Argentinian Government Bans Civil Society Organizations From Attending Upcoming WTO Ministerial Meeting

The World Trade Organization (WTO), the multilateral global trade body that has almost all countries as members, has been eyeing an expansion of its work on digital trade for some time. Its current inability to address such issues is becoming an existential problem for the organization, as its relevance is challenged by the rise of smaller regional trade agreements such as the Trans-Pacific Partnership (TPP), North American Free Trade Agreement (NAFTA), and Regional Comprehensive Economic Partnership (RCEP) that do contain digital trade rules.

That's one reason why some experts are now arguing that the WTO ought to retake leadership over digital trade rulemaking. Their reasoning is that a global compact could be more effective than a regional one at combatting digital protectionism, such as laws that restrict Internet data flows or require platforms to install local servers in each country where they offer service.

Civil Society Barred from WTO Summit

It's true that some countries do have protectionist rules that affect Internet freedom, and that global agreements could help address these rules. But the problem in casting your lot in with the WTO is that as closed and opaque as deals like the TPP, NAFTA, and RCEP are, the WTO is in most respects no better. That was underscored last week, when in a surprise move the Argentinian government blocked representatives from civil society organizations (CSOs) from attending the upcoming WTO biennial summit of 164 member states, which is scheduled between 10-13 December in Buenos Aires.

Last week the WTO reached out to more than than 64 representatives from CSOs, including digital rights organizations Access Now and Derechos Digitales, to inform them that "for unspecified reasons, the Argentine security authorities have decided to deny your accreditation." The Argentine government later issued a press release claiming that activists had been banned as "they had made explicit calls to manifestations of violence through social networks"—a remarkable claim for which no evidence was presented, and which the groups in question have challenged.

Most of the banned organizations belong to the Our World Is Not For Sale network (OWINFS), a global social-justice network which has been engaging in WTO activities, including organizing panels and sessions for over two decades. In a strongly-worded letter, Deborah James, OWINFS Network Coordinator has condemned Argentina's actions and noted that the lack of explanation behind the decision "attacked the conference's integrity" and violated "a key principle of international diplomacy".

Even before these delegates were barred from the meeting, their ability to participate in
the WTO summit was tightly constrained. Unlike other international negotiation bodies such as WIPO, the WTO does not permit non-state actors to attend meetings even as observers, nor to obtain copies of documents under negotiation. Their admission into the meeting venue would only authorize them to meet with delegates in corridors and private side-meetings, and Argentina's action has taken away even that. Instead, public interest groups will essentially be limited to meeting and protesting outside the summit venue, out of sight and out of mind of the WTO delegates inside.

Multilateral v. Multistakeholder to Digital Trade

Thus the problem with the suggestion that the WTO should take on the negotiation of new Internet-related issues is that any such expansion of the WTO mandate would require a rehaul of its existing standards and procedures for negotiations. International trade negotiations are government-led, and allow for very limited public oversight or participation in the process. On the other hand, the gold standard for Internet-related policy development is for a global community of experts and practitioners to participate in an open, multistakeholder setting.

Transparent consultative practices are critical in developing rules on complex digital issues as prescriptions nominally about commerce and trade can affect citizens’ free speech and other fundamental individual rights. In this respect and others, digital issues are different from conventional trade issues such as quotas and tariffs, and it is important to involve users in discussion of such issues from the outset. Thorough documents such as our Brussels Declaration on Trade and the Internet, EFF has been calling upon governments to make trade policy making on Internet issues more transparent and accountable, whether it is conducted at a multilateral or a smaller plurilateral level.

The WTO's lack of any institutional mechanisms to gather inputs from the public and its inability to assure participation for CSOs is a big blow to the WTO's credibility as a leader on global digital trade policy. Argentina's unprecedented ban on CSOs is especially worrying, as e-commerce is expected to be a key topic of discussion at the summit.

E-commerce Agenda Up In The Air

Last week, WTO director general Roberto Azevedo announced that he will be appointing "minister facilitators" to work with sectoral chairs and identified e-commerce as an area for special focus. That doesn't mean that it's an entirely new issue for the WTO. E-commerce (now sometimes also called "digital trade") entered the WTO in 1998, when member countries agreed not to impose customs duties on electronic transmissions, and the moratorium has been extended periodically, though no new substantive issues have been taken on.

