

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

15 September 2017

Since the UNECA / South Centre Policy Brief was written in May, there have been further developments:

E-Commerce

In MC11, a mandate is being sought by major developed countries and some others to change the 1998 Work Programme on E-Commerce. The existing Work Programme (attached in Annex 1) was far-sighted. It had mandated Members to 'examine and report' on the treatment of electronic commerce within the existing WTO Agreements – the GATT, GATS, TRIPS Agreements. It also mandated Members to discuss the development implications of E-Commerce including infrastructure, transfer of technology, and movement of natural persons.

E-Commerce proponents, particularly the big players are impatient with these existing Agreements. They are based on a model of 'progressive liberalisation' – liberalising at a Member's own pace; some sub-sectors are open, others are closed. Instead, the big digital corporations want to have comprehensive access to global markets. They therefore want to side-line the existing Agreements, and in MC11, obtain a mandate that can allow them to begin negotiations on new rules that would be much more far-reaching in accessing global markets.

Hence **Japan** (JOB/GC/130, 14 July 2017) has a proposal suggesting to i) expand the issues discussed under the existing Work Programme (such as e-authentication i.e. no local content requirements allowed for domestic technologies, free data flows, rules disallowing localisation etc) and ii) to decide a year from MC11 if negotiations should begin.

Russia (JOB/GC/131, 14 July 2017) has a similar proposal but also suggesting that a new Working Group on E-Commerce is set up. This would take the energy out of or bypass completely the 'relevant bodies' now tasked to discuss e-commerce issues: the Council on Services, the Goods Council, the TRIPS Council, the Committee on Trade and Development. These relevant bodies are important because they oversee the implementation of the existing Agreements – the GATS, GATT and TRIPS. They are therefore the logical place to discuss E-Commerce if WTO Members are sincere about fine-tuning our existing Agreements to also apply to E-Commerce.

Agriculture

Domestic Supports has dominated the Agriculture discussions. The **EU/Brazil** submission (JOB/AG/99, 17 July 2017) is a major departure from the Rev.4 (the last agriculture modalities text which remains the African Group position). In the Uruguay Round, the large subsidisers were allowed to continue their subsidies (through large AMS entitlements¹), whilst most developing countries, as they had not provided subsidies,

¹ AMS is Aggregate Measure of Support – these are what the WTO's Agreement on Agriculture terms as 'trade-distorting domestic supports'. However, other categories, though not termed as such, have been found to be distorting also, including the Green Box.

were bound at 0 AMS. They were given a small subsidy entitlement, called the 'de minimis'². The Uruguay Round negotiations and Doha Round negotiations (including Rev.4) recognised this imbalance³, hence those with 0 AMS entitlements were not expected to undertake reduction commitments. This key principle is lost in the EU/Brazil submission, as well as in the other submissions (NZ/ Australia, G10, Japan).

Letting go of this principle means that all Members including developing countries with only their 'de minimis' will have to undertake domestic support reductions to their already small de minimis entitlements. This means turning the tables around, and putting the burden of agriculture domestic support cuts primarily on developing countries. (Most developed Members have shifted their supports into the so-called 'Green Box' where there are no disciplines). In contrast, most developing countries are using their de minimis supports.

Furthermore, the EU/Brazil proposal would allow those Members with AMS to concentrate supports in specific products (eg. the EU has high subsidies – up to 53% of value of production – in skimmed milk powder; the US up to 16% in cotton and 59% in sugar). Developing Members cannot do likewise as they have no AMS and their product-specific supports are capped at their de minimis 10% value of production for that product.

India and China have a joint proposal (JOB/AG/102, 18 July 2017) based on the spirit of the Rev.4. It underscores the importance of equity in the negotiations, and having a level playing field. It thus says that Members with AMS entitlements must eliminate these entitlements before further negotiations in agriculture can proceed.

