WTO Reform: Framing Challenges in the Facilitator-led Process and Strategic Considerations for Developing Countries

Vahini Naidu, Trade for Development Programme, South Centre

Informal Note, 15 July 2025

Abstract

This Informal Note was prepared to inform developing country participation in the next round of Facilitator-led consultations on WTO reform. It provides a critical reflection on the three-track framework proposed by the Facilitator, namely Governance, Fairness and Future, and raises concerns about the framing, legal coherence, and process legitimacy of the emerging reform agenda. The note highlights the risks of implicitly reshaping negotiating priorities through informal structuring, particularly in ways that may disadvantage developing countries or dilute existing legal mandates. It offers strategic considerations and suggested responses to the three guiding questions posed by the Facilitator, underscoring the need to reaffirm treaty-embedded rights such as Special and Differential Treatment, preserve institutional integrity, and ensure that any reform remains firmly anchored in multilateral principles, Member-driven processes, and the development dimension. A separate working document proposing a structured positive agenda for developing countries will follow to complement this analysis.

Introduction: The shift from summary to structured tracks

1. As the WTO reform process enters its next phase, Members will be participating in a second round of informal consultations convened by the Facilitator for WTO Reform, Ambassador Petter Ølberg. Building on his initial report contained in JOB/GC/445 (the report),[1] the Facilitator has issued a communication dated 10 July 2025 proposing that discussions be organised around three thematic tracks: Governance, Fairness, and Future. This informal note provides a legal and institutional critique of the proposed three-track framework (Pages 1 - 5), as well as suggested responses to the three guiding questions circulated by the Facilitator in advance of the consultations (Pages 6 - 9).

2. The report is an open-ended summary by the Facilitator. It records divergent views, acknowledges complexity, and avoids prescribing a reform architecture. It explicitly says, "There remains less clarity around the specific 'what' and 'how' of that reform." In contrast, the Facilitator's latest communication presents a structured, three-track framework with thematic labels, namely Governance, Fairness, and Future. There is no indication in the report that Members coalesced around this framework or even discussed it.

3. In consultations with several developing country delegates, concerns have been raised that the structure and the issues clustered under it may not fully reflect the diversity or nuance of Member interventions during the first round of the Facilitator-led consultations. There is also some unease that the inclusion of certain topics may be an attempt to accommodate the preferences of a particular Member, despite continued uncertainty regarding their commitment to engage meaningfully in reform discussions through this Facilitator-led process.

[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).

Problematic Grouping of Issues under the Three Tracks:

a. Track 1: Governance (Institutional Issues)

4. The current structuring of this track groups together issues of distinct legal and procedural character, including decision-making (notably consensus), negotiating instruments, and dispute settlement, without clearly distinguishing between matters of institutional practice and those that are governed by treaty-based rules.

- **Consensus Decision-making**

5. The WTO's consensus-based decision-making framework is enshrined in Article IX:1 of the Marrakesh Agreement, continuing the GATT 1947 practice. While consensus is the preferred method, Article IX:1 also provides for decision-making by voting where consensus cannot be reached. In practice, however, voting has only been employed once in the history of the WTO in 1995, when the General Council held votes by postal ballot on the draft decisions on the accession of Ecuador and on certain waivers; even then this came only after reaching consensus on each matter. Thereafter, the GC adopted a decision (in the form of a statement by the Chair) that accession and waivers would henceforth be decided by consensus.[2]
6. Any modification to the consensus rule such as introducing voting thresholds, reinterpreting consensus, or imposing new decision-making criteria, would require a formal amendment under Article X of the Marrakesh Agreement, not merely a procedural adjustment.
7. Based on current discussions, there is no agreement among Members to alter the consensus rule.[3] Including consensus under the "Governance" track without explicit clarification may create the impression of tacit agreement to revisit core institutional rules and principles.

- **Negotiating Instruments**

8. The term "negotiating instruments" is ambiguous and requires clarification. If it refers to procedural modalities (e.g., negotiating formats or schedules), these are managed through established practice and do not raise governance concerns. If, however, it refers to the legal status of plurilateral agreements or the form of rulemaking, these are substantive legal matters governed by Article X of the Marrakesh Agreement and should not be subsumed under procedural reforms.
9. Developing countries should seek explicit clarification of what is meant by "negotiating instruments" before endorsing the current structure of the track.

