



# European Services Forum Position on WTO Modernisation



## ESF Position on WTO Reform

### Executive Summary:

ESF is a strong supporter of the multilateral system. The World Trade Organisation is the right tool to set international trade rules that will ensure a level playing field among all exporters and investors. ESF calls on WTO members to modernize the organisation so as to transform the rules of the world trade of yesterday into a new rules book of the 21<sup>st</sup> century, by notably:

- Need to better comply with existing obligations, like notification and transparency requirements;
- Need to reduce market distorting behaviour of State Owned Enterprises;
- Need to accept new negotiating methods, like plurilaterals, allowing countries to go beyond existing rules. ESF supports the joint initiatives on e-commerce, on services domestic regulation, on investment facilitation and on MSMEs;
- Need to discuss the “Development Question”, so that WTO rules are the norm, and not the “special and differential treatments”;
- Need to give more power to the Secretariat of the Organisation in the running of the negotiations and in helping actively in finding compromises;
- The Dispute Settlement Understanding (DSU) is the jewel of the WTO that must be preserved at all cost. So ESF calls upon the WTO Members to reform it as necessary, but by respecting the need of an appeal process.

### Introduction

The rather disappointing outcome of the 11<sup>th</sup> Ministerial Conference of the World Trade Organisation that took place in December 2017 in Buenos Aires (Argentina), and the deep institutional crisis that is on the verge of blocking the functioning of the Dispute Settlement Mechanism of the WTO, have led the organisation to an impasse that risks affecting the effectiveness, if not its very existence, of the multilateral trading system.

The European Services Forum was initially created to provide the view of the services industries exclusively in the framework of the WTO negotiations. Hence, ESF is from its inception a strong supporter of the multilateral system, as we believe that the World Trade Organisation is the right tool to set international trade rules that will ensure a level playing field among all exporters and investors. ESF is therefore willing to contribute to the on-going discussions regarding the reform of the WTO

The setting up of the multilateral system has been the cornerstone of the development of the world economy since the second world war. The establishment of international rule of law, with countries taking commitments to respect their trading partners in exchange of mutually agreed access to each other markets, is the simple basis of today’s international trading system. It has allowed the prevention of major trade conflicts between nations and allowed the economies to strive, alleviating millions out of poverty, creating millions of jobs, fostering innovation and growth. This must be preserved.

The multilateral trading system is essential to modern businesses – small as well as large – that rely on global value chains. The obligations under the WTO to reduce tariffs and align technical requirements with international standards provided long-term stability that allowed companies to base their supply chains on cross-border trade flows. In the absence of multilateral rules, companies would need to navigate in an unpredictable environment, which will deter investments in new and more efficient business models. To avoid such uncertainty and to ensure persistent business innovation, we need a global commitment to rule-based trade.

The World Trade Organisation is the right venue to defend the multilateral system and to improve it. Of course, not all is perfect, but it has and must continue to prevent trade wars that can only produce losers from all sides. Bilateral and Regional trade agreements are a continuation of the WTO, allowing parties to go even further in their exchanges, committing themselves to respect their obligations taken in these international treaties.

In our modern world with digital and technological innovations striving, with the people taking profit of the globalisation in all aspects of their everyday life, with the sophisticated global value chains where trade in goods and services are deeply intertwined, ESF can only express its immense surprise and dissatisfaction in the recent move by some towards a focus on international trade that would consist of goods-only international trade with winners and losers. ESF also underlines its strong disappointment that the Trade in Services Agreement (TiSA) negotiations, which were close to the end-line in 2016 have been abandoned.

Services constitute the vast majority of the production of wealth in the world economy, going up to 80% in developed countries like in Northern America and Europe. Services employ more than 60% of the labour force. Services represent more than 25% of exports in terms of balance of payment, and even up to 50% of total trade in terms of value added of exports, since embedded services in goods exports increase value and foster innovation.

It is time for the decision makers of this world to come to grasp with the new realities of the modern world and to act accordingly. The European Services Forum calls upon all WTO members' leaders to bring back trust to the multilateral trading system and to take this opportunity to transform the rules of the world trade of yesterday into a new rules book of the 21<sup>st</sup> century, going beyond customs and tariffs, and adopting disciplines for all trade aspects, encompassing market access for goods, services, investment, government procurement, and provide transparency in all regulatory requirements that would allow business, local and foreign, to compete in a non-discriminatory environment.

