farmers' rights.

South Centre responded in 2014 to the invitation of the Governing Body of the FAO ITPGRFA by submitting comments on the issue of interrelations between the FAO ITPGRFA, UPOV and WIPO. The submission is publicly available on the treaty website: http://www.planttreaty.org/content/south-centre-submissions-interrelations-upov-wipo

With regards to the current exercise to identify possible areas of interrelations, South Centre suggests that the draft list of issues be extended to include in addition to Article 9 provisions, including 9.1, the Preamble of the FAO ITPGRFA and Article 6.

South Centre agrees that there is a need for deeper analysis on the issue of interrelations between UPOV, the FAO ITPGRFA, as well as with the WIPO. Thus, we support the establishment of an independent experts committee to undertake a report.

We also support the idea of a symposium to share experiences and views on the implementation of the UPOV Conventions and the FAO ITPGRFA. We kindly request, in continuing with the participatory and open nature of the discussion, that observers and in particular, farmer organizations, are invited and supported to participate in the symposium.

The grant of patents...

(Continued from page 21)

The application of patentability requirements for medicines, given their public health dimension, should be considered with even more care than in the case of regular merchandise or luxury items.

The first and most important step is to use the freedom permitted by the TRIPS Agreement to define the patentability requirements: novelty, inventive step and industrial applicability (utility) in a way that keeps sight of public interest in the wide dissemination of knowledge.

Germán Velásquez is the Special Adviser for Health and Development of the South Centre.

Boutros Boutros-Ghali—The Nobility of Ideas and Ideals

Boutros Boutros-Ghali, former UN Secretary-General and former Chair of the Board of the South Centre.

This article is in remembrance of Boutros Boutros-Ghali, who had been Secretary General of the United Nations in 1992-1996. He also served as Chairperson of the Board of the South Centre from 2003 to 2006.

By Roberto Savio

It is no coincidence that Boutros Boutros-Ghali (BBG), who died on February 16, was the only Secretary-General in the history of the United Nations to have served only one of the two terms that have always been allowed. The United States vetoed his re-election, in spite of the favourable vote of the other members of the Security Council. He was considered too independent.

We have now forgotten that in 1992, on US request, BBG authorised a UN intervention in Somalia, run by a US General, the aim of which was to distribute US$90 million of food and aid to the former Italian colony, shaken by an internal conflict among several war lords. The intervention cost $900 million dollars in military expenses, and ended with the downing of two Black Hawk helicopters and the tragic death of 18 American soldiers, dragged through the streets of Mogadishu.

An obvious expedient for the United States was to put the blame squarely on BBG, who became the scapegoat during the electoral campaign for the 1996 US presidential election. In his campaign, Bill Clinton referred to him as "Boo Boo Ghali", and an alliance was made with the then US Ambassador to the United Nations, Madeleine Albright, to get rid of him in exchange for her becoming Secretary of State.

As you can see, I do not intend to write a ritual commemoration of BBG. I travelled with him on the same flight to Paris when he left the United Nations (only the Italian ambassador went to say goodbye at the airport), and I remember the ease with which, when we arrived at the immigration line, he went to the Non-EU queue, in spite of a policeman inviting him to the diplomats' exit. He said: "My friend, those times are gone, now I am a citizen like you." And when we took a taxi, he had to fight with the driver, an Egyptian, who did not want him to pay.

BBG was not popular in the United Nations. He was very strict, very private (he never went to any reception) and very aloof. He was, in reality, a Professor of International Law, which was his real interest in life. He did not like very many people but suddenly became alert when he met somebody with a personality, or an unusual person. And he looked on the world of the United Nations as too pompous and formal. He always preferred a book to a diplomat, but if you became his friend, you found a very ironic and amusing mind, with striking intellectual depth and shy human warmth.

BBG came from an historical Egyptian orthodox family, which was very rich until [President Gamal Abdel] Nasser's nationalisations. He considered that, because of his family, he could not be conditioned by power. He was a Copt, married to a strong and intelligent Jewish Egyptian, Leila, and he was able to make a career up to the level of Secretary of State, while maintaining his university tenure. When he was vetoed by the United States for a second UN term, he told me: "Americans do not want you to say 'yes', they want you to say 'yes sir'."

He never forgot his identity. He spoke of himself as an Arab, and openly wondered whether he would have had the same treatment had he been white and American or European. He openly sympathised with what he called the "underdogs" and the "exploited", and he tried to make the United Nations once again a forum of global governance. We have to remember that when BBG became Secretary-General in January 1992, the United Nations was at the end of a long process of decline which had started with US President Ronald Reagan in 1981.

