# WTO Reform: Facilitator's Report on Initial Consultations (JOB/GC/445)

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**Abstract**

This commentary provides a critical analysis of the Facilitator's Report on Initial Consultations on WTO Reform, highlighting the absence of a shared reform objective, the fragmentation of issues, and the risks posed to developing country priorities, particularly with respect to the Special and Differential Treatment and self-designation, and the consensus-based decision-making. It examines the legal and institutional implications of current reform narratives and cautions against proposals that may entrench rather than correct systemic imbalances.

## Introduction: Fragmentation and lack of a coherent "Reform" objective

1. The Facilitator's report contained in JOB/GC/445[1] (report) consolidates Member inputs and serves as a reference point for understanding the current state of WTO reform discussions. However, it does not articulate a shared or coherent objective around which Members can converge. As the report itself acknowledges, "WTO reform holds different meanings for different Members" and "levels of ambition and confidence in achieving meaningful outcomes vary," with some Members expressing concerns about "uneven levels of commitment" and a tendency toward "reform-by-doing" approaches that avoid hard decisions. Even where there is reaffirmation of foundational principles such as the preamble to the Marrakesh Agreement, these are "often interpreted differently and sometimes conflict," weakening the collective sense of purpose.

2. The report spans a wide range of issues without a clear structuring logic or prioritisation. The issues raised fall into at least five distinct thematic clusters: (i) institutional functioning and working methods, (ii) decision-making processes, including consensus, (iii) the restoration of the dispute settlement system, (iv) ongoing and prospective rulemaking, including plurilaterals, and (v) the future of development and Special and Differential Treatment (S&DT). These clusters reflect not only the breadth but also the fragmentation of the reform agenda, underpinned by divergent priorities and assumptions about the purpose and elements of the reform. The earlier decision at MC12 to delink the reform of the WTO dispute settlement system from the broader reform track has compounded this lack of coherence.[2]

3. Despite the clear mandate from MC12[3] more than three years ago, where Members committed to "work towards necessary reform of the WTO... to improve all its functions" in a manner that is "Member-driven, open, transparent, inclusive, and must address the interests of all Members, including development issues," the report does not convey any

[1] WTO, *Report on Initial Consultations on WTO Reform*, JOB/GC/445, 4 July 2025, prepared by H.E. Mr. Petter Ølberg (Facilitator on WTO Reform).
[2] WTO, *MC12 Outcome Document*, WT/MIN(22)/24 – WT/L/1135 (22 June 2022), para. 4. "We acknowledge the challenges and concerns with respect to the dispute settlement system including those related to the Appellate Body, recognize the importance and urgency of addressing those challenges and concerns, and commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024."
[3] WTO, *MC12 Outcome Document*, WT/MIN(22)/24 – WT/L/1135 (22 June 2022).

structured or converging perspective. It is equally silent on how Members intend to meet their MC12 undertaking to restore a "fully and well-functioning dispute settlement system... by 2024" and the subsequent reaffirmation at MC13 of achieving this objective by 2024,[4] a deadline that has now passed.

4. This broad and fragmented landscape suggests that, notwithstanding active participation, the reform process remains adrift and lacking agreed parameters. One of the most evident shortcomings in the WTO reform discourse to date is the persistent failure to draw a clear distinction between institutional reform aimed at improving the functioning and processes of the Organisation, and substantive rule reform intended to modify or expand the disciplines that govern trade. This lack of conceptual clarity has allowed divergent agendas to coexist without resolution, undermining coherence and making it difficult for Members to assess the scope, direction, and implications of the reform process.

5. With MC14 scheduled for March 2026, the window for shaping a reform agenda that is coherent, inclusive, and development-oriented is narrowing. In light of the sustained pressure on the multilateral trading system, including the increased use of unilateral measures and the continued paralysis of key institutional functions, the prospects for achieving substantive and balanced reform in the time available are limited. The identification of deliverables that are both politically viable and substantively aligned with development priorities is now a matter of urgency. At the same time, caution is required to ensure that developing countries are not placed in the position of having to shoulder primary responsibility for preserving a system that has been most visibly weakened by those with the greatest duty to uphold it. While developing countries have consistently affirmed their commitment to a rules-based multilateral trading system, that system is neither perfect in its design nor applied in a fully balanced manner, and it requires concrete outcomes in many areas to address developmental needs of its majority membership.[5]

6. Furthermore, any reform outcomes must not come at the cost of the development-related rights, policy space, or the negotiating priorities of developing Members. The historical record of the multilateral trading system with its embedded asymmetries and the unfinished development agenda, should not be altered or selectively interpreted to justify the political objectives of individual Members. Attempts to frame the reform process in ways that disregard structural imbalances, particularly by those who are systematically undermining the rules-based system, risk entrenching further inequities rather than correcting them.

