

The fourth industrial revolution will deepen the digital divide

Alliance Sud Position on the Eleventh WTO Ministerial Conference Buenos Aires, 10 – 13 December 2017

Key points at a glance

The main topics of the Eleventh WTO Ministerial Conference are expected to be:

- **Liberalization of electronic commerce.** Positions are highly polarized. Should there be a compromise, it is likely to be on very technical and seemingly inconsequential topics such as electronic signatures and payments. But in the long run, the United States specifically wants to authorize cross-border data flows and prohibit the data localisation requirement, as already proposed in the TTP, TTIP and TISA. Switzerland wants an e-commerce negotiating group to be established in Buenos Aires. In the view of Alliance Sud, there should be neither any negotiation of this topic in Buenos Aires nor any plurilateral agreement, as that would hand even more excessive power to the high-tech giants and further widen the digital divide.
- **Disciplines on domestic regulations in services.** Proposed by a group of 22 countries, including Switzerland. These rules introduce virtually no new obligations on most industrialized countries, above all Switzerland, which has been applying them for a long time – the main problem however, is that they contemplate no exceptions for public services and they give a “prior comment” right to foreign multinationals. On the other hand, developing countries reject them as they would prevent them from trying new regulatory approaches. Alliance Sud is of the view that there should be no negotiations on this topic in Buenos Aires, nor any plurilateral agreement.
- **Agriculture: reducing trade-distorting domestic support:** Alliance Sud believes that Switzerland should endeavour to obtain a negotiating outcome that contributes to substantially reducing trade-distorting domestic support measures (amber box) – and even to eliminating them entirely. These subsidies place agricultural producers in developing countries under intense price pressure, which works against their development efforts.
- **Agriculture: permanent solution to the public stockholding programme for food security.** A permanent solution must be found to the peace clause adopted in 2013 in Bali allowing developing countries to constitute grain stockpiles for resale at subsidized prices. Switzerland has no real interest in this issue. It favours a permanent solution, provided that it has no impact on international trade. For Alliance Sud, a permanent solution must be found.
- **Investment facilitation:** Proposed by China, Brazil and Russia, with the support of some developing countries and some developed ones, including Switzerland. But most developing countries oppose it as long as the Doha Round remains unfinished. For Alliance Sud there should be no negotiations on this topic in Buenos Aires.

- **Discipline on fisheries subsidies.** This dossier does not directly concern Switzerland – which supports it by the way – but is very important to developing countries that are facing unfair competition from subsidized fishing vessels belonging to industrialized countries. Alliance Sud believes that subsidies that incentivize overfishing and represent unfair competition for small-scale fishers should be eliminated.

Introduction

The negotiations ahead of the Eleventh Ministerial Conference of the World Trade Organization (WTO) are of immediate concern to Switzerland. The mega deals (TISA [Trade in Services Agreement] and TTIP [EU-USA Trans-Atlantic Partnership]) having stalled (the TPP [Trans-Pacific Partnership] was just signed by 11 countries without the United States), the industrialized countries (including Switzerland) – having won over some developing countries to their cause – are turning to the WTO to liberalize the Internet and move forward with the «new topics» of the 21st century. All the more so considering that the Final Declaration of the Nairobi Ministerial Conference (2015) was highly ambiguous regarding the «new issues», some Members having stated their readiness to discuss them, others not. The situation has not become any clearer since then, quite the contrary...

The topics mentioned below are on the table, but the negotiations will not necessarily reach an outcome in Buenos Aires, given the deep divisions between Members – the United States has even said' that it does not want any outcome! Moreover, as positions could well change up to the last minute, it is difficult to attempt any precise stocktaking in advance.

These topics should nonetheless be analysed, as the States that proposed them have already announced that if no agreement is reached, they intend to continue negotiations in the plurilateral framework (i.e., among certain select countries). There is a precedent for this: TISA, the Trade in Services Agreement, was launched following the failure of the 2011 Ministerial in Geneva.

It is worth noting that the conclusion of the Doha Round, on which most developing countries are insisting, no longer appears anywhere...

