# **A HOLISTIC FRAMEWORK FOR WTO REFORM**

Draft dated October 16, 2023

**CONTENTS**

**[Table of Contents to be inserted]**

**Preamble**

Building on ICC’s long-standing support for the World Trade Organization (WTO) and the multilateral trading system, this paper is intended to set out a holistic vision for WTO reform and to bring clarity for negotiating items from the perspective of the global business community.

It is based on extensive consultations with the International Chamber of Commerce’s business network across all continents and all levels of development, which includes businesses of all sizes and in all sectors, as well as a wide and representative range of WTO Members in Geneva. In addressing reform issues and appraising systemic challenges, this paper focuses on dysfunctions and shortcomings. However, this must not detract from the tremendous value of the WTO institutional and legal infrastructure, the likes of which would be extremely difficult to recreate in today’s world of geopolitical tensions. The WTO system must be preserved and updated to meet the challenges of the 21st Century.

Finally, this paper does not attempt to set out solutions to technical reform issues, such as the dispute settlement function, or assume all reform matters will be addressed at the same time. Rather it is intended to encourage WTO members to align behind a common purpose and vision and develop a comprehensive work programme on WTO reform.

# **INTRODUCTION**

[Seventy percent] of world trade relies on the rules of the WTO, bringing certainty and predictability to billions of traders across the world, most of whom are unaware of the system underpinning world trade, which has fuelled and continues to contribute to global growth and prosperity. But as is widely recognised, the quiet engine of international trade is in urgent need of reform. Recognizing the tremendous value of the WTO for business, consumers and as a vehicle for development, its rulebook must be updated to meet the challenges and opportunities of the 21st century coupled, its rules enforced, and its agreements effectively monitored.

Since the 2007-2008 financial crisis, the WTO has faced many external challenges, including the ensuing economic crisis leading to trade distortive rescue measures and a growing anti-globalization backlash. It has also faced internal challenges, including the failure of the Doha Round of multilateral trade negotiations (launched in November 2001), the breakdown of the dispute settlement function, and rising geoeconomic and geopolitical tensions among WTO Members. More recently, with the Covid-19 pandemic and the war in Ukraine, the WTO has been confronted with unprecedented existential challenges. All of these challenges together with rising geopolitical tensions are creating an unprecedented threat to international economic relations.

Another key challenge facing the WTO today is that it must ensure that the rules underpinning trade are fair, inclusive and create a level-playing field. The system must work for everyone, everywhere. Development related concerns and interests should permeate all aspects of WTO reform efforts, including a more effective and equitable approach to the application of special and differential treatment, to ensure that MSMEs in developing countries and LDCs reap the benefits of the system. Also, most of the WTO rulebook was agreed almost 30 years ago and needs to be updated and reshaped to address the dynamic changes in the way trade currently operates. While the WTO has a built-in negotiating function the very purpose of which is to update the rules in the face of a changing global trade environment, Members have not fulfilled that task.

Recognizing the urgency of the situation, at the Twelfth Ministerial Conference of the WTO (MC12) in June 2022, Members committed for the first time to work towards necessary reform of the WTO to ensure its proper functioning.

In August 2023, the G20 encouragingly reaffirmed the essential role of the multilateral trading system with the WTO at its core and its commitment to WTO reform, recognizing the foundational principles and objectives set out in the Marrakesh Agreement. While active discussions are underway and various WTO Members have submitted proposals, there is yet to emerge a coherent and structured framework that maps out all the issues to be addressed in a reform agenda and articulates a holistic vision for reform. Such a framework is necessary to ensure a holistic approach to reform across the three vital functions of the organization – negotiation, dispute settlement and, monitoring and deliberation. This Framework aims to do just that.

# **The wto imperative for business**

Since its establishment in 1995, the WTO has been the backbone of the multilateral trading system. Through enforceable rules, the system provides the stability and predictability in trade relations needed for informed long-term trade and investment decisions.

The critical importance of a rules-based trading system for securing a fair and competitive business environment is beyond question. This is what motivated the global business community, as the ultimate end-user of the trading system, to play an instrumental role in the creation of the WTO with binding rules covering trade in goods and services as well as intellectual property protection. Before and during the Uruguay Round of trade negotiations that established the WTO, the most important strategic objective was to create a rules-based (and not a power-based) trading system that guarantees stable business conditions.