**Legal status and reinterpretation of S&DT**

7. S&DT is recognised in WTO law as a treaty-embedded right for developing countries. Its legal foundation lies in the Marrakesh Agreement,[6] the GATT 1994 provisions (Articles XXXVI, XXXVII, and XXXVIII), and various other WTO agreements. The Marrakesh preamble commits to "positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development."

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[4] WTO, *MC13 Dispute Settlement Reform Ministerial Decision*, WT/MIN(24)/37, WT/L/1192 (2 March 2024).
[5] South Centre, *WTO Reform: Developing Country Priorities for the Future of the Multilateral Trading System*, Policy Brief No. 95, March 2021. Available at: https://www.southcentre.int/southviews-no-284-21-march-2025/
[6] Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, in force 1 January 1995.

8. Despite this legal foundation, the Facilitator's report introduces language that risks diluting the normative clarity of S&DT. References to "diverse development realities," "voluntary opt-outs," and "pragmatic, evidence-based approaches" shift the discussion away from the legal entitlements of developing countries and towards discretionary, potentially conditional applications of S&DT. These framings lack clear legal criteria and may open the door to subjective determinations by more powerful Members.

**Differentiation and fragmentation with the "developing country" category**

9. The report explicitly identifies subgroups such as Small Island Developing States (SIDS) and Landlocked Developing Countries (LLDCs) as deserving tailored treatment. While these structural vulnerabilities are legitimate, this form of differentiation implicitly undermines the entitlement of other developing countries to S&DT. The approach risks institutionalising a hierarchy of entitlement within the "Global South" and threatening the rights of members that are beneficiaries of S&DT as a group.

10. The report also engages with the issue of self-designation, a point of contention that has been used to pressure certain larger developing countries to renounce their development status. By entertaining the notion of voluntary opt-outs and evidence-based differentiation, the report suggests a departure from the principle of sovereign self-identification, which has underpinned S&DT since the establishment of this principle (see **Box 1**).

**Box 1. Historical origins and legal foundations of "self-designation"**

The practice of self-designation as a developing country in the multilateral trading system originates from the GATT era and was carried forward into the WTO without formal modification. No WTO provision defines "developing" or "developed" country status. Instead, Members self-declare their development status, a practice rooted in the negotiating dynamics of the 1960s and 1970s, when developing countries were largely excluded from the early tariff negotiations under GATT. The introduction of the 1979 Enabling Clause formalised this practice by giving permanent legal standing to the Generalized System of Preferences (GSP) and recognising S&DT for developing countries. This clause maintained the principle of self-identification without prescribing objective economic criteria or requiring external verification. Upon the establishment of the WTO in 1995, self-designation remained intact, supported by Article XVI:1 of the Marrakesh Agreement, which affirms the continued application of GATT 1947 customs and practices. More than two-thirds of WTO Members have declared themselves developing countries under this framework. While the practice has persisted uninterrupted, reform pressures most notably from the U.S. (formally in 2019) have challenged its legitimacy, proposing fixed criteria for differentiation and pressing for "graduation" of certain Members.[7] These proposals overlook the negotiated and historically embedded nature of self-designation as a governance practice and risk undermining the flexibility necessary to accommodate structural diversity among developing countries.

[7] WTO, *An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance*, Communication from the United States, WT/GC/W/757/Rev.1, 14 February 2019. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W757R1.pdf&Open=True ; WTO, *Procedures to Strengthen the Negotiating Function of the WTO*, Draft General Council Decision, Communication from the United States, WT/GC/W/764/Rev.1, 25 November 2019. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W764R1.pdf&Open=True

**Shifting the burden of proof**

11. Proposals that suggest a "pragmatic, evidence-based approach" to differentiation imply that developing countries must justify their need for flexibility. This represents a reversal of the legal presumption that developing countries are entitled to S&DT. Given that many S&DT provisions are already non-binding or expressed as *best endeavour* commitments, those proposals would impose additional political and administrative burdens. They would also introduce procedural asymmetries that could be used to challenge or delegitimise claims to flexibility. The critical question then becomes: to whom should these justifications be made, and who would decide whether they are valid? In a member-driven organisation, the introduction of external or subjective criteria for entitlement risks politicising access to legal rights. This could reinforce hierarchies of power rather than correct for imbalances, particularly when key Members continue to breach or disregard existing legal norms without consequence.

**Opt-outs and the treatment of plurilateral agreements**

12. The report extends the "opt-out" discussion to the context of plurilateral agreements, where Members choosing not to participate are encouraged not to block consensus. While framed as a facilitative mechanism, this approach could lead to a marginalisation of dissenting Members from decisions that may have systemic implications. Where plurilateral initiatives are incorporated into the WTO framework, they should remain subject to multilateral oversight and institutional safeguards.

