# **A FRAMEWORK FOR WTO REFORM**

# Conceptual Note

# *Draft* – 16 June 2023

The current dysfunction of the WTO calls for a collective reform vision that builds on long standing ICC support for the WTO and the multilateral trading system. In 2021, ICC issued [27 concrete recommendations](https://iccwbo.org/wp-content/uploads/sites/3/2021/09/icc-document-wto-policy-paper.pdf), the first of which was to “Agree on a coherent holistic vision for WTO reform”. Such holistic vision needs to be informed by a diagnostic view of the root causes behind the current crisis. This Concept Note diagnoses the current WTO problems and maps out solutions through a comprehensive agenda for WTO reform.

This Concept Note provides background information on WTO reform issues from a business perspective. Section I recalls the critical importance of the WTO for global business. Section II provides a diagnostic view of the main causes behind the dysfunction of the WTO. Section III proposes a conceptual framework for a holistic reform agenda. This note builds on the ICC’s “Global Business Priorities for the WTO” of September 2021 with a particular focus on WTO reform issues of immediate priority. Section III addresses those issues with cross references (\*--) to related recommendations in the 2021 ICC Paper. They are allocated to the different elements of the reform agenda covering the vital functions of the WTO.

The aim of this note is to get broad industry input and arrive at a proposed framework for a holistic WTO reform approach. In light of consultations with ICC’s business network, it would also be possible to consider the need for further notes to elaborate on or clarify issues raised.

# **Introduction**

Since its establishment in 1995, the World Trade Organization (WTO) has been the backbone of the rules-based multilateral trading system, which provides for the stability and predictability of trade relations among its Members as a means of promoting the growth and development of their economies through enforceable rules which, in turn, facilitate informed long-term business investment decisions. The global business community, as the ultimate end-user of the trading system, played an instrumental role in the creation of the WTO system and has continued to attach great importance to its effective functioning and its reform efforts. It has also often provided a “reality check” on the extent to which the system remains relevant to business needs and fulfils its purpose as established by Members.

Since the financial crisis in 2008, the WTO has faced many external and internal challenges, including the ensuing economic crisis leading to trade distortive rescue measures, anti-globalization backlash, the failure of the Doha Round, the breakdown of the dispute settlement function, and rising trade and geopolitical tensions among Members. With Covid-19 and the war in Ukraine, the WTO has been confronted with unprecedented existential challenges.

Recognizing the urgency, at the Twelfth Ministerial Conference of the WTO (MC12), Members committed for the first time to work on WTO reform to ensure its proper functioning.

While discussions are underway and various Members have submitted proposals, there is yet to emerge a coherent and structured framework that maps out the issues to be addressed in a reform agenda, which is necessary to ensure a holistic approach across the three vital functions of the organization.

The critical importance of a rules-based trading system for securing a fairer and procompetitive business environment is beyond question. This is what motivated the global business community to play a central role in the creation of the WTO with binding rules covering trade in goods and services (including digital trade) as well as intellectual property protection. The most important strategic objective was to create a rules-based (and not a power-based) trading system that guarantees stable business conditions.

The erosion of the WTO system and the consequent loss of stability and predictability of the global business environment would cause great damage to the interests of the global business community. The risks of such an eventuality have not been subject to careful analysis by the international community, especially concerning WTO coverage beyond merchandise trade like services, digital trade, and intellectual property protection, which have major implications for global business.

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## **The Main Challenges Facing the WTO**

### Leadership Deficit

### The 2008 financial crisis exacerbated the pre-existing backlash against globalization and free trade resulting in a chilling effect on the political will in capitals that traditionally provided the thought leadership indispensable for the well-functioning of the WTO.

### Increasing Complexity of Trade Policy Issues

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In the years since the establishment of the WTO, technology driven innovative business models have provoked various types of regulatory responses that raise complex questions for trade policy makers and negotiators. This has been combined with the rise of global challenges in areas such as trade and climate, health, privacy, and national security. In the absence of thought leadership and effective deliberative and negotiating functions, the result has been an outdated rulebook and erosion of relevance of the WTO.

### Increasing Diversity of Membership

Since the WTO was created in 1995, the size of its membership has grown from 112 to 164. More importantly, a greater diversity has emerged among members, particularly developing country Members. This has resulted in more diversity in development levels, important shifts in global trade landscape and individual shares in world trade, as well as diversity in trade policy ideological orientation.

### The “Common Purpose” is No Longer Common

Based on the above, there is currently a segment of the Membership which no longer seems to believe that the WTO serves their interests and are reluctant to engage positively in the day-to-day work of the organization, thereby hindering progress across the three vital functions of the organization.

