

# Brief to the Standing Committee on International Trade

## Study on the Reform of the World Trade Organization

### Introduction

Reflecting a wider scepticism about the benefits of global cooperation in many parts of the world, the World Trade Organization (WTO) is experiencing a crisis of legitimacy, with each of its three core functions — negotiation, transparency and dispute settlement — confronting an unprecedented set of serious problems. The WTO finds itself struggling to respond effectively to the challenges of rapid economic, political, social, technological, and environmental changes. Further, it seems locked in an out-of-date governance paradigm, and in need of a new program of work with which to start to break impasses and address the urgent and encompassing challenges of the twenty first century. The incoming Director General — an appointment made after considerable delay and negotiation among key countries, itself a symptom of the wider malaise around global trade governance — might help give some direction and purpose to the organization, but the core challenges go well beyond personnel and leadership.

Multilateralism and rules-based trade cooperation are critical for Canada's prosperity and relations with the world. As a middle power with a trade-dependent economy, Canada has both the incentive and the capacity to contribute enlightened ideas and advance novel reform initiatives to the WTO. Canada should leverage its traditional reputation as a "bridge" country to advance a positive and pragmatic vision for strengthening the rules for the future rather than only reacting to tensions and immediate crises. Canada has already shown leadership with the creation of the "Ottawa" Group to guide WTO reform efforts.<sup>1</sup>

### Main Ideas for WTO Reform

Today, the WTO is an international trade governance body that deals with norms on a wide range of issues rather than just tariff reduction. Indeed, the trade governance agenda is almost entirely a "trade and..." agenda with the "and" list daunting, including labour, gender, Indigenous peoples, climate change (and the environment more broadly), data and digital issues, human rights, and IP, ideally crowned by a reformed dispute resolution process.

It is hard to visualize the WTO — or any single multilateral organization — dealing with these issues in their entirety, starting with the negotiation. Clearly, the "single undertaking" approach, where all manner of topics were pooled to make broad-based progress while allowing for trade-offs between them, is dead — and should be. It is harder still to imagine an organization tasked with monitoring commitments to this wide range of issues, much less adjudicating disputes around them.

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<sup>1</sup> Canada with the Ottawa Group (comprised of Australia, Brazil, Canada, Chile, the European Union, Japan, Kenya, South Korea, Mexico, New Zealand, Norway, Singapore and Switzerland) have put forward ideas for WTO reform, including improving the monitoring of existing rules, safeguarding and strengthening the dispute settlement function, and modernizing trade rules for the twenty-first century.

Moreover, the WTO is operating in a very challenging context with changing economic conditions, growing complexity of transnational regulation, backlash against globalization, plurality of state interests and renewed geo-strategic rivalries.

CIGI suggests that member States reinvent the WTO by narrowing its focus to trade basics and leave more flexibility to nations for their own development, abandoning effort to manage so many “behind-the-border” issues like data and competition policy that cover disparate elements of economic and social policy. The WTO must transition to more of a negotiating forum, similar in structure to the General Agreement on Tariffs and Trade, with greater focus on facilitating negotiations and increasing barrier-free trade.

To accomplish this mission, reasonable goals of reform and modernization must be set. We should return to the WTO’s core task of trade basics and cordon off certain areas from the negotiations, leaving these areas as the WTO peripheral issues to be negotiated through other relevant international organizations (IOs) or via the venue of preferential trade agreements (PTAs).

While there is a need for ambition, realism is required in developing a substantive work program on non-trade peripheral issues, which can be “outsourced” to other IOs that have “orthodox” jurisdiction over them (for instance, the International Labour Organization on labour issues), or can be achieved via PTAs with like-minded countries, as Canada did with Chile and New Zealand on the issue of trade and Indigenous people. All WTO member countries could be mandated and provided incentives to report trade impact assessments on these “and” issues as well as mitigation plans annually, to develop a better database for measuring the distributive consequences of trade measures.

