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ECA POLICY BRIEF

Eleventh World Trade Organization Ministerial Conference (Buenos Aires, December 2017) in the context of Africa's Agenda 2063 and the Continental Free Trade Area

The present policy brief has been made available by the African Trade Policy Centre of the Economic Commission for Africa to provide background information on the key issues expected to be discussed at the eleventh World Trade Organization Ministerial Conference. It is based on a series of discussion papers developed by the African Trade Policy Centre in collaboration with the South Centre. Full papers are available upon request.

1. Introduction

Critical challenges face Africa as the eleventh World Trade Organization (WTO) Ministerial Conference approaches, which will be held in Buenos Aires in December 2017. Some WTO members are pushing strongly for outcomes at the Conference, which, if agreed to, could undermine the aspirations articulated in Agenda 2063 for continental transformation and the regional market that negotiations on the Continental Free Trade Area are seeking to put in place.

The Doha Development Round was launched in 2001. A central objective was to correct the inequities in the WTO agreements, especially those relating to agricultural trade. Notwithstanding years of Doha negotiations, by 2014, when the United States of America adopted its new farm bill, it was no longer interested in pursuing the agriculture negotiations on the terms under which those negotiations had been conducted previously. Since then, the United States has wanted to close the Round and move to negotiate new issues. Developing countries have resisted this suggestion and demanded the conclusion of the Round.

Technically, the Doha Development Round is ongoing. The final language in the Nairobi Ministerial Declaration (WT/MIN(15)/DEC) recognized that many members reaffirmed the Round and remained committed to its conclusion, while other members did not reaffirm the Doha mandates. It also noted that members have various views on how to deal with the negotiations. A commitment was made to advance negotiations on the remaining Doha issues.

On new issues, similar differences existed. It is stated in paragraph 34 of the Nairobi Ministerial Declaration that, "While we concur that officials should prioritize work where results have not yet been achieved, some wish to identify and discuss other issues for negotiation; others do not. Any decision to launch negotiations multilaterally on such issues would need to be agreed by all Members".

Since the Ministerial Conference in Nairobi in 2015, the bulk of energy has been put into e-commerce (a new issue)[1] and, recently, investment facilitation (another new issue). Less emphasis has been given to agriculture and other remaining Doha Development Round issues.

1 As will be noted later, there is a 1998 work programme on e-commerce that mandates discussions, not negotiations.

Section II of this background brief outlines the key issues posed by the rise of the digital economy. Section III discusses the background and implications on Africa of the current discussions on the new issues. Section IV outlines the developments in and implications of the remaining Doha Development Round issues and discussions. Section V presents recommendations on process issues for the eleventh Ministerial Conference and section VI provides conclusions and discussion points.

2. Features of the digital economy and implications for African trade

The digital economy is rapidly emerging. In and of itself, this is already going to be a major challenge for African economies. The new raw commodities of the future are data, and Africa will require a digital industrialization and trade strategy. Before any of this can happen, however, the countries where the large digital and technology companies reside[2] have been suggesting that there should be new trade rules. It has been proposed that such rules could bring benefits to developing countries, including helping countries to develop their e-commerce capability and catapult their micro-, small- and medium-sized enterprises into the global markets.

A distinction must be made, however, between e-commerce and the type of new e-commerce rules that are being proposed at WTO. The rules suggested include, for example, free data flows, no localization requirements and no disclosure of source code. Met with resistance in some quarters in 2016, proponents are now articulating a seemingly softer step-by-step version, beginning with possible rules on e-signatures and authentication, and the facilitation of online payment methods, among others. This is also being coupled with other proposed rules in domestic regulation or trade facilitation in services and investment facilitation.

Working in combination, these rules would disallow African countries, in the future, to put in place data regulation laws and severely constrain their ability to implement their own digital industrialization plans.

The ongoing "datafication" of all aspects of our lives has led to the emergence of data as new, very valuable, raw materials. Those able to analyse the data can obtain the market (e.g., personally targeted advertisements) and attain digital intelligence on a consumer or society. This can be in a myriad of areas, such as logistics, agriculture, health, education, energy usage and human behaviour. As datafication of all aspects of life becomes the norm, there are immense governance, political and even security implications, drawn from questions over ownership and the holding of data.