Liberalization of electronic commerce/digital trade:

The liberalization of e-commerce is progressing under cover. Officially, the Buenos Aires discussions may well cover only technical and seemingly innocuous topics, but what is at stake in the long run is regulation and the taking of power by the high-tech giants.

In the past 18 months, several Members, in particular the United States, EU and Japan, have submitted «non-papers» laying out their vision for the liberalization of e-commerce. India, the African Group and the Least Developed Countries (LDCs) are opposed to any negotiation on the topic, at least while the Doha Round remains inconclusive.

The pre-conference positions of Members lie very far apart: some wish to negotiate binding rules on many aspects of e-commerce, others are refusing to do so. The EU proposes the creation of a working group on e-commerce, without specifying its remit. Switzerland supports this proposal and would even like to see a decision taken at the Ministerial.

Should there be a compromise, it would most likely be a call for the sharing of best practices in trade facilitation (such as the establishment of free zones and customs warehouses), promoting e-commerce and the implementation of the Trade Facilitation Agreement; a more coordinated approach to electronic signatures and payments, authentication and contracts,

as well as measures to enhance transparency and promote development and cooperation.

Soon or later however, the negotiations on e-commerce will move beyond this relatively innocuous phase – whether at the WTO or in a plurilateral agreement, as some Members have already suggested.

Although it is not a topic of negotiation in the present phase, the United States «non-paper»¹ clearly lays out its vision. Its purpose is to add even more to the already excessive power of the technology giants that dominate the world (Amazon, Apple, Google, Facebook, Microsoft, etc.) all of which are American (with the notable exception of China's Ali Baba). There is a close resemblance to the chapter on e-commerce/digital trade that the United States has proposed in the TPP, TTIP and TISA. Among other things, it contemplates:

- Prohibiting digital customs duties (music, video, software and games).

Comment: On this point, one may well wonder what game Switzerland has played... From the 2001 Doha Ministerial until that of Nairobi in 2015, Switzerland, together with other countries, had successfully limited its demand to a two-year moratorium on customs duties that were more political in nature. This strategy paid off. Yet in 2017, Switzerland switched to an extreme position, joining the United States and others in calling for the definitive prohibition of any duties on electronic communications. It suffered a crushing defeat. The proposal already had to be withdrawn from the discussions just after the summer of 2017, having elicited nothing but an outcry from other Members. Why this risky about-face? This is a mystery. Based on what mandate? The question remains open. To defend what export interests in a sector where Switzerland's economy is hardly present? There is every reason to wonder.

- Enabling cross-border data flows and prohibiting the data localization requirement.

Comments²: Data have become one of the principal riches of countries. They are the very «raw material of the digital economy». Access to and control of data are generating substantial revenues for those who gather and analyse them. With this proposal, States will no longer be able to insist that data remain within their borders, but instead will have to hand them over, without compensation, to (American) multinationals. Personal data (e.g. medical, banking, etc.), national security, military and intelligence could be moved unimpeded anywhere around the world. This raises crucial issues of sovereignty and national security and the protection of personal privacy.

BusinessEurope, the European industry lobby, was very clear on this. In a letter addressed to the European Commission on 30 October 2017,³ it supports cross-border data flows and the prohibition of forced data localization, especially in view of the Buenos Aires Ministerial. It regrets the lack of a common EU position on the topic – which was one of the reasons for the failure of the TISA negotiations in December 2016.

¹ <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/JOBS/GC/94.pdf>

² See also Uni Global Union, *Discussions inquiétantes à l'OMC, le fossé numérique risque de se creuser*, Nyon, 5 May 2017

³ <http://www.bilaterals.org/IMG/pdf/businessseurope-letter.pdf>

- Prohibiting the local presence requirement (office, branch, company).

Comment: If a foreign provider is not physically present in a country, how will its service be regulated? And taxed? In the event of a dispute, clients will most likely have to file a complaint against the offshore company with courts in the USA or EU, the main data storage locations. This is a protracted and costly procedure that will take precedence over national institutions. Like Uni Global Union notes, the offshore service provider may deploy personnel in accordance with mode 4 of the WTO General Agreement on Trade in Services (GATS). Therefore, it is not the labour law of the host country that will apply but that of the country of origin of the multinational, with the risk of wage dumping that this entails (as we have seen with the controversy over posted workers in the EU). The number of contract workers will increase at the expense of salaried workers, and this will further accentuate the «uberization» and casualization of the economy. National enterprises will come under the pressure of competition from these foreign giants and will have to cut costs. Local content requirements for television, radio and cinema will disappear.