The European Council of 28-29 June 2018 gave the European Commission a mandate to pursue WTO modernisation in pursuit of the objectives of making the WTO more relevant and adaptive to a changing world. On 5<sup>th</sup> July 2018, the European Commission sent to the EU Council's Trade Policy Committee its proposal on WTO Modernisation. The Commission's background note has presented some proposals in three main domains:

- (1) WTO regular work and transparency;
- (2) rulemaking in the WTO including the approach to the development question; and
- (3) WTO dispute settlement system.

We agree with the importance of these three issues and to facilitate the debate, this Position will follow the same structure.

## 1. WTO regular work and transparency

The WTO was created in 1995 and the world economy and politics have changed very much since then, but the WTO rules book has not. The collapse of the Doha Development Agenda is a demonstration that big rounds of talks encompassing all trade related issues is not a method that is delivering. So, it is clear that, even if ESF continues to support the writing of new rules and disciplines, the consensus based system where one country can block all the others will not allow the adoption of new WTO agreements in the near future.

However, there are existing rules that are not sufficiently exploited and that, if properly implemented, would contribute to more efficiency of the organisation.

### a) Monitoring the implementation of existing obligations

One of the mission of the WTO is to monitor the implementation of the WTO agreements by its members. This monitoring is done in the regular meetings of the WTO councils and committees as well as the Trade Policy Review Body. Unfortunately, many WTO members do not comply with their notification obligations. This is especially a problem when it comes notification of subsidies. Therefore, our businesses do not get the necessary information on how to access markets, on where are the contact points to get the information, and also on whether new rules are implemented, etc., and they also risk facing unfair competition due to lack of information on illegal subsidies. Hence, there is a clear need to improve the level of implementation of existing obligations related to notifications and transparency of trade related national regulations. In this regard, ESF suggest to reverse the burden of proof in order to put pressure on non-complying members to meet their obligations.

If the WTO wishes to get back the trust of the business community, there is a need to make the regular work of the Geneva WTO Committees more constructive and reliable, delivering concrete results, and not remaining simple talk-shops where inertia and blockages are the recurrent tactic, which is paralyzing the whole system and led to today's impasse.

The Trade Policy Review mechanism is a very efficient tool, but when lack of progress in implementing existing obligations and voluntary reiterated deficiencies are registered, there comes a need to find a way to persuade the recalcitrant country to change its attitude, including the possibility of losing some WTO membership benefits. If indeed there is a need for specific targeted technical assistance to help putting into action a specific obligation, this should be encouraged in an agreed specific time line. But if clearly nothing is done, possible relevant sanctions should be envisaged.

### b) Ensuring level playing field for all enterprises including the state-owned

Private companies, local and foreign owned, in a said market have to comply with domestic regulations. It is sometimes, however, unclear what the rules are that state-owned enterprises (SOEs) have to comply with. In the European Union, strict anti-subsidies and state-aid disciplines have been enacted, but at the international level there are no comprehensive rules for SOEs. National competition laws and regulations are not always applicable to them and the general lack of transparency on their structure does not allow a proper apprehension of their main purpose when such companies go outside their domestic market. When these businesses create distortion

in trade and investment activities, they go against the necessary level playing field among all trading actors and investors that the WTO is meant to establish.

We take note that an agreement has been reached on export subsidies in agriculture in 2015, and that there is the Agreement on Subsidies and Countervailing Measures (SCM Agreement), set at the inception of the WTO, that aims at disciplining industrial (goods related activities) subsidies. We understand that these rules are not always effectively implemented and might need to be revised to prevent certain bad practices. But furthermore, there are no rules for the services sectors and for disciplining such state-owned enterprises in their domestic and foreign direct investments activities. ESF would welcome any initiative that would aim at reducing market distorting behaviour of SOEs, through first the clarification of existing rules and encouragement for transparency of the structures and purposes of these SOEs, and second through possible new rules. In this regard, ESF believes that the WTO should also look at common rules for export credits and trade finance. This is currently an OECD-discipline, but we need other countries on board, especially China and India.

## 2. Rulemaking in the WTO including the approach to the development question

### a) The negotiating method

ESF considers that the conclusion of the Trade Facilitation Agreement in Bali in 2013 has marked the end of the “single undertaking” negotiating method. This has been confirmed by the conclusion of the agreement on export subsidies in agriculture at the 10<sup>th</sup> Ministerial Conference in Nairobi in December 2015. The disappointing result of the 11<sup>th</sup> Ministerial Conference that took place in December 2017 in Buenos Aires, where nothing has been agreed upon, not even the banning of illegal fisheries, is a new signal of the inability of the WTO to function properly and hence the need for a new decision-making process if there is any willingness to keep the organisation relevant in today’s global economy.