In addition, industrialization in this new age will require a rethinking of African industries and an African data strategy. It will be important to consider what kind of regional strategy can be put in place for processing and gaining value out of Africa's own data. Manufacturing is being digitized and likely absorbed with artificial intelligence. The boundaries are blurring between manufacturing and technology.3 Smart goods are also being "servicized". Instead of a physical product to be sold, it is becoming a service that is provided to its customers on the basis of the digital stream created by the smart product.[3]

There is also a major shift from services provided through a commercial presence, such as foreign banks setting up branches (Mode 3) to the cross-border supply of services (Mode 1), for example, through e-financial platforms. This is also happening in health, education and professional services, among others.

The digital economy is characterized by extreme concentration. The world's five biggest companies (by market capitalization) are now all technology companies: Apple, Alphabet (the parent company of Google), Amazon, Facebook and Microsoft.[4] This has

2 The acronym sometimes used to describe the technology giants is GAFA-A (Google, Amazon, Facebook, Apple, Alibaba). See, for example, http://distributionmarketingblog.accenture.com/applying-gafaa-banking-approach-to-all-financial-services-institutions.

3 Deloitte University Press, The Future of Manufacturing: Making Things in a Changing World (2015). Available at www2.deloitte.com/content/dam/Deloitte/za/Documents/manufacturing/ZA_Future_of_Manufacturing_2015.pdf.

4 Jonathan Taplin, "Is it time to break up Google?", The New York Times, 22 April 2017. Available at www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html?_r=0.

created scope for anti-competitive practices, such as predatory pricing (i.e., running at a loss in order to capture a market) and buying over successful companies. These practices can easily undermine attempts in developing countries to compete and build equivalent domestic platforms.

The other feature of the digital economy is automation and, as a result, reshoring. For example, Adidas has moved some of its manufacturing back to Germany, having discovered that it is cheaper to produce shoes with robots and 3-D printers than with Asian labour.[5] The big garment companies are thinking along similar lines. This has implications for industrial policy in developing countries, including those in Africa. It was warned in an Oxford Martin School report that automation will have a greater impact on developing countries because of lower income levels and safety nets, compared with developed countries. The expectation that industrialization will fuel employment opportunities may not be so easily achievable. Instead of export-led manufacturing growth, developing countries, according to the report, will need to search for new growth models. Services has been touted as an option; however, many low-skill services are becoming equally automatable.[6]

An African digital industrial strategy would include elements to build domestic and regional data capabilities, for example, harvesting and processing domestic and regional data. This could include building data hubs to support this industry in which the regional data (at least in some sectors) can be stored and processed. Examples of success stories include China, but also Ireland and Sweden, where data centres have become important hubs for the software industry, the gaming industry, Internet-related industries and data industries.[7]

A digital version of the Continental Free Trade Area agreement could be used to create a regional digital market. Much like the agreement, in which a firewall of tariffs is erected to give domestic suppliers breathing space to supply to the regional market, the same holds true for the African digital regional market. Some protection is at least needed in specific areas for domestic suppliers. The awareness of data and data localization as a national economic strategy has been recognized by several nations.7 For starters, a national or regional digital market can be supported by e-government procurement from domestic markets.

Conditions on investors should be considered. Strategies to build up digital economies have included foreign partnerships with local firms. If digital companies want access to the domestic market, Governments may allow this, but with conditions of partnership with local firms. Technology transfer requirements of foreign suppliers and the establishment of research and development centres have also been used. This includes disclosure of source code that can support domestic industries to do reverse engineering (as the Chinese have also done).[7]

3. New issues and the stakes for Africa at the eleventh Ministerial Conference

The proposals on the table in e-commerce, domestic regulation in services and investment facilitation run deep in terms of their implications, the reasons being:

- They are about regulating the trade route of tomorrow. Given that a large part of manufactured goods will also be traded as services, "domestic regulation in services" can be seen as the regulation of goods and services.

- Governments' ability to put in place regulation is being constrained by these disciplines. This is deliberate because, unlike the world of trade in physical goods, in which tariffs guard access to the market, in this digital world with no tariffs (as yet), government regulations are the gatekeepers to the market.

5 "Adidas's high-tech factory brings production back to Germany: Making trainers with robots and 3D printers", The Economist, 14 January 2017. Available at www.economist.com/news/business/21714394-making-trainers-robots-and-3d-printers-adidass-high-tech-factory-brings-production-back.

6 Oxford Martin School and Citi, Technology at Work v2.0: The Future is Not What It Used to Be (2016). Available at www.oxfordmartin.ox.ac.uk/downloads/reports/Citi_GPS_Technology_Work_2.pdf.

7 Shamel Azmeh, and Christopher Foster, "The TPP and the digital trade agenda: Digital industrial policy and Silicon Valley's influence on new trade agreements", Working Paper Series, No. 16–175 (London: London School of Economics, 2016).