In **Public Stockholding**, the mandate is to have a permanent solution by MC11. The same **EU/Brazil** proposal (JOB/AG/99, 17 July 2017) contains language that does not improve on the temporary solution – the Bali Peace Clause. In fact, it adds further conditionalities. It is very far from the **G33** proposal (JOB/AG/105, 19 July 2017) and cannot be the basis for discussions.

In **Cotton**, this must be a priority for the African Group. The **C4** has a draft proposal that dovetails with the India/ China proposal in Domestic Supports, since C4 also calls for the elimination of AMS supports in cotton.

Domestic Regulation in Services (GATS Art VI.4 Negotiations)

As of end July, a draft consolidated text has been informally circulated by proponents (**Australia, Canada, EU, New Zealand etc**⁴). The draft contains all the problematic elements in the earlier proposals. The GATS Article VI.4 is often seen as mandating that there must be negotiations. However, as the African Group has been repeating, the mandate is for Members to '*develop any necessary disciplines*'. The necessity for these disciplines remains elusive. Particularly with the emergence of the digital economy, governments may have to regulate in ways that they may have not anticipated thus far (e.g. localisation of data requirements or requirements to disclose source codes etc). Such regulations could be challenged under the proposed disciplines for lack of objectivity, independence, or for being more burdensome than necessary.

² As a 'de minimis' subsidy allowance, all developing countries can provide 10% of the value of production (VOP) of product-specific supports, and 10% VOP for non-product specific supports. For developed countries, in addition to their AMS, they have a de minimis of 5% of VOP for product-specific supports and 5% for non-product specific supports.

³ EU for example has an entitlement of over \$80 billion in AMS, in addition to their de minimis, US has \$19 billion, Japan over \$36 billion. In contrast, most developing countries had bound their AMS at 0.

⁴ The group of proponents Argentina; Australia; Canada; Chile; Colombia; EU, Hong Kong China; Iceland; Israel; Japan; Kazakhstan; Mexico; New Zealand; Norway; Peru; Republic of Korea; Taiwan; Switzerland.

Trade Facilitation in Services

India has resubmitted a revised proposal (JOB/SERV/267, 27 July 2017). However, taking on board comments including from the Africa Group, it seems that India will not be pursuing outcomes in this area for MC11.

Special & Differential Treatment (S&D)

The **Africa Group, LDCs and ACP** have submitted their proposal (JOB/DEV/48, 10 July 2017) containing legal language strengthening WTO S&D provisions for developing countries. This is in line with the Para 44 Doha Declaration mandate. There are suggestions in the area of Agreement on Trade-Related Investment Measures (TRIMS – allowing more flexibility for local content requirements to support local industries), Article XVIII (infant industry, balance of payments), the Agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT), transfer of technology etc. The reception by the key developed players has not been overwhelming.

Fisheries Subsidies

Despite intensive discussions in the Negotiating Group on Rules, positions are still very far apart. There are murmurings that there could be a less ambitious package prohibiting subsidies for Illegal, Unreported and Unregulated (IUU) fishing. However, even here, there are major differences amongst Members in the area of Special and Differential Treatment (S&D). Many developing countries remain concerned that their small fisherfolk which are not always well reported or regulated for lack of resources, could be categorised as IUU.

MSMEs

Argentina and Brazil et al (JOB/GC/127, 9 June 2017) are calling for a Work Programme in MC11 on MSMEs. This would include the possibility to begin negotiating rules that would in their opinion, support MSMEs. They suggest the following areas: information and transparency; trade facilitation; E-commerce; possibly transparency in public procurement.

Japan's aforementioned E-Commerce proposal (JOB/GC/130, 14 July 2017) also cites the importance of advancing digitalisation to support MSMEs.

EU's proposal on Regulatory Measures for Trade in Goods (TN/MA/W/144/Rev.2) requires governments to pre-publish new or changed regulations in SPS and TBT, and to provide the opportunity for 'interested persons' to comment.

