



Reinvigorating the WTO – Safeguarding a strong and effective multilateral trading system

KEY MESSAGES

- 1** The WTO should remain the main point of reference for governments and businesses in rule-setting and trade disputes. We urge governments to solve the unprecedented crisis in the WTO that puts the benefits of multilateralism in jeopardy.
- 2** The WTO has failed to deliver modern rules that respond to today's constantly evolving environment. Updating the existing rule book of the WTO, for instance in the area of subsidies, and developing new rules on e-commerce or investment facilitation is essential. We call on WTO members to show the necessary political will and flexibility in order to allow the WTO to deliver tangible results under its negotiating function.
- 3** The WTO is also facing profound institutional challenges, most prominently regarding its Dispute Settlement functioning and the Appellate Body in particular. This is the "crowning jewel" of the WTO, providing the necessary scrutiny on the implementation of rules. WTO members should discuss their concerns openly, involving business, and find effective and long-term solutions to the current stalemate. The proposals of the EU constitute an excellent basis.
- 4** BusinessEurope also recommends an increased and more structured cooperation between the WTO and stakeholders, including the private sector. We consider this process key for the WTO to receive practical, comprehensive and balanced input from those stakeholders that work on trade in their daily operations.



2 October 2018

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SAFEGUARDING A STRONG AND EFFECTIVE MULTILATERAL TRADING SYSTEM

Introduction

The WTO, as the guardian of trade rules, stands at the centre of a multilateral system that aims to promote an open, rules-based and fair-trade environment against policies that lead to discrimination and protectionism. In this regard, the WTO is indispensable to help businesses source, produce and sell products and services across the globe equitably and competitively. Open, rules-based and fair trade also creates positive externalities for business, consumers and workers alike.

The limited outcome of the 11th Ministerial Conference of the WTO that took place in December 2017 in Buenos Aires, combined with the deeper institutional crisis that involves the functioning of the Dispute Settlement pillar of the WTO, reveal that the WTO is currently at an impasse that risks affecting the nature and effectiveness of the multilateral trading system.

It is our view that solutions to the current problems can be found within the WTO through its modernisation as an institution and the reinforcement of its three pillars: negotiations, dispute settlement and monitoring. We urge the members of the WTO to find the necessary political will to invest in the multilateral trading system and bring concrete proposals for the reform of the WTO. Furthermore, we believe that increased engagement with non-state actors, including business, will also contribute to discussing viable solutions.

This position paper takes stock of the current developments and proposes recommendations that we believe are going to improve, modernise and reinforce the WTO. Our aim is also to contribute to the on-going discussions regarding the post-Buenos Aires Work Programme of the WTO. In this context, BusinessEurope commends the EU's approach and takes it into consideration in our analysis and proposals.

A. A strong and effective WTO

Over the past years, the centrality of the WTO in the multilateral trading system has been challenged, as important members seem less engaged in the efforts to modernise and reinforce it. The failure of the Doha Development Agenda (DDA) and the inability of WTO members to agree on a joint Ministerial Declaration during the Buenos Aires Ministerial Conference made this rupture within the WTO membership very clear.

Looking at ways to reinvigorate the WTO as an institution for multilateral trade, bold initiatives should be pursued by all members – developed and developing. These



initiatives relate to the structure of the WTO, the decision-making process in the organisation as well as members' approaches to negotiations.

1) Negotiating method

Since the 9th WTO Ministerial Conference in Bali, the WTO has moved away from its traditional negotiating method of the single undertaking¹, otherwise described as “nothing is agreed unless everything is agreed”.

This has enabled the WTO members to conclude the Trade Facilitation Agreement, the first multilateral agreement adopted since 1994. It has also tangibly demonstrated the readiness and willingness of members to adapt their traditional approaches in order to move the WTO forward.

For BusinessEurope, this marks a positive step for the future of the WTO and should be considered in the forthcoming endeavors to update the WTO. A modular approach to liberalisation initiatives and rule-setting is more promising than insisting on a strategy of “single undertaking”. In this context, action should also be explored and encouraged in the following areas:

- Format of agreements – introducing flexibility

There are different types of WTO agreements with most allowing certain leeway for developing countries and Least Developed Countries (LDCs) under the provisions for “special and differential treatment”. This is the case, for instance, with the Trade Facilitation Agreement, concluded during the Bali Ministerial. Under the agreement, developed countries are required to apply substantial provisions from the day it enters into force. At the same time, the agreement allows for transitional periods as well as technical assistance and capacity building for developing countries and Least Developed Countries.