Today, the flow of data is de facto already taking place, which also means that trade can already potentially flow. There are some data localization regulations that specific Governments have taken, but, by and large, digital markets are quite open. E-commerce and domestic regulation rules are about disabling countries from having data localization rules in the future. They are also about ensuring that countries cannot block access to their markets through mandating only the use of specific technologies, methods of authentication or specific technical standards.

Investment facilitation rules are about making sure that, if countries do put in place specific localization rules or simply that if suppliers do have to be located in a foreign territory to supply a digital service, access would more easily be available.

A. Key issues on e-commerce

There are attempts to convert the current WTO work programme on e-commerce, which has a mandate for *discussions* on e-commerce as it relates to the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services rules, to a mandate to *negotiate* new rules. Given that proponents faced stiff resistance by Africa and other developing countries in 2016, they have readjusted their narrative and are now talking more about trade facilitation in e-commerce.

The proposals are problematic, given that they include opening to online financial services platforms and suppliers (the up-and-coming "fintech" industry) and, therefore, the free flow of data in specific sectors, and technological neutrality in e-signatures and authentication methods to allow big digital companies to have market access.

The provisions on e-commerce in the Trans-Pacific Partnership agreement and the Trade in Services Agreement, also replicated in the proposals by the United States, the European Union and Japan at WTO, provide indication of the next stage of discussions.[8] These include, among other issues, free data flow, no localization requirements, no disclosure of source code[9] (no technology transfer requirements by the United States) and safeguarding network competition and telecommunications.

The kind of rules sought would be very different from those proposed if they were rules that allowed Africa to be truly e-commerce-ready. Enabling rules could include binding technology transfer rules, rules mandating disclosure of source code for security reasons and as a form of technology transfer to encourage development of domestic suppliers, rules that encourage data localization for the development of domestic capacities and rules that commit to financial assistance for technology development and infrastructure in order to bridge the digital divide and facilitate e-commerce.[10]

B. Key issues in domestic regulation in services

A range of developed countries (including Australia, Japan and New Zealand, and State members of the European Union) have proposed to agree to a package of rules in the eleventh Ministerial Conference on domestic regulation in services. These rules are to "apply to measures by members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services where specific commitments are undertaken."[11] These disciplines must apply to all levels of Government, namely, at the central, regional and local levels.

The proposals have the following key elements, among others:

8 See "Work programme on electronic commerce – non-paper from the United States" (2016), document JOB/GC/94, "Work programme on electronic commerce – trade policy, the WTO and the digital economy" (2017), document JOB/GC/116, and "Work programme on electronic commerce – non-paper for the discussions on electronic commerce/digital trade from Japan" (2016), document JOB/GC/100. Available at https://docs.wto.org.

9 Source code is the programming language behind a software.

10 Some would argue that WTO is not a development bank and therefore cannot involve itself in infrastructure projects. This point is debatable, after all, because there are no rules to say that capacity-building in trade cannot include infrastructure. Whatever the case may be, the other areas are well within the WTO mandate.

11 See "Working part on domestic regulation - Administration of measures" (2016), document JOB/SERV/239/Rev.1. Available at https://docs.wto.org.

- The measure relating to licensing and qualification requirements, procedures and technical standards must be "objective and transparent".

- The regulator must "administer in an independent manner".

- The technical standards must be developed according to "open and transparent processes".

- Very detailed transparency requirements (i.e., all aspects of licensing and qualification requirements and procedures and technical standards) must be published, including time frames for processing fees and procedures for monitoring compliance.

- Fees must be reasonable, transparent and cannot restrict the supply of the service.

- Allow for prior comment (i.e., foreign industry players are allowed to comment on regulations that are being developed domestically, among other things). The literature on this consistently finds that this process leads to regulatory capture by the interest groups.[12] This could be regulatory capture by the well-resourced foreign competitor rather than domestic suppliers or consumers.

Developing countries can easily be challenged on the basis of these disciplines when implementing measures intended to support the development of domestic industries. It will be clear that licensing requirements and technical standards are very broad, and the same objectives that the major economies have advocated in e-commerce (free data flows, no localization requirements and no source code disclosure) can also be obtained through this route.