Investment Facilitation

Brazil has been circulating informally a draft Investment Facilitation Agreement. It is likely that a mandate at MC11 is sought to allow for negotiations to begin on such an Agreement. The draft language (still subject to further revisions), seems to imply that countries must have listed all their screening criteria in all sectors. Failure to do so, or having only inadequately listed the criteria could lead to challenges. Similarly, Members' screening decisions of investors could also be challenged if their criteria are not perceived to have been 'clear' enough.

WAY FORWARD

Big decisions will be sought in MC 11. The major players are not looking to have new rules right away, but to open the doors to the negotiation of new rules. These new rules, if finally negotiated and adopted, are much more ambitious in terms of their liberalisation effect than anything we currently know in the WTO. African countries should therefore be extremely cautious about opening these doors since the proponents' interest

and the new rules they want, would be at odds with Africa's digital industrialisation or transformation agenda.

The new ground that is sought to be shifted includes:

- Changing the existing mandate in the E-Commerce Work Programme to open the door for negotiations for rules that are not in line, and will even contradict with the existing Agreements, and override the current 'progressive liberalisation' model of liberalisation
- Possibly having a new work programme on MSMEs – central to this would be new E-Commerce rules
- A mandate to begin negotiating the issue of investment facilitation, contradicting the existing mandate that during the Doha Round, no work is to be taken up on investment and the other 'Singapore issues'
- Agriculture – the basis of the negotiations is sought to be changed (dropping the Rev.4 principle that those with 0 AMS need not take commitments), so that the burden will principally be on developing countries. The impact may not be felt in the MC11 negotiated outcomes but in future negotiations.

E-Commerce

75% of Africa's households remain offline today. At the same time, the challenge of industrialisation has become greater. Africa needs to move quickly, but not at the WTO, where the focus is on fast-paced liberalisation.

Africa will be asked to open up its markets quickly, and at the same time promises will be made to support the bridging of the digital divide. It would be ill advised to open up Africa's market at the same time as Africa is still attempting to build infrastructure. This is also because the digital markets are highly concentrated - the first mover has powerful advantages that are difficult to compete with; and the big digital companies have deep pockets. The WTO is also not a development bank and big promises of aid in the past has not materialised.

If the CFTA is to be used for Africa's industrial transformation, Africa must very consciously encourage the strengthening of its domestic digital suppliers and ensure they have the regional digital market to sell to. It must prioritise the setting up of regional platforms, and regional data industries – how to gather, analyse and use Africa's data for its own industrial development. Whilst this is happening, the sector must be given some reprieve from global competition (certainly at least in selected areas).

The WTO's existing Agreements can support these efforts. Hence rather than moving to new E-Commerce agreements, serious work is needed to examine and clarify the treatment of E-Commerce in the GATS, GATT and TRIPS agreements.

It is therefore important to reaffirm the 1998 E-Commerce Work Programme as it is. Africa should resist efforts to expand this Work Programme to include other issues outside the scope of the existing agreements since this is about eventually putting in place provisions that would open markets completely. The issues already identified in the current Work Programme for discussion must be taken up with renewed vigour. These include: technological neutrality; the meaning of our existing market access GATS schedules; classification issues to have legal clarity of current commitments; Modes – e.g. is an e-book Mode 1 or Mode 2 etc. **The discussions should take place in the bodies which oversee the existing Agreements, not in a new Working Group.**

MSMEs

The issues relating to MSMEs have already been taken up by Africa in the agriculture and S&D proposals.

Why not pursue this concern under these existing mandates, rather than reinventing the wheel. **Any new programme will be a distraction from the remaining DDA issues** which Ministers had prioritised in Nairobi, **and in fact an excuse to pursue the interests of the biggest digital corporations.**⁵

Investment Facilitation (IF)

Until the DDA is concluded, the mandate is that no work on investment is to be taken up in the WTO. The IF agenda of publishing all criteria is doable only if countries already have investment regulations and screening criteria in every single sector. Otherwise, **countries could find that their policy space to screen investors according to domestic concerns of the time could be curtailed when they least expect it.**

Agriculture – **Cotton, PSH and the Special Safeguard Mechanism issues are the priority. Domestic Supports is also an important issue but only if it moves in the right direction e.g. the India/ China proposal.** The current climate does not indicate so. **It is better not to prejudice Africa's future policy space in domestic supports, and therefore hold on to the existing rules, even if these are not ideal.** No outcome is better than a bad one. Africa needs to be extremely serious in its cotton demands if these rules are to be changed.