Eight years earlier, in 1973, the UN General Assembly had unanimously approved a global plan of governance, under which international cooperation became the basis for its actions. Out of this plan, for example, the UN Industrial Development Organization (UNIDO) was created, and a Summit of Heads of State was even held in Cancun, Mexico, in 1981 to advance on a New Economic Order.

It was the first overseas visit of newly-elected U.S. President Reagan, and he immediately made it clear that the days of the United Nations were finished. The United States, he said, would not tolerate being straightjacketed in an absurd democratic mechanism in which its vote was equal to that of Monte Carlo (he probably meant Monaco!).

The United States had become rich because of trade, and its slogan was 'trade not aid'. British Prime Minister Margaret Thatcher was also part of the Cancun Summit, and she and Reagan established an alliance making markets and the free movement of capital the new basis for international relations.

From 1981 to 1992, the world changed dramatically, not only because of the collapse of a bilateral world with the end of the Soviet Union, but because the winners took literally the end of communism as a mandate for a capitalism disencumbered from any form of governance.

BBG was not a left-wing person, but he felt how the big powers were marginalising the United Nations. Finance and Trade – the two engines of globalisation – were already running outside of the organisation and BBG spoke about this trend based on national interest with the concern of an Arab and the distaste of a Professor of International Law.

In his early days as Secretary-General, he made a strong effort to establish an Agenda for Peace, a strong juridical document on a clear role for the United Nations, which was conveniently ignored by the great powers.

He then proceeded to convene a number of extraordinary conferences, from the one on Environment (Earth Summit) in Rio de Janeiro in 1992 (the basis of the path towards the Paris Climate Conference at the end of 2015), to the conference on Human Rights in Vienna in 1993, the conference on Population in Cairo in 1994, the Social Summit in Copenhagen in 1995 and the conference on Women in Beijing in the same year.

In all those conferences, the United States and the other great powers had to bow again to the rules of international democracy, and accept resolutions and plans of action that they would gladly have avoided.

When they finally got rid of him in 1996, the decline of the United Nations resumed its course. Even Kofi Annan, who was chosen to succeed BBG on Madeline Albright's request, eventually fell into disgrace, because he tried to retain some independence for his actions.

Today, the United Nations has no funds for action, and has become a dignified International Red Cross, left with education, health, food, children and any other humanitarian sector which is totally extraneous to the arena in which the politics of money and power is played out. The Millennium Development Goals, adopted with great fanfare from the world's Heads of States in 2000, would cost less than 5% of the world's military expenses. The five permanent members of the UN Security Council are responsible for the international trade of 82% of weapons, and the Council's legitimacy for military intervention is a blanket conveniently used according to circumstances. The sad situation of Iraq, Syria and Libya is a good example.

Meanwhile, the great powers have not hidden their agenda of displacing the debate on governance from the United Nations. The Group of Seven has become the Group of 20, and the World Economic Forum in Davos a more important space for exchange than the UN General Assembly.

BBG viewed the decline of the UN with regret. After he left, he moved into positions which were consistent with his concerns. He became Secretary-General of the International Organisation of La Francophonie, where again he had trouble with the French because he wanted to make alliances with other Latin language areas given a cultural not merely linguistic view of the world to be mobilised.

He then became Commissioner for Human Rights in Egypt, and did not deviate from his overall political view by becoming Honorary President of the Belgrade-based European Centre for Peace and Development, an organisation created by the UN General Assembly which has played a unique role in creating academic cooperation all over the Balkans and other countries of Eastern and Central Europe. In this centre, he found a place where his ideals of justice and peace, development and cooperation, were still vibrant and active.

BBG died in the moment of clashes between the fundamentalists of Islam and the others. He had tried to draw attention to this problem which he had clearly seen looming, and he leaves a world where his ideas and ideals have become too noble for a world where nationalism, xenophobia and conflict have become the main actors in international relations.

It is time now to look more at those ideas and ideals, and less to BBG as a human being, with his inevitable flaws and shortcomings. This would also be as he would like to be remembered. With him, we lived through what unfortunately looks now as the last great moment of the United Nations, and of international law as the basis for cooperation and action.

Roberto Savio is publisher of Other News, editorial adviser to IDN (InDepthNews) and adviser to Global Cooperation Council. He is also co-founder of Inter Press Service (IPS) news agency and its President Emeritus.

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A group photo of a South Centre Board Meeting with Boutros Boutros-Ghali (2nd row from the top, third from left) who was Chairman of the Centre in 2003-2006.