The needs of the business community have not changed throughout the years, and the private sector has continued to attach great importance to its effective functioning and its reform efforts. Securing the stability and predictability of trade and investment conditions remains a top priority. The increasing complexity of new and evolving business models and regulatory responses by governments have further underscored and heightened the need for predictability and certainty.

The business community has also often provided a reality check on the extent to which the system remains relevant to trading realities and is fulfilling its purpose as established by its Members in the Marrakesh Agreement, the WTO’s foundational document.

The erosion of the WTO system and the consequent loss of stability and predictability of the global business environment threatens to cause great damage to the global business community, particularly the MSMEs who risk being further excluded from the system.

# **DIAGNOSTIC OF wto institutional challenges**

Multilateral organizations in different fields of international cooperation have been under unprecedented strain due to geopolitical tensions and rivalries. The WTO, like other organizations, has been adversely affected by such global trends but also by five key factors which are specific to the organization and the area of trade. These five key factors have contributed to the current dysfunctions of the WTO.

### Leadership Deficit

### The 2007-2008 financial crisis and its aftermath exacerbated the pre-existing backlash against globalization and open trade and investment relations. This has resulted in a chilling effect on the political will in capitals that traditionally provided the thought leadership indispensable for the well-functioning of the multilateral trading system and the WTO. While appetite for liberalization is diminishing, leadership has also been lacking to preserve and strengthen the WTO’s role in guaranteeing stability and predictability of trade and investment conditions and, in turn, erodes its credibility which fosters compliance with a rules-based system.

### Increasing Complexity of Trade Policy Issues

###

In the years since the establishment of the WTO, technology-driven innovative business models that raise complex questions for trade policymakers and negotiators have provoked various types of regulatory responses, such as in the area of data protection and privacy. At the same time, policymakers are grappling with the rise of global challenges in areas such as digital trade, climate change, labour rights, health, and national security. As a result, whilst raising tariffs and import/export restrictions are the first line of defence which are still widely used to hinder trade, the focus of trade negotiations has shifted from the traditional emphasis on market access (e.g., tariffs) towards more complex regulatory issues, such as how to develop trade disciplines to ensure that regulatory measures taken by governments are not more trade restrictive that what is necessary to achieve legitimate policy objectives. Global challenges have also raised complex questions about defining the precise role of the WTO (as well as trade policy and negotiations) in contributing to the global response agenda in accordance with the defined role and mission of the WTO as a rule-based treaty system. In the absence of government 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. This has resulted in more diversity in development levels, which among other things, has sharpened differences regarding the practical application of special and differential treatment. This challenge has been further compounded by shifts in the global trade landscape and in trade policy ideological orientation, including the rise of protectionism and the growing role of governments in national economies. The WTO needs to respond to these challenges by updating and reshaping its rules to ensure the well-functioning of the multilateral trading system for the benefit of all, particularly developing countries and LDCs.

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

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 preamble to the Marrakesh Agreement specifies that these objectives should be achieved by:

“…entering into **reciprocal and mutually advantageous arrangements** directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations (emphasis added).

The Marrakesh Agreement then specifically resolves “to develop an integrated, more viable and durable multilateral trading system”. 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.

While the purpose behind the establishment of the WTO is explicit in the Marrakesh Agreement, in practice, Members have been increasingly diverging from it. A segment of the Membership increasingly seems not to adhere to that common purpose, believing that the WTO is not the most appropriate tool to serve their interests. Consequently, they are reluctant to engage positively in decision-making or in the day-to-day work of the organization, thereby hindering progress across the three vital functions of the organization. While the WTO functions by consensus, nowhere in the WTO rulebook does this mean or require unanimity. While the practice of decision-making by consensus is considered the most appropriate for the WTO, it should not turn into an instrument of veto. In some instances, it leads to blockages due to intransigence. In other cases, it becomes a hurdle because some members demand a consensus decision on matters where such a procedure is not required by the rulebook.

### The Trust Deficit

All the challenges above have led to an overall environment in the WTO which is often characterised by lack of trust. The leadership deficit, the complexity of trade policy issues in the absence of an effective deliberative function to provide clarification, the diversity of trade policy directions, and the continuing obstructionist practices have all lead to a serious trust deficit within the system. A lack of transparency has also contributed significantly to the trust deficit both within and outside the organization.

