

EU REFORM PROPOSALS FOR THE WTO (SEPT. 2018)

[Edited]

This paper is intended to serve as a basis for discussion with the European Parliament, the Council and with other Members of the WTO, in response to the conclusions of the European Council of 28 June 2018, which invited the European Commission to propose a comprehensive approach to improving together with like-minded partners, the functioning of the WTO in crucial areas, including the dispute settlement and the Appellate Body in particular (paragraph 16 of the conclusions). It is without prejudice to the final position of the European Commission on the matters described within.

Introduction to future EU proposals

The European Council of 28-29 June 2018 gave the Commission a mandate to pursue WTO modernisation in pursuit of the objectives of making the WTO more relevant and adaptive to a changing world, and strengthening the WTO's effectiveness.

The EU remains a staunch supporter of the multilateral trading system and firmly believes that the WTO is indispensable in ensuring free and fair trade. The multilateral system has provided the basis for the rapid growth of economies around the world and for the lifting of hundreds of millions of people out of poverty. It has been the guarantor of trade at times of growing tensions and the backbone of the international system of economic governance. Even at a time of the harshest economic conditions during the great recession, it has helped avert recourse to the trade wars that have fuelled economic decline in the past. As such the health and centrality of the multilateral system needs to be preserved. Its marginalisation, weakening and decline have to be prevented at all costs.

Unfortunately, the rules-based multilateral trading system is facing its deepest crisis since its inception. For the first time, the basic tenets of the WTO, both in setting the essential rules and structure for international trade and in delivering the most effective and developed dispute settlement mechanism of any multilateral organisation, are threatened.

The crisis is set to deepen further in the coming months, as **more unilateral measures are threatened** and imposed, leading, in some cases, to countermeasures, or to mercantilist deals. In parallel, as **more Appellate Body members leave office while the new appointments are being blocked**, the dispute settlement system will soon fall into paralysis, rendering enforcement of the rules impossible. That would equate to a **20-year step backward in global economic governance**. It would mean going back to a trading environment where rules are only enforced where convenient and where strength replaces rules as the basis for trade relations.

This development constitutes a major risk for the EU, both for the stability of the political order and for the sustainability of economic growth. The EU economy is highly integrated with global value chains and depends on predictable, rules-based international trade for both imports and exports.

For this reason, there is an urgent need to move the **current debate on a positive path** focusing on the modernisation of the WTO. It is clear that 23 years after the creation of the organisation and the conclusion of the Uruguay Round, **the multilateral system is in need of change**. While the broader WTO membership may have different views regarding the particularities of this change, it is unquestionable that a discussion needs to take place on the question of how to make the WTO relevant again.

For the EU, **the current crisis and the ongoing marginalisation of the WTO** have their roots in the inefficiencies of the current system. The **WTO's negotiating function has not been able to deliver any significant improvements in the trade rulebook** apart from the agreements reached on Trade Facilitation and Export Competition. The system remains blocked by an antiquated approach to flexibilities which allows over 2/3 of the membership **including the world's largest and most dynamic economies to claim special treatment**. The WTO's monitoring function is crippled by **ineffective and repetitive committee procedures** which are based on **insufficient transparency**. And, the core of the dispute settlement system is being challenged, with the distinct possibility of its paralysis in the near term. **These problems are compounded by the broader geo-strategic developments. In essence, since 1995 the world has changed; the WTO has not.**

In this broader context, the EU believes that a modernisation of the WTO is urgently needed. The following three papers covering **(1) rulemaking and development; (2) regular work and transparency; and (3) dispute settlement** set out the direction of a possible modernisation effort.

Broader context and the focus of EU efforts

The WTO also has the objective of facilitating rulemaking. Unfortunately, this has only materialised to a very limited extent. Despite an institutional structure designed to help advance discussions, the **WTO's negotiating function has largely been blocked** and is now effectively paralysed. There are multiple reasons for this situation including, in particular, divergent interests, the extreme difficulty in arriving at consensus decisions by all 164 Members and the current approach on development.

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Economic operators in a number of countries increasingly benefit from targeted and significant market-distorting government support that is often channelled through **state-owned enterprises**.

The lack of comprehensive information on subsidies provided by Members is one of the biggest shortcomings in the application of the current system.

State-owned enterprises (SOEs) are, in a number of countries, an instrument through which the state decisively governs and influences the economy, often with market distortive effects. However, the growth and influence of SOEs in recent years is not yet matched with equivalent disciplines to capture any market-distorting behaviour under the current rules.

The **multilateral rule-book on investment**, whether in services or other sectors of the economy, needs to be updated.