Bringing in the Group of Twenty (G20), a ready-made forum that balances inclusivity, diversity and efficiency in decision making, might be useful in helping to choose among the options and setting a realistic course for WTO modernization. It can also help to achieve consensus and reach comprises on key issues over which the WTO is negotiating, including on the central issue of how to break deadlocks and develop a new program of work for the WTO. The WTO can work better with other IOs, other stakeholders, and specifically composed expert groups through improved information sharing and developing expert consensus on technical issues. For example, closer cooperation and improved coordination with the United Nations Environment Programme, the World Bank, and the European Commission can help to make progress on the issue of border carbon adjustments.

## WTO Reform and Modernization of Core Trade Issues

### *i. Dispute Settlement*

The impasse over the Appellate Body (AB) threatens the whole system and risks distracting from discussion of other improvements that would make dispute settlement system more inclusive and effective for many members. In fact, for many WTO members, the WTO functions well.

To cope with the absence of a functioning AB, Article 25 of the Dispute Settlement Understanding can be used as an interim appeal arbitration procedure for future disputes. Other interim solutions, such as “no-appeal” agreements and a “restatement” process to assemble a group of experts and jurists to review the interpretations of the AB for the purposes of consultations and dialogue with WTO members, can preserve rights for some members. Canada, along with the EU, have agreed to Multi-Party Interim Appeal Arbitration Arrangement.<sup>2</sup>

The roots of the Dispute Settlement System (DSS) problem, however, stem from the crucial relationship between WTO panels and the AB. Reform therefore should focus on how to recalibrate the WTO DSS and the relationship between first instance panels and the AB. The standard of appellate review should be reshaped towards a more deferential one, in which the reasoning and findings of panels are more respected while allowing the AB to lead on fundamental issues. This would help to avoid the massive overuse of the AB. Permanent panel chairs could be introduced, which would provide continuity and respect by the Secretariat and the AB alike.

#### *ii. Negotiating Strategies*

The “key tenets of WTO culture”, including member-driven, negotiations within rounds, single undertaking of multilateral negotiations and consensus decision making, lead to dysfunctions that must be fixed for the WTO to modernize.

Multilateralism is best, but in current circumstances a plurilateral approach is more workable, where it can help to build consensus. Trade negotiators will need to work on a plurilateral basis with countries that share similar values and achieve deep, but exclusionary, integration among those like-minded allies.

It is important for negotiators to keep in mind that the WTO’s enduring strength is as a forum of compromise, where consensus results are not always economically or politically optimal, given the flexibilities offered to member countries in the Agreement establishing the WTO and the alternating contractual and constitutive aspects of the agreement, as well as legality and compliance in WTO law being relatively new phenomena.

#### *iii. Improving the WTO Monitoring Function*

Effective trade cooperation depends upon the information sharing and deliberation of national measures that might affect trade. The current paralysis and lack of trust in the WTO is caused in part by an insufficient information or an evidence base on which to pursue informed negotiations. Government notifications remain the most import source of information, but many governments face capacity challenges in complying with notification requirements that in some cases may be unnecessarily burdensome.

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<sup>2</sup> See <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/DSB/1A12.pdf>

Notifications can be improved by ensuring that information needs are fit-for-purpose and by providing more support for building the capacity of governments to gather and share information. Notifications may in any event be an outdated approach to transparency and could be partially replaced by having the Secretariat compile information from public data and other sources, with an obligation to ensure that the information is verified and legitimate.

Trade Policy Reviews are important opportunity for information exchange and deliberation, but could be improved by making their timing more flexible, their content more targeted, their discussions more probing, and the Secretariat reports more detailed in some areas.

China presents a special challenge for inadequate transparency and has a particular problem making its subsidies notifications. But it could be encouraged to centralize notifications and make them in the original language, and other members can “counter notify” China’s measures from their own – or other – sources of information.