In this regard, the Trade Facilitation Agreement sets an important example and could provide a model for future WTO deals. It is viewed by many as an attractive structure for all WTO members as it is able to take into account the differences in their developmental status and needs. Nevertheless, only if members take responsibility and commitments according to their real economic power and capabilities will the WTO be able to strike significant new multilateral agreements. Ultimately, we should work to have all the agreements implemented by every WTO member.

- Decision-making process

Currently, the WTO is comprised of 164 members who make decisions based on consensus. Correspondingly, the role of the WTO Secretariat is relatively limited, as it does not have the right to initiate agenda items for discussion and cannot take decisions or present compromises when WTO members disagree.

With decisions based on consensus, the large and increasing number of members often expressing divergent views render the current decision-making process challenging with negotiations frequently resulting at an impasse. A more flexible approach, through which the Secretariat is also able to take a more active role, could present a viable solution and allow progress, especially in the negotiating pillar of the WTO. This flexible approach

¹ The “single undertaking” is the negotiating method adopted in the Uruguay round of negotiations. It practically means that every negotiating item is part of a whole and indivisible package and cannot be agreed separately. (source: WTO)



should include the right of the Secretariat to start initiatives in its own right. Those initiatives could include new negotiation processes, compromise proposals or changes to the rule book.

The regular work of the WTO committees should also be revitalised by giving the chairpersons a more active role in developing and proposing solutions and compromises beyond just moderating the contributions of members. This extended task should be supported by the Secretariat.

In this context, it is also our view that those WTO members that would like to move ahead in setting new rules should be allowed to do so, in a way that is open to other members, who are not convinced or ready at the certain moment, to join later. In other words, WTO members should explore different options under plurilateral agreements.

- Notification system

Notifications are key in ensuring that measures adopted at national level and trade agreements negotiated among WTO members are compatible with the multilateral trading rules. Although the notification of newly adopted legislation or the conclusion of bilateral and regional trade agreements by WTO members is an established obligation under WTO rules, the track record of many members is not positive.

The problem becomes particularly relevant when it comes to the notification of subsidies. An improved process for the notification would be a stepping stone to creating better rules defining the use of legitimate and illegitimate subsidies in pursuit of fairer global trade. Trilateral discussions held between the EU, the US and Japan explore ideas to address this issue. For instance, they suggest the reversal of the burden of proof, meaning that it should lie with the WTO member that fails to notify a subsidy.

Improving compliance with the notification system of the WTO will contribute to a clearer and more coherent legal framework both for legislators and economic operators all over the world. Members should consider adopting more committing requirements on notifications, including penalties for non-compliance and a strong role of the WTO Secretariat in monitoring and enforcement.

Increased effort should also go into improving the operation of the notification system as it pertains to individual agreements, such as in the area of technical barriers to trade. Furthermore, as there is a demand for increased surveillance of trade policy measures, the WTO members should also consider the allocation of additional resources dedicated to collecting, compiling and managing data.

All WTO Committees overseeing WTO agreements with notification obligations should explore ways to make the notifications more effective, for instance by giving the chairpersons and the Secretariat a more active and powerful role. This exercise should be part of an overall effort to review the work of the WTO at the level of Committees.

- The question of development

Given the increased pressure that the multilateral trading system currently experiences, it is our view that WTO members should undertake commitments according to their current economic weight and level of competitiveness.

This status should be regularly updated according to objective and internationally recognised criteria.



2) Monitoring pillar

Monitoring is the WTO's process par excellence offering a neutral and comprehensive view into the progress achieved by all WTO members as it relates to their adhering to obligations regarding multilateral trade, newly adopted legislation and broader economic reforms they undertake.

This is a valuable service to WTO members and non-state stakeholders, businesses in particular, and should be strengthened further. For instance, the introduction of stricter benchmarks would ensure a higher standard of evaluation and identification. Such enhanced monitoring could help to constructively point towards areas in which WTO members need to do more work at the national and multilateral level. In this perspective, the WTO can work with other international organisations such as the OECD, which has developed relevant data base (e.g. the Services Trade Restrictiveness Index).

3) Dispute settlement pillar

The strength of the WTO does not only lie in the negotiation of new disciplines in trade. It also very much depends on the full implementation of those rules by all WTO members and the possibility to check and correct their enforcement under a balanced and effective dispute settlement system.