A country could be challenged, for example, when regulators put in place data localization requirements in specific sectors (e.g., health, financial services, transport and energy) to give an advantage to the domestic data processing sector or when additional forms of regulation are required for data security, privacy or other concerns. A Kenyan regulation for additional precautions and measures to be taken by mobile payment operators regarding financial data produced by mobile devices to meet anti-money laundering requirements was already accused of not regulating in an "independent manner" and in favour of domestic service suppliers.[13] A challenge could also arise when regulators do not allow for a service to be supplied cross-border and the technical standard specifies that it must be provided through a commercial presence, including licences granted to banks, insurance companies, education suppliers, architects, lawyers and doctors only if they are located domestically (e.g., in order to be able to enforce standards or for taxation reasons).

Cross-subsidization through fees would also be subject to challenge. For example, in South Africa, at the local level, fees in a development project can sometimes also cover infrastructure costs, such as sewers, electricity, water supply and road improvements.[14]

When the process of formulating technical standards does not allow for prior comment or prior publication, this can appear to be non-transparent or not have an "open" process.

Challenges can also arise when the laws do not spell out an exhaustive list of criteria, thereby leaving space for the discretion of the regulator.[15]

C. Trade facilitation in services

India has weighed in on the discussions in domestic regulation in services with its expanded version called "Trade facilitation in services". While there are differences, by and large, both in breadth and scope, it goes further than the domestic regulation rules. Central to India's interests in the trade facilitation in services are Mode 4 (temporary movement of natural persons (e.g., H1B visa issues in relation to the United States) and relaxing the European Union's data privacy laws (article 7 of the trade facilitation in

12 Aik Hoe Lim and Bart De Meester, eds., WTO Domestic Regulation and Services Trade: Putting Principles into Practice (Geneva: World Trade Organization), pp. 5-6.

13 James Mbugua, Kenya: big banks in plot to kill M-Pesa", Nairobi Star, 23 December 2008.

14 City of Johannesburg, "Development planning – Land use management". Available at https://joburg.org.za/index.php?option=com_content&id=552&Itemid=9.

15 For example, buildings should blend in with the local architecture and must not be "unsightly or objectionable" (South Africa's National Building Regulations Standards Act 103 of 1977).

services). Both areas are highly unrealistic demands in the current climate.

There are no mandates for many elements of the trade facilitation in services. For developing countries and Africa, this is problematic, given that it is undermining efforts to ensure that the Doha Development Round and other mandates (e.g., the e-commerce work programme) are to be respected.

The proposal requires the free flow of data in Mode 1 (cross-border supply of services) in the sectors in which members have liberalized in their General Agreement on Trade in Services schedules. Mode 1 is the trade route of the future. This provision would potentially undermine the building of domestic digital markets if members have already liberally opened in Mode 1. This data flow proposal has similar elements to the United States/European Union/Japan proposals under e-commerce on data flows.

Transparency requirements for all service sectors are unrealistic in relation to countries' institutional capacities, as well as profoundly burdensome and intrusive. The proposal also contains prior comment requirements with all the problems raised earlier.

Essentially, the proposal will subject developing countries to developed countries' level of regulatory sophistication. In addition, as with domestic regulation, it will be a general tightening of Governments' bureaucratic discretion in the regulation of services. This needs to be understood to also include "servicized goods" in the future.

D. Investment facilitation

Some members are also seeking a mandate at the eleventh Ministerial Conference to negotiate investment facilitation rules. Proposals were submitted in March and April 2017 by Brazil, China and the Russian Federation suggesting extremely detailed transparency requirements that would entail spelling out all criteria used in licensing requirements and the appraisal of potential investors. If criteria are not spelled out in full, the highly elaborated procedural mechanisms would make it difficult for a country to prevent investors from entering the market.

This effectively means that markets are open to investors without conditions unless adequate criteria and conditions have already been put in place. The door is left open for members to contribute to the list of criteria. Nevertheless, in effect, these are "pre-establishment" investment market access rules, subject to the rules of the WTO dispute settlement. Rather than moving in the direction of reforming the controversial bilateral investment treaties, these would simply be an added layer of rules over and above the existing treaties.

Investment is also not rightfully an issue that belongs to WTO. The investment elements that are related to trade are already in WTO agreements. The issue of regulating investors' entry and the extent to which countries have spelled out or not spelled out every single criteria and rule is a domestic and, at most, bilateral concern. The mandate set out in the decision adopted by the General Council on 1 August 2004 (WT/L/579) also clearly states that the relationship between trade and investment will not form part of the Doha work programme and that there will be no work towards negotiations on this issue with the WTO during the Doha Development Round.