# **IMPLICATIONS FOR THE WTO’S THREE VITAL FUNCTIONS**

### **Negotiating Function**

Since shortly after the launch of the Doha Round in 2001, the WTO negotiating function has largely been at 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 with only four exceptions: the Information Technology Agreement at the 1st Ministerial Conference (Singapore 1996), 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 Agreement on Fisheries Subsidies at the 12th Ministerial Conference (Geneva, 2022). Otherwise, negotiations have not made 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 is 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 is effectively broken. While 47 WTO members set up a separate appeal system for trade disputes in March 2020 (the Multi-Party Interim Appeal Arbitration Arrangement (MPIA)), the WTO two-tier system is still not fully functional. Whilst unresolved disputes keep piling up, the once most used international dispute settlement system in the world is being neglected by the WTO Membership as evidenced by the decreasing number of disputes brought by Members. Only nine disputes were filed in 2021, eight in 2022; six up to September 2023. Members are working to address this to have a fully and well-functioning dispute settlement system accessible to all Members by 2024 in accordance with the MC12 Ministerial instruction on this issue.

### **Monitoring and deliberative function**

The WTO monitoring and deliberative function is key to the oversight of the application of different WTO agreements and the furtherance of their objectives. While this function has been performing well in some areas (e.g., Committees on Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) ), others are suffering from neglect, obstruction, and a lack of effectiveness in terms of addressing new and complex trade policy issues and global challenges. Several WTO councils and committees are not able to fulfil their basic duties of transparency and oversight. This has prompted WTO Members to put forward various proposals to revive the deliberative function as part of ongoing discussions on WTO reform.

# **A HOLISTIC FRAMEWORK FOR WTO REFORM**

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

The starting point is to recall and reaffirm Members’ firm commitment to the common purpose of the system as articulated in the Marrakesh Agreement which are in line with the business community’s fundamental need for predictability and certainty.

## **Reaffirming the Foundational Principles**

Whilst detailed discussions on the application of some principles might be required, the reaffirmation of the foundational principles of the WTO should not involve a lengthy or complicated discussion because they are well established in the Marrakesh Agreement and supported by the business community. These include Most favored nation treatment (MFN), national treatment, transparency, sustainability, progressive market opening, fair competition, and special and differential treatment for developing countries and LDCs.

However, the private sector recognizes that there may be a need for clarification regarding some principles. For example, there is a need to clarify the application of special and differential treatment as a tool for providing flexibility to individual Members, as needed, and not as a sweeping one-size-fits-all principle. While this is a strategic priority for developing countries, it is also a key element in ensuring the inclusive, fair and equitable nature of the system. A productive and non-politicized discussion is needed, particularly considering the increasing diversity of Members in the WTO.

## **Mapping Out a Reform Agenda Across the WTO's Three Functions**

While mapping out a reform agenda entails identifying specific issues related to each of the three functions- negotiation, dispute settlement and, monitoring and deliberation- an effective approach to the problems and challenges facing the system must take careful account of the interconnectedness of the WTO’s three core functions. This institutional architecture was designed to ensure that the three functions bolster one another. The system stands on three pillars that carry equal weight. Any chronic imbalance cannot be sustained -- failings in one function inevitably waken the others. Thus, any effort to reform the WTO must address all policy, legal and architectural issues comprehensively.

### The Negotiating Function

In mapping out the issues relating to the reform of 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**. These include:

* 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 facing 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 with very little aimed at enhancing the negotiating capacity of Members who need it.

#### **Specific Negotiating Agenda Items.** Updating the rulebook of the WTO would entail a rulemaking negotiating agenda that would cover a wide array of areas. The business community does not expect negotiations on all items to happen at the same time but would welcome sustained progress, keeping in mind that market access continues to be a key business objective. These areas of negotiation include:

* Updating and clarifying rules and disciplines on services and digital trade, and concluding negotiations of the E-Commerce Joint Statement Initiative (JSI)
* Making permanent the Moratorium on Customs Duties on Electronic Transmissions
* Developing new or adapting the current rules and disciplines on trade and environmental sustainability, including reconciling carbon border adjustment measures with WTO rules
* Integrating the Agreement on Investment Facilitation for Development into WTO architecture
* Reviving the market access negotiating agenda of progressive liberalization under the General Agreement on Trade in Services (GATS)
* Broadening the participation in and scope of the Information Technology Agreement
* Reviving negotiations on environmental goods and services
* Concluding the remaining aspects of 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)

### Dispute settlement

Swiftly restoring the functioning of the dispute settlement mechanism is a critical priority for upholding the credibility and effectiveness of the WTO and so that disputes are resolved through rules-based processes rather than retaliatory measures. For business it is imperative that disputes be adjudicated as quickly as possible and final decisions are enforceable --- investment decisions rest on clear and certain regulatory environments.