- Barring forced technology transfer, even for LDCs.

Comment: This is one of the traditional demands of developing countries with a view to overcoming the digital divide. So far, they have most often acquiesced to foreign investment on condition that the investor helps local providers to upgrade their technology, undertakes to buy some spare parts from local suppliers, etc. However, according to the ITU, over half of the world's population does not use the Internet, of which in 75% Africa. The digital gap would grow even wider!

- Eliminating the source code disclosure requirement, even to a regulatory authority.

Comment: This is a strengthening of intellectual property protection (TRIPS+) for all WTO Members, including LDCs. It poses problems of national security, the protection of personal privacy and again hinders the transfer of technology.

- «Prior comment»: foreign multinationals will be entitled to comment in advance on any draft law and regulations so as to ensure «transparency», with a view to a kind of regulatory coherence.
- Removing non-tariff barriers such as administrative barriers.

As stated by Abdoullah Cissé, Law Professor and lawyer at the Bar of Senegal, at a meeting on e-commerce organized by UNCTAD in Geneva:

«Many African countries have no laws on data protection, e-commerce and cybercrime. The consequences are dire, as the digital divide is widening and becoming commonplace. Those who are not connected end up being forgotten. The upshot is a dearth of African enterprises in the digital enterprise value chain (...) Their digital sovereignty is under threat: most African States no longer control anything within their borders, the world runs on data, they have no cloud, they do not manage their own data centre, they are unable to produce statistical data, their commercial registers are not digitized. The cultural heritage is being pillaged owing to the absence of statistical data. SMEs and SMIs are located in Africa but work for companies in the North. (...) As for data protection in Africa – open data, big data, personal data – our States have no regulations whatsoever. There is no sovereign cloud and most States are unaware of the discussion on block chains. Many States are at risk of cyber colonization, as when there is no sovereignty over data, the situation is the same as some centuries ago when a government would fall into the hands of slavers!»

Switzerland supports the proposals on the liberalization of e-commerce. India, South Africa, the African Group, the LDCs and other developing countries oppose them. Positions seem so far apart that an outcome in Buenos Aires seems unlikely, but those countries in favour (including Switzerland) could begin plurilateral negotiations right after the conference. For Alliance Sud, there should be no negotiations on e-commerce in Buenos Aires (nor any plurilateral negotiations).

Disciplines on domestic regulations in services

Some years ago, WTO Members decided to develop any «necessary» domestic regulation disciplines in services, but most developing countries doubt that they are really «necessary». The topic is unresolved at the WTO, but in 2017, some 20 Members, including Switzerland, tabled proposals for coming up with binding rules by the time of the Buenos Aires Ministerial.⁴ Apart from the EU, there is no major country among those Members. In the event of failure, they could launch plurilateral negotiations. China has stated its readiness to discuss these proposals. India (which had put forward a proposal on trade facilitation in services) and Bangladesh, among others, take the view that an outcome can be reached only after Buenos Aires. The African countries, including South Africa, the LDCs and some South American countries are opposed to any outcome on the matter.

The fact is that these rules introduce virtually no new obligations on most industrialized countries, above all for Switzerland, which has been applying them for a long time – with a few exceptions. But the most problematic aspect is that unless they contain an exception for public services, they apply to all public service sectors, regardless of their specificities and the relevant policies in place. And that they give the right to foreign enterprises to comment in advance draft laws and regulations.

Developing countries and LDCs for their part insist that their priority is the Doha Development Agenda and, domestically, economic development – which would be hampered by these disciplines. As countries they are at a stage where they must be able to try new regulatory approaches and render their service providers internationally more competitive before introducing such rules.