In sum, to date, the differences on all the MC11 issues run deep. **There remains no convergence on any issue.** However, there can be surprises if a non-inclusive or transparent process is used. **The stakes are very high for Africa because MC11 decisions will have a profound impact on whether or not Africa will be able to have the space to digitally industrialise in the 21st century. It is no exaggeration to say that the fates of the CFTA and Agenda 2063 are being decided.**

PROCESS ISSUES

The huge gaps in positions amongst Members makes the process issues at the Ministerial critical. Will the Ministerial be a caucus of 5 Members whilst others are kept waiting? Even if 5 is enlarged to 15, is this sufficient? Will it be prolonged an extra day so that most African Ministers would have left town? When will the final text be given to all Members? Can any country or even a few African countries say no in the face of blame from the world?

The following principles and guidelines are important. The context of what can be brought to MC11 must be the Nairobi Ministerial Declaration and its priorities, which are: 'the remaining DDA issues'. The Nairobi Declaration also reflected differences around new issues and agreement that consensus is needed to move forward on new issues.

1. Bring issues to MC11 only if there is consensus that these issues should be negotiated there. There must be agreement by all Members on what these issues are. Issues for which there is no consensus can be put to the side to be taken up again in Geneva after the Ministerial.

2. Once there is consensus on the issues, there should then be discussion on the scope of the issues to be brought to the Ministerial, with the aim of having a narrow scope of issues for decision-making. It is all or only some substantive aspects? Is it a mandate that is sought? What form will the outcome take?

3. There is a 6-week rule in relation to agenda-setting for Ministerial Conferences. This is based on the 'Rules of Procedure for Sessions of the Ministerial Conference', WT/L/161, 25 July 1996, adopted by the

⁵ See ICC and G20 report: 'Trade Dialogues: WTO Business Focus Group 1, MSMEs and E-Commerce', September 2016, https://www.wto.org/english/news_e/news17_e/trdia_04jul17_e.htm

General Council. If issues that do not enjoy consensus are put on the agenda, it could lead to a very contentious agenda-adopting session at the MC, and an equally contentious Ministerial.

Rules of Procedure at Ministerial Conferences (from WT/L/161, 25 July 1996):

- Regular sessions of the Ministerial Conference shall be held at least once every two years (Rule 1, WT/L/161).
- ‘The provisional agenda for each regular session shall be drawn up by the Secretariat in consultation with the Chairperson and shall be communicated to members at least five weeks before the opening of the session. It shall be open to any Member to propose items for inclusion in this provision agenda up to six weeks before the opening of the session. Additional items on the agenda shall be proposed under ‘Other Business’ at the opening of the session. Inclusion of these items on the agenda shall depend upon the agreement of the Ministerial Conference’ (Rule 3, WT/L/161).
- ‘The first item of business at each session shall be the consideration and approval of the agenda’ (Rule 6, WT/L/161).

Ahead of one of the past Ministerials (2009), WTO Members were told the following:

‘If any delegation is pursuing an issue for decision, but has not achieved consensus on it 6 weeks before the Ministerial Conference opens – the deadline for inscribing items on the agenda – that delegation will not insist on putting the decision on the Conference agenda. To do so would be unproductive, possibly divisive and contrary to our agreed principles.’ (Statement of the Chair, General Council, 22 July 2009, JOB(09)/81).