4. Remaining Doha Development Round issues

A. Agriculture

Agriculture is the flagship of "development" in the Doha Development Round. The level of ambition in the negotiations in agriculture would determine the level of ambition in other areas. If there is no movement in agriculture in the direction that is in developing countries' interests, they have always maintained that they would not be flexible in other areas.

To date, Africa still suffers from the imbalanced agricultural trade rules. The WTO Agreement on Agriculture had allowed developed countries to continue their large subsidy programmes and to protect their agriculture through a range of tariffs and other barriers. These large subsidies and other market access barriers remain in place. The European Union's total notified domestic supports to WTO amounts to a little more than 81 billion euros annually. For the United States, this figure is nearly $150 billion (including their domestic food stamps programme). By contrast, given that most developing countries were not providing many domestic supports in the 1990s, under the Agreement, developing countries were allowed only a small margin for subsidization: what is called their "de minimis" and article 6.2, which permits Governments to provide input subsidies to their small or resource-poor farmers.

Even more important, the Agreement on Agriculture created a green box containing mainly subsidies programmes appropriate to developed countries. The bulk of support for the United States and European Union is now covered under the green box: approximately 87 per cent of European Union and 94 per cent of United States total domestic support. Africa still suffers from these subsidized commodities, undercutting their domestic farmers. These include milk powder and poultry from the European Union and wheat, rice, maize, cotton and soybeans from the United States.[16]

Domestic supports

In this context, the WTO domestic support negotiations are important for Africa. This is, however, also the situation in which there is the strongest pressure in developed countries for the current system to prevail. The Doha agriculture negotiations made some inroads and recognized to some extent the entrenched imbalances in the existing Agreement on Agriculture rules. It proposed some modifications, namely, that developing countries[17] not be required to take domestic support cuts. Developed countries with large subsidy entitlements had to take on these cuts.

Nevertheless, the most recent proposals (by Argentina, Australia and Brazil) are asking all countries to take on domestic support cuts in the "trade-distorting" domestic support categories. The discourse is that big developing countries, such as China and India, are now the major subsidizers. A comparison of domestic support numbers in their aggregate is rather misleading, given the differential in the number of farmers.18 The proponents have also studiously avoided any conversation about the green box, claiming that it is largely non-trade distorting and that the Doha mandate is to have substantial reductions in trade-distorting domestic supports. The case has been made by Africa, however, that these supports are a major problem owing to their large amounts and the "box-shifting".[19]

Africa needs to push for a good and meaningful outcome in this area. Nevertheless, if a balanced solution is elusive, as appears to be the case, it is better not to have an outcome in this area, given that the proposed commitments affect developing countries rather than developed countries and would serve only to enforce existing inequalities.

Public stockholding[20]

The domestic food programmes of developing countries are covered by the green box (Agreement on Agriculture, annex 2, para. 4). Their public stockholding for food security purposes are supposedly also in the green box (Agreement on Agriculture, annex 2, para. 3). In reality, however, these programmes must be accounted for as part of developing countries' *de minimis* (Agreement on Agriculture, annex 2, footnote 5).

The current rules on public stockholding based on WTO rules on 1986-88 prices are so outdated that it is simply logical that new rules are needed in this area. The rules on public stockholding in the Agreement on Agriculture state that the gap between the 1986-88 prices and the current administered price (i.e., the price at which the Government buys

16 South Centre and African Trade Policy Centre, "The WTO's agriculture domestic supports negotiations" (January 2017).

17 Those with 0 bound Aggregate Measure of Support. In WTO jargon, this is known as a category of trade-distorting supports.

18 Total agriculture supports are $132 billion in the United States (2014), 81 billion euros in the European Union (2013), approximately $53 billion in India (2010) and approximately $100 billion in China (WTO notifications). For comparison, the estimate of the number of people employed in the agricultural sector (based on data of the Food and Agriculture Organization of the United Nations) is approximately 2.2 million in the United States (2014), approximately 191 million in India (2010) and 241 million in China (2013).

19 World Trade Organization, "African Group Elements on Agriculture in the Doha Development Agenda Negotiations" (2015), document JOB/AG/45 2015. Available at https://docs.wto.org.

20 See South Centre and African Trade Policy Centre, "The WTO's agriculture domestic supports negotiations" (January 2017), and South Centre, "WTO's MC10: agriculture negotiations – public stockholding" (December 2015).

the product from the farmer) must be notified as a country's subsidy. This has led to subsidy calculations for developing countries that are inflated and highly unrepresentative of the actual subsidies provided.