The proposed disciplines aim at making sure that three types of domestic regulations adhere to vague and open-ended criteria that would drastically restrict the sovereignty of states. The regulations are the following⁵:

- Qualification requirements and procedures for professional services providers. Ex: the requirement that a doctor must have a medical degree and take exams in order to qualify to practice and the procedure to obtain the qualification
- Licensing requirements and procedures for companies. These involve the requirements that companies must meet in order to obtain a license to provide a service, for example the amount of capital a bank must have or requirements to do an environmental impact assessment before opening a mine

⁴ EU, Argentina, Australia, Canada, Chile, Colombia, Costa Rica, Hong Kong, Iceland, Israel, Japan, Kazakhstan, Liechtenstein, Mexico, Moldova, New Zealand, Norway, Peru, South Korea, Switzerland, Taiwan, Turkey, Uruguay

⁵ Presentation by Sanya Reid Smith, from Third World Network, at the WTO Public Forum 2017

- Technical standards required. These are the standards that must be complied with in the provision of the service, once the individual obtains the qualification requirements and/or the company obtains the license. This would involve, for example, how clean the water must be that is supplied by the water company; the safety procedures in nuclear power station, etc.

What are some of the main disciplines being proposed on these domestic regulations?

1. They must be “not more burdensome than necessary” to ensure the quality of the service.
2. They must be “objective”, which can mean just anything
3. There are also proposals to regulate the licensing fees that governments may charge. Some proposed provisions would require that the fees that governments demand for licensing services are “reasonable” and “don’t restrict the supply of the service”
4. Procedures must be “impartial” in the administration of measures.
5. Licenses must take effect without undue delay (subject to its terms and conditions).
6. In addition, any foreign multinational would have the right to comment any draft law or regulation, in the name of transparency

Comment: This means that before adopting any new regulation, a government will have to publish it, explain it, allow foreign multinationals to comment it and take their comments into consideration. Eventually, foreign enterprises should be consulted and the draft regulation modified before being submitted to the parliament, even in Switzerland. “For whom are we regulating? Asked the representative of an African country. It is like if our countries were little protectorates. Philip Morris had the plan to kill the UK plan to introduce plain package. In opposing the government regulations they were able to generate 18’000 comments. This shows the influence of powerful companies. Not to mention the administrative burden that would be imposed...”

7. Necessity test: proposed among others by Switzerland to make sure that the domestic regulation “is not more restrictive than necessary to ensure the quality of service »

Comment : this would place the burden of proof on the government, that must prove that it has adopted the least restrictive measure.

As one can see, these are open-ended terms designed to minimize regulation⁶. Giving the WTO jurisdiction to adjudicate whether a regulation was “reasonable,” “objective,” “transparent,” and “not more burdensome than necessary to ensure the quality of the service,” and further that a technical standard was developed in an “open and transparent process” would put the interests of foreign services providers above governments’ obligations to ensure that services are operated in the public interest.

These disciplines would restrict the rules that governments can adopt, even if they apply in the same way to foreign and national enterprises. They would apply also to domestic non commercialized services (like construction) and to commercialized services.

⁶ See the letter of global civil society (OWINFS) on the Buenos Aires ministerial <http://notforsale.mayfirst.org/en/signon/11th-wto-ministerial-letter-global-civil-society-about-agenda-wto>

Probably, they would apply only to services liberalized at the WTO. But current proposals foresee that disciplines apply to laws and regulations *that exist* and to the ones adopted in the future! This means that States would have to review all laws, measures, regulations etc and change the ones that don't comply to WTO rules.

According to Michael Wamai, from the Mission of Uganda to the WTO, that was speaking at the WTO Public Forum 2017 "*LDCs services exports fell by 14% and their current trade deficit is 35 billion USD. LDCs are net commercial services importers. If we agreed to these disciplines, we would grant unfettered market access to services exporters (...). In the African group the orientation is on transformation and industrialization of Africa. We think that these disciplines would be problematic because it would mean a complete paralysis of our administration. Embassies in our countries would do the rules. These disciplines don't give you the possibility to change your mind. African governments would be required to review all regulations, both current and future, affecting trade in services - whether it is a law, regulation, rule, decision, etc to make sure they conform to the requirements of being objective, transparent etc and amend them if not . We would need to undertake a 360 review process that would go back in Uganda before independence. This is not only extremely intrusive, but expensive, unnecessary and onerous.*"

The EU and Australia in particular are pushing for these proposals. Switzerland is favourable to them. Many developing countries oppose them. In the view of Alliance Sud, there should be no negotiation of disciplines on domestic regulations in Buenos Aires (nor plurilateral negotiations).