Forced technology transfer, where foreign operators are directly or indirectly forced to share their innovation and technology with the state or with domestic operators, has emerged as a major trade irritant. There are a number of provisions in the current WTO rule book in GATT, GATS, TRIMS and TRIPS, that should help to address forced technology transfers. However, the scope of application of these provisions (including in terms of commitments taken by the parties) is limited and therefore insufficient to address some of the most important sources of problems such as requirements prohibiting or limiting foreign ownership (e.g. joint venture requirements or foreign equity limitations).

Digital trade, or trade enabled by electronic means, is nowadays pervasive throughout the economy, covering both trade in services and in goods and enabling transactions performed completely online as well as facilitating physical transactions. As a consequence, establishing disciplines covering digital trade is important to remove unjustified barriers to trade by electronic means, to bring legal certainty for companies, and to ensure a secure online environment for consumers. Crucially, there are important cross-linkages to addressing

forced technology transfers (such as disclosure of source code requirements). Again, new disciplines should cover not only trade in services, but apply to all economic sectors.

Proposals to strengthen the procedural aspects of the WTO's rulemaking activities

The blockage of the WTO's negotiating function confirms the need **for flexibility in terms of negotiating approaches**. This reflects the concept of flexible multilateralism, where Members interested in pursuing a certain issue which is not yet ready for a full multilateral consensus, should be able to advance the issue and reach an agreement if its benefits are made available to all other Members on an MFN basis. However, other ideas should be explored as well with a view to strengthening the negotiating function and helping build political engagement and support for multilateral negotiations.

Future EU proposals on dispute settlement

The **"US concerns with WTO dispute settlement" have recently been summarized in the President's 2018 Trade Policy Agenda**. Some of these concerns had already been formulated under the previous US administrations and some of these concerns (like the issue of Rule 15) are new.

This document enumerates the following "examples of concerns with the approach of the Appellate Body" (emphasis added), or in other words certain cross-cutting issues:

i) "Disregard for the 90-day deadline for appeals";

The US essentially criticises the AB for not respecting Article 17.5 of the DSU, according to which "[i]n no case shall the proceedings exceed 90 days." In the US view, this raises the concerns of transparency, inconsistency with "prompt settlement of disputes", and uncertainty regarding the validity of the report issued after 90 days.

ii) "Continued service by persons who are no longer AB members" (i.e. Rule 15);

The US essentially claims that the Appellate Body "does not have the authority to deem someone who is not an Appellate Body member to be a member". In the view of the US, Under the DSU, it is the Dispute Settlement Body, not the Appellate Body, that has the authority and responsibility to decide whether a person whose term of appointment has expired should continue serving.

iii) "Issuing Advisory Opinions on Issues Not Necessary to Resolve a Dispute"

The US points to "the tendency of WTO reports to make findings unnecessary to resolve a dispute or on issues not presented in the dispute". They point in particular to "one egregious instance" where "more than two-thirds of the Appellate Body's analysis – 46 pages – was in the nature of obiter dicta."

iv) "Appellate Body Review of facts and review of a Member's domestic law de novo";

The US criticises the Appellate Body's approach to reviewing facts. Under Article 17.6 of the DSU, appeals are limited to "issues of law covered in the panel report and legal interpretations developed by the panel." Yet, in the view of the US, the Appellate Body has "consistently reviewed panel fact-finding under different legal standards, and has reached conclusions that are not based on panel factual findings or undisputed facts". In US' view, this is particularly the case for Appellate Body review of panel findings as to the meaning of domestic legislation (which should be an issue of fact).

v) "Appellate Body claims its reports are entitled to be treated as precedent".

The US claims that the Appellate Body has asserted its reports effectively serve as precedent and that panels are to follow prior Appellate Body reports absent "cogent reasons." which has no basis in the WTO rules. The US puts forward that "[w]hile Appellate Body reports can provide valuable clarification of the covered agreements, Appellate Body reports are not themselves agreed text nor are they a substitute for the text that was actually negotiated and agreed."

In addition, the US has formulated a more substantive concern with the "adding or diminishing of rights and obligations" by the Appellate Body in various disputes. This is exemplified by concrete Appellate Body rulings on the following issues: the interpretation of the notion of "public body" under the Subsidies Agreement, the interpretation of the non-discrimination certain interpretations relating to safeguard measures (notably on "unforeseen developments"), outcomes in the cases launched by the EU obligation under Article 2.1 of the TBT Agreement, against the Byrd amendment (giving the proceeds from anti-dumping/countervailing duties to US industry) and on Tax Treatment for "Foreign Sales Corporations" (that was considered to be an export subsidy). In the view of the US, the findings in those disputes departed from the relevant WTO agreements as negotiated.