**Misdiagnosis of the causes of negotiation deadlock**

13. The report implicitly presents S&DT as an obstacle to progress, without addressing the deeper structural factors that underlie negotiating impasses. The real barrier is the misalignment between complex rulemaking proposals and the interests and needs of developing countries or the institutional capacity to implement them. At the same time, many of the obligations proposed under new rules would not require structural change from developed countries, who are already in compliance or benefit from the status quo. This framing distracts from the need to revisit the substantive content of rules and their adaptability to development realities. It also overlooks the implementation challenges that arise from asymmetries in capacity, resources, and institutional readiness.

**Structural asymmetries and reverse flexibilities**

14. The portrayal of developing countries as overly dependent on flexibilities contrasts sharply with the extensive policy space preserved for developed countries. High levels of domestic support, use of the Special Agricultural Safeguard, and Green Box subsidies remain largely unchallenged. Conversely, proposals by developing countries for public stockholding and the Special Safeguard Mechanism continue to face resistance. This asymmetry reveals a form of “reverse S&DT”, wherein developed countries retain wide-ranging flexibilities without similar scrutiny. The continued selective invocation of mandates further weakens the coherence and fairness of the reform process.

## Affirmation of WTO Principles in the 2025 BRICS Declaration

15. The 2025 BRICS Leaders' Declaration[8] reaffirms that S&DT is a treaty-embedded right and a core component of the WTO legal framework. It underscores the continued relevance of the principles of equity, inclusivity, and consensus in the functioning and reform of the multilateral trading system. These affirmations serve as a political counterweight to ongoing efforts that seek to reinterpret, narrow, or condition existing entitlements through procedural innovation or informal differentiation. The COVID 19 TRIPS waiver negotiations illustrate that decisions regarding the application or non-application of S&DT should remain within the scope of specific negotiations. In that instance, China chose not to avail itself of the benefits of the decision. That outcome was the result of negotiated terms rather than a formal waiver of status or legal entitlement. It confirms that any adjustment to the exercise of S&DT must derive from Member-driven negotiations on a case-by-case basis, and not from imposed thresholds or differentiation criteria advanced by developed countries.

## Consensus and decision-making in the WTO

16. Consensus remains the operative basis for decision-making under Article IX:1 of the Marrakesh Agreement. It is defined by the absence of expressed opposition at the time a decision is taken (i.e., silence means consent), ensuring formal equality among Members and institutional legitimacy for outcomes. It does not constitute a legal veto, nor does it permit any Member to unilaterally block or impose decisions. It operates as a procedural mechanism to secure political acceptability and collective agreement.

17. The consensus rule evolved from the GATT's early reliance on formal voting procedures, which governed decision-making under Article XXV of GATT 1947. Although these voting rules provided for majority or supermajority thresholds, GATT practice shifted rapidly to decision-making by consensus. By 1959, the last known substantive vote under the GATT (outside of accessions or waivers) was recorded, and consensus became the de facto norm. [9] This shift coincided with the large-scale accession of newly independent developing countries. The adoption of consensus was partly a response to concerns that bloc voting by these countries could reconfigure power relations and legislative control in the global trading system.

18. The practice of consensus was codified with the establishment of the WTO in 1995. Article IX:1 of the WTO Agreement formally recognises consensus as the primary method of decision-making, with recourse to voting only where consensus cannot be achieved. Article XVI:1 of the Marrakesh Agreement further entrenches this practice by requiring the WTO to be guided by the decisions, procedures, and customs of the GATT 1947.

19. In the context of WTO reform, recent proposals have sought to qualify or replace the consensus rule. Terms such as "responsible consensus" and calls for procedural innovations like trade-weighted voting, double majorities, and "variable geometry" have surfaced. These proposals carry significant legal and political implications. Any alteration

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[8] BRICS, *BRICS Leaders' Declaration*, Strengthening Global South Cooperation for a More Inclusive and Sustainable Governance (Rio de Janeiro, 6 July 2025).

[9] Christian Häberli, *Decision Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?*, WilmerHale, 23 September 2005. Available at: https://www.wilmerhale.com/en/insights/publications/decision-making-in-the-world-trade-organization-is-the-consensus-practice-of-the-world-trade-organization-adequate-for-making-revising-and-implementing-rules-on-international-trade-autumn-2005

to the consensus rule would require a formal amendment under Article X of the Marrakesh Agreement, which itself must be adopted by consensus.[10]

20. The discourse to recalibrate the distribution of voting power in the WTO based on economic size or bloc representation raise significant institutional and legal questions. Any proposal to equalise the voting weight of individual Members with that of the EU which, pursuant to Article IX:1 of the Marrakesh Agreement, exercises a number of votes equivalent to its Member States that are WTO Members, would entail an amendment to the Marrakesh Agreement. Such an amendment would require adherence to the procedures set out in Article X, including consensus for adoption and ratification thresholds, and would raise complex legal and institutional questions concerning the constitutional structure and Member-driven character of the WTO.