Agriculture: reducing trade-distorting domestic support

This is of immediate concern to Switzerland, for which these measures, currently authorized by the WTO in small doses, are very important.

The WTO authorizes the use of domestic support measures in agriculture, provided they have no trade-distorting effect. The WTO distinguishes between three types of support, classified into three boxes.

- The «amber box» contains all domestic support measures that have a distorting effect on production and trade because they increase production – the more a farmer produces, the more subsidies he receives – and give rise to an international trade-distorting effect. In this category, only «*de minimis*» support measures are permitted;
- The «blue box» is the amber box together with conditions intended to reduce the distorting effects (by requesting farmers to reduce production) and currently contains no spending limits;
- The «green box» contains subsidies that have no trade-distorting effect or which cause minimal distortion. They are mostly direct payments, in other words they are decoupled from production level.

In 2013 (last year notified to the WTO), Switzerland's amber box entitlement was CHF 4,257 million, of which it utilized «only» CHF 2,556 million.⁷ They were mostly payments linked to

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[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20@Symbol=%20g/ag/n/che/*\)&LanVr&aisemblguage=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20g/ag/n/che/*)&LanVr&aisemblguage=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#) (notification dated 10.08.2015 on domestic support)

products, direct or not, made by the Confederation depending on the size of the area under cultivation.

At this point in time no one knows what will be negotiated at Buenos Aires.... China and India are calling on the EU, United States, Switzerland, Canada, Japan and Norway to eliminate these subsidies altogether (USD 160 billion in total!) before themselves making any concessions in agriculture. The United States wishes to withdraw from developing countries, especially India and China, the flexibilities they currently enjoy to be able to support their poor farmers in particular. But India is demanding a permanent solution to the issue of public stockholding program for food security (see below) before making concessions on domestic support in agriculture. In essence it is a struggle between India and China on the one hand, and the United States on the other, with Switzerland caught in the cross-fire.

These requests represent maximum demands and the end result will fall somewhere between completely eliminating the amber box and making no reductions at all...

Yet reducing trade-distorting domestic support measures is one of the main developing country demands in the Doha Round, with the elimination of agricultural export subsidies. The latter was decided at the Nairobi Ministerial and in reality affected only Switzerland, Norway and Canada, as the other industrialized countries do not use this particular instrument, but other types of «export support» measures (export credits, state trading enterprises and food aid) that were made subject to very few disciplines in Nairobi, because the United States opposed this.

Regrettably, instead of completely eliminating payments under the «Chocolate Act» (CHF 67.9 million per year), the Federal Council (Swiss federal government) has proposed to replace them with payments linked to products, paid to producers of milk and bread-making cereals, which fall into the amber box. The final decision will be taken by the Swiss parliament in December 2017.

In the view of Alliance Sud, Switzerland should commit to a negotiating outcome that helps substantially reduce trade distorting domestic support measures – and even eliminate them altogether. These subsidies place agricultural producers in developing countries under intense price pressure, which works against their development efforts.

At a minimum, Switzerland should endeavour to ensure that the reductions foreseen in 2008 are formally adopted at last. In the Doha Round, 34 WTO Members, including Switzerland, committed to reducing their overall support measures (amber box + other elements of no concern to Switzerland). In December 2008, reduction modalities were proposed,⁸ but never adopted for lack of agreement among Members. However, to this day they still represent a solid basis of discussion. For Switzerland, these modalities would mean reducing its amber box entitlement by 52.5% to CHF 2,022 million. In reality, therefore, Switzerland would probably not have to reduce its domestic support measures by much, but it would at least undertake not to increase them.

It is worth noting that the WTO is the only body where disciplines could be imposed on agricultural subsidies. Free trade agreements reduce customs duties, but not subsidies. Reducing customs duties, also envisaged in the Doha Round (and therefore not implemented to date), is not on the agenda of the Buenos Aires Ministerial, except for the special safeguard mechanism for developing countries, which will not be discussed here.