The current crisis concerning nominations of new members in the Appellate Body of the WTO shows that there are profound concerns that need to be addressed as soon as possible. A solution is pertinent as there is a tangible risk that by December 2019², the Appellate Body will not be able to conduct its work.

Stability and predictability offered through a neutral and efficient WTO Dispute Settlement are key for business all over the world. It is therefore of great importance that a solution to the impasse in the dispute settlement process is found within the existing framework. Should the current impasse continue, however, the WTO and those members willing to maintain a functioning dispute settlement process must be allowed to look into alternative solutions. These can be short-term, for instance under the process of Article 25 of the WTO Dispute Settlement Understanding³, while WTO members seek longer-term solutions. In this context, BusinessEurope welcomes the initiative and proposals of the EU to unblock the functioning of the Appellate Body.

Non-tariff barriers (NTBs) often represent a heavy burden on trade and are difficult to address. The horizontal mechanism for mediating conflicts over NTBs that was discussed under the DDA would be helpful to solve potential disputes. It should therefore be adopted, independently of the Doha Round.

4) WTO budget

While the WTO membership has grown from 144 to 164 countries, including accessions by large members like China and Russia, the budget has not been increased accordingly. This makes it very difficult for the WTO Secretariat to maintain the same quality of work,

² As of September 2018, there are only three members in the Appellate Body of the WTO, which is the minimum number of judges required to hear appeals. This can already create problems if conflicts of interest arise.

³ Art. 25 of the Dispute Settlement Understanding of the WTO allows for expeditious arbitration within the WTO as an alternative means of dispute settlement, subject to mutual agreement of the disputing parties (https://www.wto.org/english/Tratop_e/dispu_e/dsu_e.htm#25).



for instance in the area of monitoring and dispute settlement. Members should therefore increase the WTO budget according to the extended needs. In general, the monetary contributions of new members should increase the WTO budget and not lead to smaller member fees of the existing members.

5) Engaging with non-state actors

Although the WTO is an intergovernmental organisation and decisions are taken exclusively by its members, non-state actors have important stakes in the organisation's performance.

The WTO Public Forum and Trade Dialogues underscore the openness of the WTO to stakeholders. The WTO should build on these important annual events and develop a more systematic and structured interaction with non-state actors. This will feed into the decision-making process and ensure that trade rules respond to public concerns and expectations. Interesting experiences could be drawn from the processes in the OECD and ILO.

B. A WTO adapted to today's trading environment

Achieving progress in terms of negotiating new rules that are adapted to today's global trading environment is essential, as business all over the world depends on an open and rules-based environment in order to efficiently deliver their best products and services.

In this regard, the WTO should be able to start discussions on new issues, such as rules related to digital trade, investment, subsidies and competition, as well as consider the increased role of services and the importance of cyber security for the economy. Therefore, WTO members should concentrate their efforts in exploring possibilities under existing rules and subsequently consider updating and reinforcing the rule book of the WTO.

Agriculture and non-agricultural market access (NAMA) are of particular relevance to business and are closely linked with economic development. WTO members should explore possible avenues of restarting negotiations on market access that failed to yield results under the mandate of the Doha Development Agenda, for instance under the NAMA negotiations.

We also support the work by the EU, Japan and the US on State Owned Enterprises (SOEs), forced technology transfer and theft of intellectual property that has started in Buenos Aires in December 2017. The three partners should use their leverage to introduce effective new provisions into the WTO rule book and improve the enforcement process of all rules relevant for competition in international trade.

BusinessEurope outlines the following priority areas:

- E-commerce

During the 2nd WTO Ministerial Conference that took place in Geneva, in May 1998, WTO Members decided to establish a Work Programme on e-commerce, aiming to examine all trade-related issues pertaining to global electronic commerce. It was noted that the economic, financial as well as the development needs of developing countries would be



taken into account. This Work Programme requires the joint efforts of the WTO bodies, including the Council for Trade in Goods, the Council for Trade in Services, the TRIPS Council and the Committee on Trade and Development.

Furthermore, a moratorium on customs duties on electronic transmissions was introduced, which since then has been renewed every 2 years at the respective WTO Ministerial Conferences, including the most recent one in Buenos Aires. This is a significant contribution to the liberalisation of trade in this area and there are many voices who support that the WTO members should agree to make this moratorium permanent.

Additionally, the Buenos Aires Ministerial Decision regarding the Work Programme on e-commerce, called for the reinvigoration of the work in this area. A joint statement on e-commerce was adopted by 46 members (with the EU counting as one). The joint statement is particularly important, as it not only confirms the renewed interest of a significant number of WTO members on this issue, but it also announces the launch of exploratory discussions for future negotiations in trade-related aspects of e-commerce. These should be open to all WTO members and must be anchored in WTO rules.