Fortunately, there are a large number of WTO members who continue to support the WTO. In Buenos-Aires, Ministers from 44 WTO members issued a [joint statement on 11 December](#) underlining their support for the WTO and reaffirming the “centrality” of the rules-based multilateral trading system. It is astonishing that the European Union and its 28 members did not sign this statement. Furthermore, many WTO members wish to move ahead concretely, and among the few good news out of Buenos Aires are the [four “joint statements”](#) by four different groups of countries calling for exploring new ways of negotiating new rules.

ESF strongly support these plurilateral initiatives, under the auspices of the WTO and which should be on a Most-Favoured Nation (MFN) basis and open to all members. In the services negotiations, this method is in fact already official as it was enacted in the Annex C of the Hong Kong Ministerial Conference declaration in 2005. Paragraph 7 of the Annex says: “[...] we agree that the request-offer negotiations should also be pursued on a plurilateral basis in accordance with the principles of the GATS and the Guidelines and Procedures for the Negotiations on Trade in Services. The results of such negotiations shall be extended on an MFN basis”. This method led 70 countries to table initial offers in 2006, and then only 30 revised offers in 2008, but it worked well until the collapse of the DDA talks due to the single undertaking concept.

ESF believes therefore that this is a concrete way forward and encourage all WTO members to allow those who would wish to start plurilateral negotiations to do so, and to start with the

initiatives launched at MC11, which are to advance talks at the WTO on the issues of 1) electronic commerce, 2) investment facilitation, and 3) micro small and medium size enterprises (MSMEs).

- a. On e-commerce, ESF calls for the adoption of a negotiating mandate in early 2019 to launch plurilateral negotiations - under the auspices of the WTO that would be accessible for all WTO members – that would look at setting up disciplines in various related aspects to international e-commerce, including on transparency of the regulations to foster trust in the e-commerce platforms; on banning permanently the Customs Duties on Electronic Transmissions; on setting up rules on the conclusion of contracts by electronic means, on electronic trust and authentication services (e-signature), on online consumer trust, on unsolicited commercial electronic messages (Spam, etc.); on banning requirement of transfer of or access to source code/encryption keys/algorithms, on data flows and data localization requirements, etc.
- b. On Investment facilitation, ESF understands that 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. Although we take note that the negotiations will not address market access, investment protection or investor-state dispute settlement, ESF welcomes this initiative since the new disciplines should improve the good governance and the regulatory environment that investors always seek as a pre-requisite to open or enhance operations in a third country.

ESF would like to draw the attention to the fact that among the major impediments to foreign direct investments are forced technology transfers and other trade distortive policies where foreign businesses, in order to be allowed to enter a market, are obliged to share their innovation and technology with a local partner or to give access to it to licensing authorities. Without opening market access negotiations for investment, ESF believes that one of the great benefits of an Investment Facilitation Agreement would be the establishment of disciplines that would prohibit or restrict these practices.

- c. On MSMEs, as for the rest of the economies, more than 95% of all services businesses are in that category. ESF therefore can only but support the largest number of countries to join the Informal Working Group on MSMEs at the WTO that will work towards a multilateral outcome aimed at establishing a formal work programme for MSMEs at the next Ministerial Conference. We are committed to work with the governments to help identifying issues of relevance to MSMEs, like transparent and predictable regulatory environment; single window of access to information for exporters and investors, access to trade finance, etc.

The fourth joint ministerial statement of MC11, and the one that is actually even closer to ESF ambit, is the one on “services domestic regulation” co-signed by 61 members recognizing the importance of good regulatory practices in facilitating trade in services. They acknowledge the good progress made in reviving the negotiations in the WTO Working Party on Domestic Regulation (WPDR) (which is a good example that existing bodies can effectively deliver some outcomes). It was unfortunate that no final result came out of Buenos Aires, but the ministers reaffirmed their commitment to advancing negotiations on the basis of recent proposals to deliver a multilateral outcome. This initiative is therefore still looking for a multilateral result, and the Joint Ministerial Statement gives signals that the signatory countries would not wish to be blocked and should be able to move on a plurilateral basis on a first phase if need be. ESF calls upon all WTO

members to remain active in this field and do utmost efforts to conclude these talks as soon as possible, since one of its major objective is indeed, as stated earlier in this paper, to provide more transparency of existing rules for services providers, giving information on licensing and authorization procedures, etc.