An interim peace clause solution was arrived at in the 2013 WTO Ministerial Conference in Bali, Indonesia. Developing countries with these public stockholding programmes should not be taken to the WTO dispute settlement system, even if they are in breach of their *de minimis* limit, as long as they have notified WTO that they are exceeding or are at risk of exceeding their *de minimis* limits.

Many African countries do have public stockholding programmes. They are important for rural livelihoods and food security and provide subsistence farmers in developing countries with a buyer of last resort, namely, the State, contributing to a minimal level of stability and income. They have been known to be extremely useful in lower-income countries where markets may not be functioning well (e.g., the market is manipulated by traders) and as a form of domestic food aid to areas experiencing food shortages. Several African countries, owing to the problematic methodology of the outdated rules, have already been in breach of their *de minimis* limits in some years.

The interim peace clause will continue until a permanent solution has been established.[21] On the basis of the Bali Ministerial Declaration (WT/MIN(13)/DEC), the issue of the permanent solution should be concluded "no later than the 11th Ministerial Conference". Many areas, however, are problematic in the peace clause. African countries with no existing programmes will not be covered if they begin these programmes. The anti-circumvention clause, stating that the public stockholding programme should not distort trade or adversely affect the food security of another member, also considerably weakens the protection provided by the peace clause.[22] It is not difficult to accuse a member of distorting trade, and therefore these countries can still be taken to the dispute settlement body.

The Group of 33 coalition of 46 developing countries is still very actively pushing for a public stockholding solution by the eleventh Ministerial Conference (in accordance with the Bali mandate). Their proposal is that public stockholding supports should be notified under the green box, as had been agreed to in the Doha negotiations and which is reflected in the most recent text of the negotiations.[23]

Special safeguard mechanism

The special safeguard mechanism negotiations are also an important part of the Doha agriculture negotiations for developing countries, including Africa. The goal of the mechanism is to protect food security and rural livelihoods. The idea is that, in times of an import surge (i.e., a large influx of agricultural imports), developing countries can increase their tariff levels or, in times of an import price decline, an increased tariff can also be used to protect the domestic sector.

Today, Africa still has one of the highest levels of food import surges. They are, in fact, highest for least developed countries, followed by the small and vulnerable economies. While the developed countries are still subsidizing their agriculture, the special safeguard mechanism would be a relatively small compensatory tool to help Africa to safeguard its producers to a very limited degree, and only in the most difficult of times. It is also unlikely that the mechanism would be used extensively, given that population size in many developing countries is increasing and food imports are often needed. The most recent text of the negotiations[24] also contains many conditions, making it very difficult to invoke the mechanism. When invoked, the remedies available are very limited.[24]

21 World Trade Organization, "Public stockholding for food security purposes – Ministerial Decision of 27 November 2014", document WT/L/939. Available at https://docs.wto.org.

22 World Trade Organization, "Public stockholding for food security purposes – Ministerial Decision of 7 December 2013", paragraph 5, document WT/MIN(13)/38.

23 World Trade Organization, "Revised draft modalities for agriculture" (2008), document TN/AG/W/4/Rev.4. Available at https://docs.wto.org.

24 For a more in-depth analysis of the special safeguard mechanism conditionalities in the most recent text of the negotiations (TN/AG/W/4/Rev.4), see the following South Centre papers: "The volume-based special safeguard mechanism (SSM): analysis of the conditionalities in the December 2008 WTO Agriculture Chair's text" (November 2009) and "The price-based special safeguard mechanism (SSM): trends in agriculture price declines and analysis of the conditionalities in the December 2008 WTO Agriculture Chair's text" (November 2009).

Given that developed countries have enjoyed a special safeguard provision since 1995, a similar instrument for Africa and developing countries would address an existing inequality. In addition, the special safeguard provision has conditions that are more flexible than the special safeguard mechanism.[25]

Cotton

Cotton has been highly subsidized by both the United States and the European Union. Owing to the large production of cotton and the export of it on the world market, United States subsidies have had a debilitating effect on world cotton prices, affecting African and other developing countries' cotton farmers very negatively. The mandate from the 2004 General Council decision (WT/L/579) is that disciplines on cotton would be addressed "ambitiously, expeditiously, and specifically, within the agriculture negotiations". Since then, cotton has become equated with "development" in the Doha Development Round. Nevertheless, notwithstanding good mandates, negotiations regarding cotton have not advanced at WTO, and certainly not in the area that matters most: domestic support rules.

Moving forward, it is imperative that Africa put this issue at the forefront of the WTO negotiations. The proposals of the four major cotton-producing African countries, which contain calls for meaningful solutions, should be actively advocated.