BusinessEurope welcomes progress in this area and supports the deepening of the discussions among WTO members. An agreement under the auspices of the WTO, that is comprehensive in nature and covers both aspects of market access and disciplines should be the ultimate objective. It is our understanding that WTO members share different levels of ambition on e-commerce. In light of this, the WTO should be open to more flexible negotiating formats, including a plurilateral agreement under the auspices of the WTO that would be accessible for all WTO members should they wish to join in the future.

The agreement on e-commerce should create legal and planning security by addressing open questions regarding, among others, classification/mode of services and jurisdiction. WTO members should make the moratorium on import duties on electronic transmissions permanently legally binding and clarify that it also covers the content of the transmissions. Trade in digital products should also be protected from other forms of discrimination. The technological neutrality of all WTO agreements should be explicitly confirmed. In view of the growing importance of e-commerce, the agreement should establish binding rules for free, secure, and reliable cross-border data transfer. Legal localisation requirements should be minimised, and the freedom of businesses to decide whether and what data is transferred should not be curtailed. The transfer or access to source codes should not be a market access requirement for software. Here – as well as for cross-border data transfer – existing rules on data protection and security that are in conformity with WTO law are still to be respected. The OECD and WTO should make progress on gathering and analysing data on cross-border e-commerce and data transfer as well as international trade in services in order to facilitate the negotiating process.

- Investment facilitation

Over the past few years, the issue of investment facilitation has attracted the attention of many WTO members. During the Buenos Aires Ministerial, 45 members (with the EU counting as one) signed a joint statement on investment facilitation for development. The



statement calls for the launch of discussions on establishing a multilateral framework for cooperation to improve transparency and predictability in order to facilitate investments. In terms of structure, discussions will be open and members will monitor how this initiative falls within the WTO rules. In terms of scope, it is clear that discussions will not address market access, investment protection or investor-state dispute settlement. Finally, members will examine and work on enhancing the relationship between cross-border investments and development.

From a business perspective, a clear and predictable legal framework to pursue and conduct investments is essential. Although BusinessEurope would support a more comprehensive approach to multilateral rules on investment, we recognise the immense challenges this task poses. We, therefore, welcome a step-by step approach towards an agreement on investment facilitation.

- Domestic regulation in services

During the Buenos Aires Ministerial discussions also took place on the domestic regulation in services. Several proposals were submitted ahead of the Ministerial Conference by WTO members under the Working Party on Domestic Regulation. Despite the parties' significant efforts, it was not possible to reach an agreement on disciplines. Nevertheless, a joint statement, signed by 34 members (with the EU counting as one), reiterates the value of good regulatory practices in services. Members are calling for the revival of negotiations in the context of the WTO Working Party on Domestic Regulation. Since the ultimate goal is the negotiation of a multilateral agreement, these discussions are open to all WTO members.

An agreement on domestic regulation in services means clarity and simplification in licensing as well as qualification requirements and procedures, which are essential business active in the service sectors. BusinessEurope supports the initiative, because it provides more transparency, access to information and legal certainty, while reducing costs for companies and administrations.

- Subsidies, competition and SOEs

The lack of coherent and comprehensive rules in the area of subsidies – beyond export subsidies – and, increasingly, the role of State-Owned Enterprises (SOEs), is often described by businesses as one of the reasons behind significant distortions in trade.

The 2015 Nairobi Ministerial achieved a landmark agreement in the area of export subsidies in agriculture. Moreover, regulating fisheries subsidies was a central item on the agenda of the Buenos Aires Ministerial. Although members did not manage to reach an agreement, discussions currently continue at the WTO with the aim of concluding a deal by the next Ministerial Conference, in Astana, in 2020.

With the issue still unaddressed, similar efforts should also be pursued for industrial goods and services. This is a long-standing demand from business, which has become particularly pertinent in today's environment replete with protectionist temptations. We should seek a global and permanent solution to concerns about subsidies and we view a future agreement as an important step towards establishing a level playing field in this



area. When it comes to export credits, it is also important that WTO members act along the OECD Arrangement on Export Credits and the Export Credits Sector Understandings. In this context, WTO members should make sure that their export credits measures are not used as disguised subsidies.