## **Effects on the Three Vital Functions of the WTO**

### **Negotiating Function**

Since the launch of the Doha Round in 2001, the WTO negotiating function has been in an impasse. In spite of WTO Ministers calling for exploring new negotiating approaches at the 8th Ministerial Conference (Geneva, 2011), no progress has been made in multilateral negotiations, with only three exceptions: the Trade Facilitation Agreement at the 9th Ministerial Conference (Bali, 2013), the prohibition of agriculture export subsidies at the 10th Ministerial Conference (Nairobi 2015), and the interim Agreement on Fisheries Subsidies at the 12th Ministerial Conference (Geneva, 2022). Otherwise, negotiations have not achieved any progress. Even the so-called “built in agenda” for negotiations on agriculture and services agreed at the end of the Uruguay Round back in December 1993 are yet to be concluded.

### **Dispute Settlement Function**

The breakdown in the negotiating function and the inability to update the WTO rulebook resulted in ever-increasing pressure on the dispute settlement system. Since the Appellate Body ceased functioning in 2019, the two-tier dispute settlement function has also broken-down.

### **Monitoring function**

The WTO monitoring and deliberative function, which is instrumental for the operation of the system, also suffers from neglect, obstruction, and lack of effectiveness in terms of addressing new and complex trade policy issues and global challenges. WTO councils and committees are not fulfilling their basic duties of transparency and oversight of the functioning of WTO Agreements.

# **A comprehensive and coherent approach to WTO reform (\*1)**

## **Recalling the Common Purpose of the System**

It is extremely important in taking a diagnostic view of this situation to take careful account of the essential relations among the three WTO functions. This institutional architecture was designed to ensure that the three functions bolster one another. The system stands on three pillars with equal weight distribution. Any chronic imbalance cannot be sustained, as we have seen. Therefore, any effort to reform the WTO must address all policy and architectural issues comprehensively.

The common purpose of the WTO is enshrined in the Marrakesh Agreement, the preamble of which cites several global objectives:

“Rising standards of living, full employment, expanding production of goods and services, sustainable development, protect and preserve the environment and, ensuring that developing countries and LDCs secure their share in international trade.”

The Agreement specifically confirms that the way to contribute to those global objectives is "to develop an integrated, more viable and durable multilateral trading system". It also states that the system should be directed to the reduction of trade barriers and elimination of discrimination. The ultimate purpose of the WTO has always been to provide certainty by securing the stability and predictability of trading conditions through a legally binding rules-based system.

## **Reaffirming the Foundational Principles (*with clarification where needed*)**

The reaffirmation of the foundational principles of the WTO need not involve a lengthy or complicated discussion. It would most likely be confirmatory in nature.

Foundational principles would include the following:

* MFN
* National Treatment
* Transparency
* Sustainability
* Market openness
* Fair competition
* Special and differential treatment for developing countries and LDCs

However, there may be a need for clarification regarding some principles. For example, the question of whether the MFN principle is about securing identical outcomes in all situations or about securing equal opportunities for all products and suppliers considering prevailing regulatory conditions in a Member’s jurisdiction. Such clarification would have a direct impact on how regulatory frameworks comply with the principle but also on the conclusion of important on-going “plurilateral” negotiations (e.g., e-commerce).

Another example is the need to clarify the application of special and differential treatment as a tool to provide flexibility to individual Members, as needed, and not as a sweeping one-size-fits-all principle. A productive discussion is needed particularly considering the increasing diversity of Members in the WTO.

Finally, Members need to find a constructive and non-confrontational manner to clarify the expectation of economic management by Members, as determined in the Marrakesh Declaration, “based upon open, market- oriented policies and the commitments set out in the Uruguay Round Agreements and Decisions.”

##  **Mapping Out a Reform Agenda**

### The Negotiating Function (\*3):

In mapping out the issues relating to reforming the negotiating function of the WTO, a distinction needs to be made between the cross-cutting systemic challenges that hinder progress in all areas of negotiation and the specific negating agenda items needed to update the system.