21. Further, it is highly improbable that any major economy would accept the imposition of binding obligations through a formal vote in circumstances where it has expressed opposition. This is particularly the case where implementation would require legislative or regulatory changes at the domestic level. The likelihood of acceptance is further diminished in light of entrenched constitutional limitations and the sovereign prerogatives of Members over trade policy. As such, proposals for weighted or majoritarian voting mechanisms are legally contentious and operationally unviable in the WTO's current treaty framework.

22. Proposals for weighted or majoritarian voting are frequently framed as solutions to institutional paralysis; however it is worth noting somewhat ironically that under a strict voting regime,[11] many longstanding development proposals would likely have already been adopted, given that developing countries constitute the majority of the WTO membership. Nevertheless, developing countries have consistently upheld consensus as a foundational safeguard. It protects their sovereign equality in decision-making, prevents the imposition of rules without their consent, and ensures that new obligations (at least in theory) reflect differential capacities and are implemented in accordance with domestic legal and institutional readiness. In practical terms, consensus has been indispensable in preserving policy space in politically and economically sensitive areas of WTO negotiations.

23. It ought to be noted that to date, the U.S. has vetoed the blocking of Appellate Body appointments 88 times despite overwhelming Member support in the WTO Dispute Settlement Body.[12] This situation, however, does not invalidate the principle of consensus. Selective obstruction by one Member should not serve as a pretext to alter a systemic safeguard that benefits the entire Membership, especially the weakest among them.

24. Proposals that seek to redefine consensus or introduce conditions for its exercise such as requiring objecting Members to justify their opposition risk transforming consensus into a privilege rather than a right. Such changes would shift the burden of legitimacy to those

[10] Article X.2 states that "Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members: Article IX of this Agreement; Articles I and II of GATT 1994; Article II:1 of GATS; Article 4 of the Agreement on TRIPS."
[11] Article IX of the Marrakesh Agreement contemplates that a vote can take place in case a decision cannot be arrived at by consensus if not otherwise provided for in the Agreement.
[12] *US Blocks Appellate Body 88th Time; China Canada Panels Named," Washington Tariff and Trade Letter*, 27 June 2025, available at https://www.wttlonline.com/stories/us-blocks-appellate-body-88th-time-china-canada-panels-named,13977

expressing dissent, disproportionately affecting smaller or less powerful countries. As the ACP Group has noted, Article IX:1 does not qualify consensus with descriptors such as "responsible" or "constructive," and any attempt to introduce such qualifiers would amount to an unlawful reinterpretation of treaty obligations.[13]

25. It is also necessary to contextualise the critiques of consensus within the broader institutional dynamics of the WTO. The challenges of consensus-based decision-making such as delay, deadlock, or disproportionate influence are often symptomatic of deeper structural issues. These include the informal "green room" processes that marginalise non-invited Members and a lack of transparent, inclusive, and accountable negotiating processes that are becoming the norm rather than the exception in recent years.

26. Improving decision-making in the WTO should not begin with the erosion of foundational rules. Instead, efforts should focus on strengthening inclusive procedures, ensuring representational balance in informal consultations, and restoring confidence in the negotiating function of the institution. Consensus remains the procedural backbone of a member-driven organisation and should be preserved as a legal guarantee of sovereign equality in multilateral trade governance.

**Conclusion**

27. At a time when one of the major WTO members is deploying unilateral trade measures, the requisite conditions for foundational institutional reform are neither stable nor assured. The sustained obstruction of core WTO mechanisms, in particular the paralysis of the Appellate Body, and new trade deals that violate bound tariffs and MFN, deliberately dismiss the rules-based system. The escalating politicisation of trade policy further undermines the prospects for good faith engagement in systemic reform. Any proposals to amend the institutional architecture must be approached with legal precision, procedural discipline, and a clear commitment to the principle of sovereign equality. Reform that is advanced without these conditions risks codifying asymmetries rather than correcting them.

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[13] WTO, *Preserving the Current Practice of Consensus-Based Decision-Making in the WTO,* Communication from Samoa on behalf of the African, Caribbean and Pacific Group and the African Group, WT/GC/W/932/Rev.1, 22 May 2024. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W932R1.pdf&Open=True