This is changing. Since last year, developed and developing countries have been locked in a battle over whether the WTO's digital trade work program should expand to include new digital trade issues such as cross-border data flows and localization, technology transfer, disclosure of source code of imported products, consumer protection, and platform safe harbors.
This push has come most strongly from developed countries including the United States, Japan, Canada, Australia, and Norway. During an informal meeting at the WTO in October, the EU, Canada, Australia, Chile, Korea, Norway and Paraguay, among other countries, circulated a restricted draft ministerial decision to establish “a working party” at the upcoming WTO ministerial meeting in Buenos Aires and authorizing it to “conduct preparations for and carry out negotiations on trade-related aspects of electronic commerce on the basis of proposal by Members”.

Amongst these are a May 2017 proposal presented by the European Union in which the co-sponsors mapped out possible digital trade policy issues to be covered, including rules on spam, electronic contracts, and electronic signatures. The co-sponsors noted that the list they provided was not exhaustive, and they invited members to give their views on what additional elements should be added.

But many developing nations have opposed the introduction of new issues, instead favoring the conclusion of pending issues from the Doha Round of WTO negotiations, which are on more traditional trade topics such as agriculture. In particular, India this week submitted a formal document at the WTO opposing any negotiations on e-commerce. Commerce and Industry minister Suresh Prabhu said, "We don't want any new issues to be brought in because there is a tendency of some countries to keep discussing new things instead of discussing what's already on the plate. We want to keep it focused." India has maintained that although e-commerce may be good for development, it may not be prudent to begin talks on proposals supported by developed countries. A sometimes unspoken concern is that these rules provide "unfair" market access to foreign companies, threatening developing countries' home-grown e-commerce platforms.

China has a somewhat different view, and has expressed openness to engage in discussions on new rules to liberalize cross-border e-commerce. Back in November 2016, China had also circulated a joint e-commerce paper with Pakistan, and has since called for informal talks to "ignite" discussions on new rules, with a focus on the promotion and facilitation of cross-border trade in goods sold online, taking into account the specific needs of developing countries.

A number of other developing nations have their own proposals for what the WTO’s future digital trade agenda might include. In March 2017, Brazil circulated a proposal seeking “shared understandings” among member states on transparency in the remuneration of copyright, balancing the interests of rights holders and users of protected works, and territoriality of copyright. In December 2016, another document prepared by Argentina, Brazil, and Paraguay focused on the electronic signatures and authentication aspect of the work programme. And in February 2017, an informal paper co-sponsored by 14 developing countries identified issues such as online security, access to online payments, and infrastructure gaps in developing countries as important areas for discussion.
Expectations From the Ministerial Meeting

With so many different proposals in play, the progress on digital trade made at the Ministerial Conference is likely to be modest, reflecting the diverging interests of WTO Members on this topic. Reports suggest that India has built strong support amongst a large number of nations including some industrialized countries, for its core demands for reaffirming the principles of multilateralism, inclusiveness and development based on the Doha work programme. Given India’s proactive stance opposing the expansion of the current work programme on e-commerce, this suggests an underwhelming outcome for proponents of the expansion of the WTO’s digital trade agenda.

However India’s draft ministerial decision on e-commerce also instructs the General Council of the WTO to hold periodic reviews in its sessions in July and December 2018 and July 2019, based on the reports that may be submitted by the four WTO bodies entrusted with the implementation of its e-commerce Work Programme, and to report to the next session of the Ministerial Conference. If enough members agree with India and relevant changes are made to suit all members, India’s draft agreement could become an actual declaration.

In other words, even if, as seems likely, no new rules on digital trade issues come out of the 2017 WTO summit, that won't be the end of the WTO’s ambitions in this field. It seems just as likely that whatever protests take place in the streets of Buenos Aires, from activists who were excluded from the venue, will be insufficient to dissuade delegates from this course. But what we believe is achievable is to make further progress towards changing the norms around public participation in trade policy development, with the objective of improving the conditions for civil society stakeholders not only at the WTO, but also in other trade bodies and negotiations going forward.

This is one of the topics that EFF will be focusing on at this month's Internet Governance Forum (IGF), where we will be hosting the inaugural meeting of a new IGF Dynamic Coalition on Trade and the Internet, and hopefully announcing a new multi-stakeholder resolution on the urgent need to improve transparency and public participation in trade negotiations. The closed and exclusive 2018 WTO summit is an embarrassment to the organization. If and when the WTO does finally expand its work program on digital trade issues, it is essential that public interest representatives be seated around the table—not locked outside the building.