B. Special and differential treatment

WTO agreements have special provisions for developing countries. Nevertheless, especially after the Uruguay Round, when developing countries were implementing them, they found them to be weak, too general and difficult to operationalize. Paragraph 44 of the 2001 Doha Ministerial Declaration (WT/MIN(01)/DEC/1) sought to address this problem, with the promise of a review of the special and differential treatment provisions. Notwithstanding years of negotiations, there have been few concrete outcomes. Before Nairobi and at Nairobi in 2015, proposals by the Group of 90 (the Africa Group, the Caribbean and Pacific Group and the least developed countries) were diluted by their developed negotiation partners to such an extent that the Group of 90 felt that the package given to them was not worth accepting.

In 2017, the groupings are once again finalizing proposals for negotiations. Some of the items to be put forward are likely to include trade-related investment measures (on local content measures); the General Agreement on Tariffs and Trade, article XVIII A and C (on infant industry); the General Agreement on Tariffs and Trade, article XVIII B (on balance of payments); the Agreement on the Application of Sanitary and Phytosanitary Measures (on providing financial and technical assistance to developing countries facing such barriers); the Agreement on Technical Barriers to Trade (assistance to developing countries facing technical barriers on trade); the Agreement on Subsidies and Countervailing Measures (flexibility for the use of subsidies for industrialization); and technology transfer.

C. Fisheries subsidies

The 2030 Agenda for Sustainable Development makes a direct reference (target 14.5 of the Sustainable Development Goals) to the elimination of specific types of fisheries subsidies. Since their adoption, fisheries subsidies negotiations have been given yet another push at WTO, with some racing to try to attain a package by the eleventh Ministerial Conference.

There is a large range of fisheries governance instruments in the United Nations system (i.e., the Food and Agriculture Organization of the United Nations) and at the regional levels, namely, the regional fisheries management organizations and other regional mechanisms. There are also national Governments with their own regulations. Most of these have some form of fish management system and quotas. The biggest problem for many African countries is that fisheries from elsewhere illegally enter their waters and fish or the foreign operators who have access rights fish beyond what they are allowed. Many developing countries, including those in Africa, do not have the capacity to properly enforce their own rights in their exclusive economic zones. Improving the implementation and enforcement of the web of governance instruments (including national regulation) would be an important way to move forward in addressing the environmental

25 See South Centre "Comparing the special safeguard provision (SSG) and the special safeguard mechanism (SSM): special and differential treatment for whom?" (November 2009).

concerns regarding global marine fish stocks, as well as receiving enforcement support from countries that are hosting these operators.

A case has been made that, if subsidies that contribute to overfishing and overcapacity and if illegal, unregulated and unreported fishing are controlled and disciplinary measures are instituted by WTO, then it would help to reduce the sustainability challenges facing wild marine fish stocks. This could be true. Some of the proposals submitted, however, have been worrisome for many developing countries.

There are concerns that the subsidy prohibitions suggested by some[26] (i.e., subsidies that increase fishing capacity or those that support the construction of fish vessels) cut at the very heart of the types of supports that developing countries would require to develop their still underdeveloped fishing capacities. In addition, the small fisheries of developing countries could be unregulated (or insufficiently regulated), in addition to being insufficiently reported, and would be disadvantaged by efforts to remove subsidies from illegal, unregulated and unreported fishing (as unregulated and unreported).

If there is a package at WTO, it would be important that African countries' hands not be tied such that they are prohibited from increasing their domestic/regional fishing capacity in sustainable ways. In addition, the outcomes must allow African countries to support their small fisheries without a host of fisheries management conditions that are beyond their capacity to implement.

5. Process issues

No matter how well prepared countries have been on the substantive issues, the process remains an Achilles heel that can place countries at a severe disadvantage, leading to substantive outcomes that they would prefer not to have been made to accept. The two most recent Ministerial Conferences, in Bali in 2013 and in Nairobi in 2015, especially the latter, have been singled out by many members reconvening upon their return to Geneva as an experience that they did not want to see repeated. A key critique is the concentration of the process to a few delegations and the secretariat, with most ministers excluded from the negotiations. Several lessons can be drawn from the Nairobi process.