⁸ https://www.wto.org/english/tratop_e/agric_e/ag_modals_dec08_e.htm

Agriculture: permanent solution to the public stockholding programme for food security

Switzerland has no real interest in this issue. It favours a permanent solution, so long as it does not impact international trade.

Under the programme, developing countries may buy cereals from poor farmers («low-income or resource-poor producers») at set prices – often above market price – and resell them to poor consumers at less than market price. At the Bali Ministerial in 2013, India persuaded the WTO to accept a «peace clause» allowing it to maintain a food aid programme estimated at USD 20 billion per year and which would provide 5 kg of cereals per month to all needy persons (two thirds of its population!)

A condition was attached to the peace clause: that of finding a permanent solution in the space of four years, in other words by 2017. We are now in 2017, but positions are still very far apart, with the United States in particular being firmly opposed to it.

For Alliance Sud, a permanent solution must be found.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Switzerland and the United States oppose the renewal of the moratorium on the filing of TRIPS non-violation complaints. Thanks to this moratorium, the possibility for a country to file a complaint against another even when no agreement has been violated, does not apply to the TRIPS Agreement. So far, this moratorium has been renewed every two years despite opposition from Switzerland and the United States, who are calling for an end to it so as to avoid the proliferation of «frivolous» laws that would jeopardize intellectual property.

Once again, Switzerland opposes this moratorium. For Alliance Sud, Switzerland should accept it, as it facilitates technology transfer to developing countries. As in other years, a solution may be found before the conference, and Switzerland and the United States should join the majority.

Investment facilitation:

Proposed by China, Brazil and Russia, with the support of some developing countries – Argentina, Nigeria, Mexico, Pakistan, etc. Developed countries, including Switzerland, are in favour of it. India and the African Group are opposed to it. Investment is one of the «Singapore issues» rejected by developing countries in 1996 and 2003, pending the conclusion of the Doha Round. The countries tabling this proposal insist that it contains no Investor-State Dispute Settlement (ISDS) mechanism, which is too controversial. This notwithstanding, the proposed rules on transparency and domestic regulations could pose a genuine problem to developing countries, beginning with the «prior comment», which is the right granted to any foreign multinational to comment on any draft law or regulations in advance.

For Alliance Sud, there should be no negotiation on investment facilitation in Buenos Aires.

Discipline on fisheries subsidies

This dossier is not of direct concern to Switzerland, but is highly important for developing countries facing competition from fishing vessels subsidized by industrialized countries, which are destroying their fishing industries and their livelihoods. The aim is to help reduce overfishing and prevent illegal, non-declared and non-regulated (IUU) fishing.

There is no real North-South divide on this subject, but a divergence of views between countries that wish to abolish the subsidies (estimated at US\$14-20 billion per year) (United States, Peru, Argentina, and Norway...) as they view them as contributing to overfishing and the disappearance of fish stocks, and those who deny this link and do not wish to eliminate them (Japan, South Korea, Taiwan).

Alliance Sud believes that fishing subsidies that contribute to overfishing and create unfair competition with developing countries should be eliminated.

Conclusion

At least three of the subjects to be negotiated in Buenos Aires are of immediate concern to Switzerland: e-commerce, disciplines on domestic regulations in services, and the elimination of trade-distorting domestic support in agriculture. It is favourable to the first two and has a defensive attitude with regard to the third. For Alliance Sud, there should be no negotiations on e-commerce and domestic regulations in Buenos Aires – nor plurilateral negotiations – as most developing countries – especially the poorest ones – are opposed to this, at least while the Doha Round is not concluded. Indeed, these two issues would limit the policy space they need to be able to realize their development and would be a threat to their sovereignty (and to that of industrialized countries!)

As regards limiting trade-distorting domestic support measures in agriculture, this is contemplated in the Doha Round and Alliance Sud therefore believes that Switzerland should approve it. The fact is that these support measures create unfair competition that is harmful to small farmers in developing countries, who do not receive subsidies.

Isolda Agazzi, Lausanne, 30 November 2017