- Potential sectorial agreements under NAMA

Liberalisation through increased access to global markets remains a core trade policy objective and the WTO should deliver results in this area. Recognising the challenges in achieving a broad, comprehensive agreement in non-agricultural market access, European businesses would like to explore the possibility of concluding sectorial agreements. These may include:

- *Chemicals Tariff Harmonisation Agreement (CTHA)*: The successive extensions of the existing CTSH to new members of the WTO have delivered tangible benefits for the industry. A possible way forward is to pursue further tariff liberalisation and/or broadening the signatory base.
- *Pharmaceutical Agreement (PA)*: There is a pressing need to expeditiously start the 5th update of the pharmaceutical zero-for-zero agreement of the GATT Uruguay round. Preferably, this should occur in combination with broadening the signatory base. This agreement included a provision to be updated at least every three years, in order to include additional products for tariff elimination. However, since 1994, only four such updates have been made.
- *Environmental Goods Agreement (EGA)*: Initiatives aimed at improving overall market access are welcomed, while ensuring a non-discriminatory treatment between products and sectors. Although formal negotiations on an EGA have been paused, such an agreement could potentially contribute to achieving the targets of the Paris Climate Accord by reducing the cost of environmental goods and technologies.

C. Other areas where BusinessEurope would like to see results

- Government Procurement Agreement (GPA)

Accession of key trading partners, including China, Russia, India and Australia to the Government Procurement Agreement (GPA) is important and should happen on ambitious terms (e.g. covering both central and sub-central procuring entities as well as SOEs).

- Trade Facilitation Agreement (TFA)

Following the ratification and entry into force of the TFA, the efforts of the WTO and the members should now focus on ensuring the effective and ambitious implementation of the agreement. This also means close monitoring of the commitments made by WTO members. Businesses show their active engagement to the TFA by participating in projects around the globe.



- Trade-related Aspects of Intellectual Property Rights (TRIPS)

The TRIPS agreement sets the minimum intellectual property rights protection standards globally. We believe that its standards should be respected and strengthened in various bilateral trade agreements as well as international agreements that address IP issues. IP initiatives that aim at lowering the standards set in TRIPS should be countered globally. TRIPS implementation should be ensured where it is still pending in line with special transitional arrangements foreseen. In this context, we also note the decision reached during the previous WTO Ministerial Conferences on the TRIPS non-violation and situation complaints, which is designed to facilitate the economic development of WTO members.

- Progress in rules in Services

Services are fundamental for the economy and need to be globally liberalised. Therefore, action is needed at a plurilateral or multilateral level, and should go beyond the discussions on domestic regulation in services. Negotiations under a Trade in Services Agreement (TiSA) are currently blocked. WTO members should explore ways of either relaunching TiSA or start discussions for another, more comprehensive agreement for the liberalisation of services.

- Further develop the Information Technology Agreement (ITA)

The ITA II was sealed at the 2015 Nairobi Ministerial Conference. The declaration of intent to discuss non-tariff barriers (NTBs) in this sector also needs to be quickly followed by binding agreements. Furthermore, all WTO members should be encouraged to sign the ITA (I and II). It is also important to regularly review and expand the product lists.

- Supporting Micro and Small and Medium Sized Enterprises (MSMEs)

During the 2017 Buenos Aires Ministerial, WTO decided to launch a Work Programme on MSMEs, while a group of 88 WTO members signed a joint statement to promote the creation of an informal Working Group. This Working Group aims at discussing issues of transparency, Rules of Origin, finance for trade and technical assistance.

From the perspective of European business, the WTO and its members should pursue a more ambitious trade agenda. MSMEs are the most affected by trade barriers. Therefore, the work in the WTO should promote the elimination of tariffs and non-tariff barriers, enhanced regulatory coherence and regulatory cooperation, simplification of trade procedures, promotion of investment friendly environments, ensuring that trade restrictive practices in third markets are effectively addressed. Developing countries should have a particular interest in the discussions.

- A smooth UK transition

Establishing the UK's position as an independent member at the WTO should be secured in a manner that avoids disruption and provides certainty for trading partners and businesses. EU27 and UK schedules on both goods and services should preserve existing market access in an equitable fashion and be swiftly established, including in relation to the important issue of tariff rate quotas. WTO members should also work with



the UK to ensure that it remains a party to the Government Procurement Agreement to minimise any impact on the global public procurement market. The EU and the UK should continue cooperating as the UK becomes an independent member at the WTO to protect the gains made in the multilateral trading system, and to support an ambitious new agenda in Geneva that drives forwards free trade and multilateralism.