The most important issues that developed countries and allies wanted from the Ministerial Conferences (the key paragraphs in the Declaration on the Doha Development Round and new issues) were not put on the agenda for negotiations by the membership and were barely discussed. The time in the Ministerial Conference was spent on other issues, and when it was already running over time, the critical issues were pushed through with almost no discussion.[27]

There was some transparency in Geneva prior to the Ministerial Conference (through the room W process in which all delegations were present when negotiating the Declaration). Nevertheless, the most contentious issues were bracketed and not discussed by the entire membership. In past Ministerial Conferences, imperfect as they were, negotiations would be held in a green room configuration of 20 to 30 delegations. Those negotiations would break for coordinators of groupings to carry out group consultations. In Nairobi, the group overseeing the entire package was the Group of Five delegations (i.e., Brazil, China, India, the United States and State members of the European Union). None of the coordinators of the Africa Group, the least developed countries or the African, Caribbean and Pacific group of States were part of this.

26 See, for example, "Advancing toward a multilateral outcome on fisheries subsidies in the WTO - European Union" (2016), document TN/RL/GEN/181. Available at https://docs.wto.org.

27 The Group of Five met for 26 hours continuously in the final two days. This kind of scenario means that very critical issues can be slipped through at the very end because ministers who might resist would already be overly tired.

Members excluded from the main negotiations were presented the final text a day late and with little more than one hour to review it and decide whether to consent or object. The consensus process assumes that silence is consent. The Ministerial Conference was also extended by another day without warning. Therefore, many Ministers had left by the time they should have been present to take the most critical decision of evaluating the final package.

This process puts countries in the impossible situation of bringing the Ministerial Conference to a collapse if there is disagreement on the final package. This is a price that almost no country would want or would politically be able to take, even if their rights (in the future in the trading system) and those of many others were being preserved by such an action. To avoid this, inclusiveness in the negotiating process is critical so that a country's opposition to any part of a text can be made at an earlier stage, and it need not always mean a collapse of the Conference.

It would be preferable to follow a room W format before and during the Ministerial Conference, in which the text is put on the screen and the entire membership can provide comments. This would be transparent, inclusive and democratic. If not possible, a much less transparent and inclusive process is a large-enough green room negotiating process, in which all the coordinators of developing country coalitions must be represented. The negotiations must provide sufficient breaks for representatives to report back and discuss with their coalitions. To complement this, delegations that want to be part of the green room should be allowed to do so.[28]

Better than any of the above, decisions can already be taken in Geneva six weeks before the Ministerial Conference.[29] Conferences should not therefore be surprise events: too much is at stake in the negotiations for countries to take decisions in a rushed manner and under pressure-filled conditions that are stacked against countries that are not in the green room or in any "G" configuration. The idea that members should agree to negotiated packages at every Conference should be changed.

The Ministerial Conference should close at its scheduled time. Otherwise, developing countries are at a serious disadvantage. One member noted in Nairobi that it regretted not being able to change the tickets of the Minister and delegations because budgets were tight and it was the end of the fiscal year.

28 Ministers must be accompanied by the number of officials whom they feel they need, for example, three or four officials. Many countries have various persons working on a number of issues. Developing country ministers are not full-time trade negotiators and need the support of their officials.

29 Known as the full participation, inclusiveness and transparency principle. See World Trade Organization, "Eighth session of the Ministerial Conference – Statement by the Chairman" (2011), document WT/GC/133. Available at https://docs.wto.org.

6. Conclusion and discussion points

Heading towards Buenos Aires, and perhaps also at the Ministerial Conference itself, the areas of negotiations are likely to be: (a) the new issues, including e-commerce, domestic regulation/trade facilitation in services and investment facilitation; (b) agriculture (with a focus on domestic supports and public stockholding); (c) fisheries subsidies; and (d) possibly special and differential treatment.

If a change in mandate in the work programme on e-commerce (from discussions to negotiations) is agreed to or the door is opened for this change to happen, or if domestic regulation rules are accepted, the policy space for African countries to implement measures to support industrialization is likely to be significantly reduced. It is crucial to first implement a clear strategy on the continent on data industrialization before these issues are negotiated. This does not exclude discussions on the issues set out in the work programme.[30]

If the proponents of e-commerce and domestic regulation do not back down and if Africa stays on the path to first consolidating its digital regional market, a collapse of the Ministerial Conference could result. In that context, it would be better for WTO members to agree ahead of time that no outcomes are likely and that the Conference could be a stocktaking one, as has happened before.

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30 See World Trade Organization, "Work programme on electronic commerce" (1998), document WT/L/274, for details. There are very important issues highlighted for discussions for developing countries, for example, in the Committee on Trade and Development (access to infrastructure and transfer of technology) and in the Council for Trade in Services (e.g., classification issues).