## Modernizing Trade Rules

### *i. Development and Trade*

Addressing development issues will be important to successful WTO reform, including finding ways to provide flexibility in the rules for developing countries that is commensurate with their level of development, and building their capacity to take on new commitments. There is a need to encourage efforts to find solutions-oriented approaches to the controversial issue of developing country status and eligibility for special and differential treatment (S&DT).

China’s unique state-led development model and state-owned enterprises dominated economic system raise challenges for the world trading system. To move forward in WTO reform, however, the rules need to be neutral regarding the ownership structure of the enterprise that might constitute “public bodies,” while acknowledging that not all countries need or should benefit from the same level of flexibility on S&DT.

### *ii. Digital Trade*

The digital transformation and the data-driven economy call into question numerous aspects of the WTO rules-based system. Digital trade goes well beyond the current focus on e-commerce. It includes cross border data flows with implications for data and AI governance, competition, privacy and other areas. Thus, much of the technical regulation in areas ranging from privacy to competition policy to IP will need to be – and should be – developed through parallel processes. But how these regulatory developments interface with trade will require elaboration, which, in turn, will require a thorough review of WTO rules.

We also must be wary of the use of Regional Trade Agreements (RTAs) that can act as steppingstones into other policy spaces and become a multilateral standard. For example, in digital trade, an RTA can be an entry point to manage policy space for areas that go well beyond e-commerce. In effect, RTAs act as a

ratcheting mechanism, locking-in norms and practices negotiated by powerful players (whose power is even further enhanced in a regional setting) that stand to become a multilateral standard.

This can concretely be seen in CUSMA where seeming technocratic e-commerce-related provisions mask deeper and more sensitive issues of power and national sovereignty. One is data localization where if data is seen only through a commercial lens and not as an aspect of personal protection and privacy, the logic of ever more openness makes sense. But examples abound of the non-economic dimensions of data, lost when data is treated strictly through the trade agreement medium. Another is the capacity of national authorities to hold multinational digital platforms accountable for the content they carry. Safety must be balanced with freedom of speech.

### *iii. Trade Related Aspects of Intellectual Property Rights*

During decades of negotiation, all parties have recognized that the world trade system could not function without integrating intellectual property (IP).

The advent of artificial intelligence and cross border data flows changes the economics of innovation and the nature of trade and require a rethinking of TRIPS. This could be done by the World Intellectual Property Organization and other international bodies that could then feed into their implications for trade by the WTO.

## Summary

There are many strategic choices awaiting the WTO; for example, become a niche organization that provides governance in a single sector such as data or climate change; act as a repository for RTAs and forum to discuss the spaghetti bowl of ideas generated therein; host a more modest trade dispute resolution process for participating countries; or choose a default option and serve as an institution adjudicating trade among the many in areas that are not hyper charged. The WTO will no longer be the high-profile go-to organization of the past quarter-century. And it will remain relevant for a huge percentage of conventional commerce, but not to regulate the division of rents in the intangible economy.

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### *About CIGI*

*The Centre for International Governance Innovation (CIGI) is an independent, non-partisan think tank whose peer-reviewed research and trusted analysis influence policy makers to innovate. Our global network of multidisciplinary researchers and strategic partnerships provide policy solutions for the digital era with one goal: to improve people's lives everywhere. Headquartered in Waterloo, Canada, CIGI has received support from the Government of Canada, the Government of Ontario and founder Jim Balsillie.*

### *À propos du CIGI*

*Le Centre pour l'innovation dans la gouvernance internationale (CIGI) est un groupe de réflexion indépendant et non partisan dont les recherches évaluées par des pairs et les analyses fiables incitent les décideurs à innover. Grâce à son réseau mondial de chercheurs pluridisciplinaires et de partenariats stratégiques, le CIGI offre des solutions politiques adaptées à l'ère numérique dans le seul but d'améliorer la vie des gens du monde entier. Le CIGI, dont le siège se trouve à Waterloo, au Canada, bénéficie du soutien du gouvernement du Canada, du gouvernement de l'Ontario et de son fondateur, Jim Balsillie.*