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. The bottom line from the private sector perspective is to have an impartial, rule-based and independent dispute settlement mechanism assisted by a neutral secretariat.

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. The failure to update WTO rules has led Member states to litigate in the alternative, such as resorting to regional trade agreements. This coupled with the failure of the deliberative function to clarify and resolve issues where differences have arisen has lead to unsustainable pressure on the dispute resolution function. Again, this is why it is imperative that WTO reform must be pursued with a holistic vision across all functions.

### Monitoring and deliberation

The monitoring and deliberative function carried out 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 on 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. It is critical for the integrity of the system that Members be held accountable for the accuracy and fulfilment of their notification obligations.

The monitoring and deliberative function is intended 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. Political tensions have frequently caused agenda items to be blocked from being discussed and prevented the WTO Secretariat from providing relevant analysis, undermining its intended role as one of the three pillars of the system.

Traders across the world rely on WTO transparency notifications to conduct their business in compliance with local regulations. The WTO is in many cases the only place where this information can be found. It is an essential transparency and consultation mechanism for business. Without it, businesses are flying blind, driving up uncertainty, costs and penalties. Thus, further efforts need to be undertaken to enhance transparency rules and ensure full compliance by Members.

Members need to address political and procedural obstacles that frustrate the fulfilment of the deliberative function’s critical role in the system. They need to ensure that emerging topics are being effectively discussed. From the perspective of business, such topics would include trade and environmental sustainability, carbon leakage, circular economy opportunities, digital trade issues, labour, and the relationship between such issues 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.

### Other Key Institutional Reforms

#### The reform of the WTO would also benefit from two other key institutional reforms:

**Create standing consultative mechanisms with stakeholders in the business community and civil society**

It is 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. It is after all businesses that engage in cross-border trade, not countries. This provides the Secretariat with the chance to gather practical information, knowledge, and insights to ensure that the Secretariat effectively supports Members in reaching negotiated outcomes that are responsive to the needs of the business community and to how business is conducted. For these purposes, the Secretariat should augment and formalize its collaboration with interlocutors from the global business community as well as representatives from civil society. A collaborative, structured relationship between the working levels in the Secretariat and stakeholder organizations would be of great benefit to all sides.

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 establishment of an Advisory Business Council by the Director General in July 2023 is a welcome step in the right direction. Similarly, the openness of the WTO Trade and Environmental Sustainability Structured Discussions (TESSD) and Joint Statement Initiatives to engage with stakeholders not only allows the private sector to contribute its technical knowledge and expertise, thereby enriching the discussions, but also boosts support for the work of the WTO within the private sector. While governments in capitals have their consultative mechanisms with their respective business communities, the issues taken up and discussions that take place in the WTO are of such a different nature that the risk of duplication would hardly arise.

 **Bolster the Secretariat’s support-function capacity**

The Secretariat plays a key role in ensuring the well-functioning of the monitoring and negotiating functions of the organization. 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, including regular and structured consultations with the private sector which can provide their real-world experience of how WTO agreements and rules are being implemented in practice.

The Secretariat should be allowed to 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 as the “honest broker” in a most professional and impartial manner with no affiliation or external influence. The Secretariat embodies a world-class pool of knowledge and expertise that combines sound political judgement with authoritative substantive knowledge of issues confronting the WTO.

# **CONCLUSION**

At the next ministerial (MC13). the global business community urges trade ministers to agree on a coherent and holistic vision for WTO reform, based on the organization’s foundational principles, and deliver on a work programme for WTO reform covering all three pillars of the organisation—negotiations, dispute settlement and monitoring national trade policies.

Whilst the current challenges facing the WTO are great, the opportunities are even greater. A thriving, fit-for-purpose WTO will provide certainty and predictability to traders across the world, leveling the playing field and driving economic growth whilst ensuring that the WTO is a key partner in addressing global challenges.