#### Cross-cutting systemic issues

* Clarifying the rules that govern plurilateral negotiations and outcomes in the WTO system.
* Clarifying the approach to and application of special and differential treatment to implement customised flexibilities for specific Members or sub-groups of Members rather than a one-size-fits- all approach.
* Addressing the challenge of negotiating capacity deficit for many developing countries and LDCs. It is noteworthy that by and large, capacity building efforts and resources are usually directed towards implementation of negotiated outcomes but very little is aimed at enhancing the negotiating capacity of Members who need it. (\*4, 3)

#### Specific Negotiating Agenda Items

#### Updating the rulebook of the WTO would entail a rulemaking negotiating agenda that would cover among other things:

* Concluding negotiations on the Agreement on Fisheries Subsidies
* Updating WTO rules on agricultural and industrial subsidies
* Developing new disciplines that ensure a neutral competitive environment and a level playing field and prohibit discriminatory industrial policies, including those that favour state-owned enterprises (SOEs)
* Updating and clarifying rules and disciplines on services and digital trade
* Developing rules and disciplines on trade and environmental sustainability, including reconciling carbon adjustment measures with WTO rules
* Finalizing the negotiation on the Agreement on Investment Facilitation for Development (\*6, 14, 15, 18, 21, 23)
* Reviving the market access negotiating agenda of progressive liberalization under the General Agreement on Trade in Services (GATS) (\*2, 19, 21)
* Broadening the participation in the Information Technology Agreement
* Reviving negotiations on environmental goods and services

### Dispute settlement

Restoring the functioning of the dispute settlement mechanism is a critical priority for upholding the credibility and effectiveness of the WTO. Efforts by Members to provide a temporary alternative to the Appellate Body are welcome but fall short of resolving the crisis. Members must accelerate and deepen their examination of the substantive as well as the procedural issues relating to the system with a view to restoring its full functionality.

Proposals have been made to address many of those issues, some dating back more than a decade. However, the breakdown in the dispute settlement function is also related to dysfunctionalities in the other two functions of the WTO, in particular rule-making negotiations. Again, this is why it is imperative that WTO reform must be pursued with a holistic vision across all functions. (\*5)

### Monitoring and deliberation

The monitoring and deliberative function by regular WTO Councils and committees is the institutional means of overseeing the functioning of WTO Agreements and furthering their objectives. This covers transparency, notifications, cross-notifications, monitoring, cooperation with other international organizations, deliberating specific trade concerns raised by Members, as well as discussing new issues or any matters raised by any Member that affect the functioning of WTO Agreements or the attainment of their objectives.

The core monitoring and deliberative function is meant to support the other two functions by informing negotiating initiatives through updating the analytical and knowledge base of the organization while at the same time providing a means of resolving differences between Members that otherwise can grow into legal disputes. This function has been stifled by political tensions that have undermined its intended role as one of the three pillars of the system.

Members need to address political and procedural obstacles that hold back the deliberative function from fulfilling its critical role in the system. They need to ensure that priority topics are being effectively discussed. Such topics would include specific issues on trade and environmental sustainability such as carbon leakage, circular economy approaches, and the relationship between environmental measures and WTO obligations. While being open to new issues, discussions should also be energized on other existing topics such as the Work Program on E-Commerce. (\*15, 16, 17, 24-27)

### Other Institutional Reforms

#### Improve Secretariat’s capacity to monitor trade policy developments and to serve the negotiating function (\*7)

Monitoring trade policy developments is critical for achieving transparency. Exclusive reliance on notifications by Members limits the pool of information that the Secretariat relies on to produce its reports and analysis. The Secretariat should be called upon to draw on other sources of information to enrich its contribution to the monitoring function of the WTO.

The Secretariat should also play a more active role in assisting Members in their negotiations. The Marrakesh Agreement establishing the WTO explicitly stresses the international and impartial character of the Secretariat. Paragraph 4 of Article VI of the WTO Agreement states that:

 *The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.*

This places the Secretariat in a unique position to serve Members in a most professional and impartial manner with no affiliation or external influence. The Secretariat embodies a world class pool of knowledge and expertise. It is headed by the Director General who is also the Chair of the Trade Negotiations Committee. Together, the Director General/Chair and the Secretariat should always play the key role of the “honest broker” that combines sound political judgement with authoritative knowledge of issues under negotiations.

#### Create standing consultative mechanisms with stakeholders in the business community and civil society (\*9)

It is also crucial that the Secretariat engage with the business community regarding the substantive details of issues under negotiation, especially when it concerns business realities on the ground. This provides the Secretariat with the chance to gather practical information, knowledge, and insights to ensure that negotiated outcomes are responsive to the needs of the business community and to how business is conducted. For that purpose, the Secretariat should augment and formalize its collaboration with interlocutors from the global business community as well as representatives from civil society.

The WTO Public Forum provides opportunities for stakeholders to meet. However, the multilateral trading system would benefit from greater and more frequent dialogue on issues of common interest.

The foreseen establishment of an Advisory Business Council by the Director General is a welcome step in the right direction. A collaborative relationship between the working levels in the Secretariat and stakeholder organizations would also be of great benefit to all sides.