WORLD TRADE ORGANIZATION

WT/L/274
30 September 1998
(98-3738)

WORK PROGRAMME ON ELECTRONIC COMMERCE

Adopted by the General Council on 25 September 1998

1.1 The Declaration on Global Electronic Commerce adopted by Ministers at the second session of the Ministerial Conference urged the General Council to establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce, taking into account the economic, financial, and development needs of developing countries, and to report on the progress of the work programme, with any recommendations for action, to the Third Session. The General Council therefore establishes the programme for the relevant WTO bodies as set out in paragraphs 2 to 5. Further issues may be taken up at the request of Members by any of these bodies. Other WTO bodies shall also inform the General Council of their activities relevant to electronic commerce.

1.2 The General Council shall play a central role in the whole process and keep the work programme under continuous review through a standing item on its agenda. In addition, the General Council shall take up consideration of any trade-related issue of a cross-cutting nature. All aspects of the work programme concerning the imposition of customs duties on electronic transmission shall be examined in the General Council. The General Council will conduct an interim review of progress in the implementation of the work programme by 31 March, 1999. The bodies referred to in paragraphs 2 to 5 shall report or provide information to the General Council by 30 July 1999.

1.3 Exclusively for the purposes of the work programme, and without prejudice to its outcome, the term "electronic commerce" is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. The work programme will also include consideration of issues relating to the development of the infrastructure for electronic commerce.

1.4 In undertaking their work, these bodies should take into account the work of other intergovernmental organizations. Consideration should be given to possible ways of obtaining information from relevant non-governmental organizations.

Council for Trade in Services

2.1 The Council for Trade in Services shall examine and report on the treatment of electronic commerce in the GATS legal framework. The issues to be examined shall include:

- scope (including modes of supply) (Article I);
- MFN (Article II);
 - transparency (Article III);
 - increasing participation of developing countries (Article IV);
 - domestic regulation, standards, and recognition (Articles VI and VII);
 - competition (Articles VIII and IX);
 - protection of privacy and public morals and the prevention of fraud (Article XIV);
 - market-access commitments on electronic supply of services (including commitments on basic and value added telecommunications services and on distribution services) (Article XVI);
 - national treatment (Article XVII);
 - access to and use of public telecommunications transport networks and services (Annex on Telecommunications);
 - customs duties;
 - classification issues.

Council for Trade in Goods

3.1 The Council for Trade in Goods shall examine and report on aspects of electronic commerce relevant to the provisions of GATT 1994, the multilateral trade agreements covered under Annex 1A of the WTO Agreement, and the approved work programme. The issues to be examined shall include:

- market access for and access to products related to electronic commerce;
- valuation issues arising from the application of the Agreement on Implementation of Article VII of the GATT 1994;
- issues arising from the application of the Agreement on Import Licensing Procedures;
- customs duties and other duties and charges as defined under Article II of GATT 1994;
- standards in relation to electronic commerce;
- rules of origin issues;
- classification issues.

Council for TRIPs

- 4.1 The Council for TRIPS shall examine and report on the intellectual property issues arising in connection with electronic commerce. The issues to be examined shall include:
- protection and enforcement of copyright and related rights;
 - protection and enforcement of trademarks;
 - new technologies and access to technology.

Committee for Trade and Development

5.1 The Committee on Trade and Development shall examine and report on the development implications of electronic commerce, taking into account the economic, financial and development needs of developing countries. The issues to be examined shall include:

- effects of electronic commerce on the trade and economic prospects of developing countries, notably of their small- and medium-sized enterprises (SMEs), and means of maximizing possible benefits accruing to them;
 - challenges to and ways of enhancing the participation of developing countries in electronic commerce, in particular as exporters of electronically delivered products: role of improved access to infrastructure and transfer of technology, and of movement of natural persons;
 - use of information technology in the integration of developing countries in the multilateral trading system;
 - implications for developing countries of the possible impact of electronic commerce on the traditional means of distribution of physical goods;
 - financial implications of electronic commerce for developing countries.
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