#### b) The decision-making process of the WTO

There is no real alternative to the “one country, one vote” system in any multilateral organisation, which means that in troubled times as today, it seems more and more difficult to reach a consensus and therefore this leads to the paralysis of the whole system. We have seen above that the “plurilateral” route allowing the “countries of the willing” to move ahead in the multilateral system and on an MFN basis might be a solution in a short term. This has already been tested with the Government Procurement Agreement and the Information Technology Agreements. ESF also strongly advocated in 2013 that the Trade in Services Agreement” would also be an agreement that would follow WTO rules as it was allowed by the Hong Kong Ministerial Declaration. But unfortunately, that has not been the case. It must be reminded however that to remain in the WTO auspices, all WTO members had to agree that the GPA and the ITA agreements were exceptions to the rules, and these agreements got a waiver to the rule that states that only full multilateral agreement adopted by the whole membership can use the WTO Dispute Settlement Body. Without a strong and well-accepted body in charge of interpreting the rules of the treaties and able to apply sanctions, any international agreement has less value.

Under the current rules, our understanding is that this will be also the case for the possible agreements on e-commerce, on domestic regulation in services, on investment facilitation and on MSMEs. We therefore still run the risk that one or more countries would block these initiatives. This must be examined and, if necessary, an alternative solution found so as the salvage the whole WTO edifice. A High-Level Working Group should be nominated and equipped with a robust mandate in order to take stock, analyse the current situation and propose concrete suggestions for improvements in the future.

Furthermore, ESF would strongly be in favour of giving more power to the Secretariat of the Organisation in the running of the negotiations and in helping actively in finding compromises. The competences of the Secretariat are largely under-used. The Secretariat should have the right to take initiatives, to table proposals to the members for discussion in the Council and Committees’ meetings, and to demand an explanation from members blocking decisions. The General Council should be allowed to entitled the Director General to act as an intermediary to look for compromises towards deals making.

#### c) The development question

The WTO, and its predecessor the GATT, was founded with international trade at its main purpose. It is only in 2001, after registering a significant interest from developing countries in joining the organisation that the” development question” became an important issue. It led to the launch of the Doha Development Agenda (DDA). The driving reason was the fact that free rules-based trade contributes to growth and hence to development. The opening of the markets in non-discriminatory manner initiates more trade, more exchanges, more exports opportunities and cheaper or better-quality imports, that trigger economic development through trade. However, along the years in the life of the WTO bodies in Geneva, the tone has changed. Many among the “developing countries” are now advocating that global trade

rules are not good for development and therefore that the poor developing countries should not be subject to the main WTO rules. Over the years, many “special and differential treatments” have been negotiated and granted, to a point that it sometimes becomes the norm, since only developed countries have taken commitments to implement these rules.

This is in particular the case in the area of trade in services. The GATS rules apply only to the sectors where specific commitments have been taken by the WTO members. And unfortunately, beside the members of the OECD (and to a certain extent, the newly acceded countries), these schedules are pretty poor by most of the developing countries. ESF has for long argued that the closing of the services markets by these countries is having a negative impact on their own development. Many surveys demonstrate that those countries who chose to open up have taken a faster developing track. The foreign direct investment that enter their markets create local jobs, trigger innovation and competition among domestic and foreign firms. It is not surprising to see that services sectors are contributing to more than 75% of the GDP of developed countries, while they produce less than 50% of the developing countries GDP. Special and differential treatment, or the possibility to not participate to the world trade rules, are in fact impediments to trigger economic development.

This “development question” needs to be tackled in the WTO. This organisation was not created to exempt more than half of its members from the rules it adopted. This organisation was not created to provide development support and technical assistance to its members, but to create and implement international trade rules. On the other hand, dedicated technical assistance to help the adoption and implementation of such rules should be encouraged. But may be such a task should be the one of the United Nation Conference on Trade and Development (UNCTAD), as its name says, and which was created much before the creation of the WTO.

ESF would welcome the clarification of the missions of both organisations in relation to development, and more importantly, a clarification of the status of what is a “developing nation”, using for instance the criteria used by the United Nations for the classification of the Least Developed Countries (LDCs). As we understand, the Committee for Development Policy (CDP) is mandated by the General Assembly (GA) of the United Nations and the Economic and Social Council (ECOSOC) to review the list of LDCs every three years and to make recommendations on the inclusion and graduation of eligible countries using an agreed list of criteria. As all WTO members are also member of the United Nations, we don’t see any reason why these criteria would not be used as well within the organisation. Unfortunately, it seems that the purpose of some developing countries’ governments seems to make sure that they remain categorised as in “development” so that they would not need to apply some WTO rules. It is time for these countries to understand that it is thanks to these rules that millions of people have been lifted out or poverty, and that full implementation will be a continuing tool for further economic and social development.

### **3. WTO dispute settlement system**

It is well accepted that the success and the respect of the work of the WTO comes essentially from the strength of its Dispute Settlement Body. It is very important to write rules, but if there is no tool to address the non-respect of these rules, they soon are badly or not implemented at all and become useless. It is thanks to the fact that WTO members accepted to give some teeth to the dispute resolution mechanism that the business community has acquired trust in the multilateral trading system. It gained confidence that the agreed rules and commitments will be respected by



the parties and that non-compliance would be redressed. International trade depends very much on the predictability and legal certainty. The Dispute Settlement Understanding (DSU) is therefore the jewel of the WTO that must be preserved at all cost.

The WTO cannot be taken hostage by one country, and be soon brought up to total paralysis, by blocking the nomination of the arbitrators in the Appellate Body of the WTO. ESF calls upon all WTO leaders to come to a solution on this particular aspect as soon as possible, and then work on the necessary reform of the DSU, where indeed some loopholes have been identified after more than twenty years of functioning.

### **Concluding and additional remarks**

The European Services Forum stands up in the defense of the rules-based multilateral trading system and calls upon all WTO members to take necessary actions to ensure its capability to properly function as to maintain stability to world trade.

Furthermore, the European Services Forum would like to take this opportunity to call for further actions under the WTO framework in the field of writing new rules.

First and foremost, we need to reiterate that international trade is more and more oriented towards services and that digital services are revolutionising the global supply chain and the whole world economy. There is therefore clearly a need to write a new rule book for services and work towards better liberalisation of services sectors for the benefit of the whole global trade and development. Since the negotiations under a Trade in Services Agreement (TiSA) are currently stalled, we would like to call the WTO members to explore ways for starting new discussions for launching negotiations of an agreement on international trade in services.

Secondly, the services companies are great beneficiary of the Government Procurement Agreement, and we would like to call for expansion of the GPA to other members. We welcomed the recent accessions of New-Zealand, we expect to see accession of Australia in the coming months and encourage further progress towards China's accession. More countries should start accession negotiations, as open public procurement rules and access increase efficiencies of public administration and optimise public budget for the benefits of all taxpayers and citizens.

-----

## List of ESF Members Supporting the above Position

- Accountancy Europe
- Amfori
- Architects' Council of Europe – ACE
- British Telecom Plc
- BDO
- Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
- BUSINESSEUROPE
- BUSINESSEUROPE WTO Working Group
- Danish Shipping
- Deutsche Telekom AG
- Deutsche Post DHL
- DI – Confederation of Danish Industries
- Digital Europe
- EK - Confederation of Finnish Industries
- EuroCommerce
- European Banking Federation - EBF
- European Community Shipowners' Associations – ECSA
- European Express Association – EEA
- European Federation of Engineering and Consultancy Associations – EFCA
- European Public Telecom Network – ETNO
- European Savings Banks Group – ESBG
- European Satellite Operators Association - ESOA
- European University Association - EUA
- Fédération de l'Industrie Européenne de la Construction – FIEC
- FratiniVergano European Lawyers
- IBM Europe, Middle East & Africa
- Inmarsat
- Institute of Chartered Accountants of England and Wales - ICAEW
- Insurance Europe
- Irish Business and Employers' Confederation - IBEC
- Le Groupe La Poste
- Microsoft Corporation Europe
- Mouvement Des Entreprises Françaises - MEDEF
- Oracle Europe, Middle East & Africa
- PostEurop
- SELDIA – European Direct Selling Association
- Svenskt Näringsliv (Confederation of Swedish Enterprise)
- Telenor Group
- The CityUK
- Thomson-Reuters
- UPS
- Vodafone
- Zurich Financial Services