- **Dispute Settlement Reform**

10. Dispute settlement reform is recognized as a systemic priority by Members but is formally outside the Facilitator's mandate, as acknowledged in the report and communication. Including dispute settlement under "Governance" risks conflating institutional reform with

[2] Craig VanGrasstek, *The History and Future of the World Trade Organization* (Geneva: World Trade Organization, 2013), Chapter 6, p. 213. Available at: https://www.wto.org/english/res_e/booksp_e/historywto_e.pdf

[3] WTO, *General Council, Minutes of the Meeting held on 18–19 February 2025*, WT/GC/M/216, 29 April 2025, Chairperson: H.E. Mr Petter Ølberg (Norway).

treaty-based enforcement mechanisms governed by the Dispute Settlement Understanding (DSU). The ongoing crisis in dispute settlement is fundamentally legal and political, not merely procedural.

11. Reform of dispute settlement should proceed within its dedicated process under the Dispute Settlement Body and General Council, rather than being subsumed under general governance reform.

- **Secretariat Working Methods**

12. The omission of Secretariat working methods such as neutrality, transparency, and equitable support for developing Members from this track is a significant gap. Effective governance reform should address institutional accountability, including the role and practices of the Secretariat, alongside Member-driven principles.

Suggested considerations

- Clearly distinguish between institutional practices and treaty-based rules in the structuring of the Governance track.
- Clarify the intent and legal implications of references to consensus and negotiating instruments, ensuring that any proposed changes to core rules follow the appropriate amendment procedures.
- Maintain dispute settlement reform as a distinct process under the appropriate WTO bodies.
- Include Secretariat working methods and institutional accountability as integral components of governance reform, reflecting Member concerns and best practices for transparency and equity.

b. Track 2: Fairness (Level Playing Field and Balanced Trade)

13. The current formulation of Track 2 merges legally distinct and politically charged concepts, risking confusion over the legal status, negotiation history, and systemic function of each issue. To ensure legal coherence and procedural clarity, the following distinctions and clarifications are necessary.

- **Special and Differential Treatment (S&DT)**

14. S&DT is a treaty-embedded right, reflected in the Marrakesh Agreement and multiple WTO agreements. Its purpose is to tailor obligations and flexibilities to the development levels and capacities of Members, consistent with the principle of "reciprocal and mutually advantageous arrangements."

15. Discussions on reform must reaffirm S&DT as a legal entitlement, and not as an imbalance to be corrected or as a concession subject to new conditions.

- **Transparency**

16. Transparency is a core WTO obligation, grounded in specific agreements and intended to enhance predictability and accountability in trade relations. Any proposals to strengthen transparency should specify whether the aim is to improve notification and monitoring or

to introduce new obligations and should be considered on their own legal and systemic merits.

- **Reciprocity**

17. Reciprocity is a structuring principle for negotiating balanced outcomes, and not a standalone legal obligation demanding identical commitments from all Members.[4] The WTO framework explicitly allows for differentiated obligations to achieve mutual benefit, particularly for developing and least-developed countries.

- **"Unfair practices" and "non-level playing field"**

18. These terms are not defined in WTO law and do not constitute independent legal obligations. WTO dispute settlement adjudicates based on specific covered agreements, not on abstract notions of fairness or "level playing field." Use of such terminology risks importing unilateral or bilateral benchmarks into multilateral rulemaking, which may undermine the integrity of the WTO's legal framework and the rights of Members.

- **Market access and Subsidies**

19. The inclusion of market access under this track requires clarification, as there are currently no active or prospective market access negotiations in the WTO. Any new negotiations would require an explicit mandate and consensus, or consensus to restart negotiations based on existing mandates.
20. References to "subsidies" should specify whether the focus is on ongoing fisheries subsidies negotiations, industrial subsidies, or reforming the Agreement on Subsidies and Countervailing Measures (ASCM). Each area involves distinct legal disciplines and negotiation histories which require further clarification.

Suggested considerations

- Clearly distinguish between treaty-embedded rights/obligations and politically constructed narratives.
- Avoid conflating legal entitlements such as S&DT with contested concepts like "unfair practices."
- Clarify the scope and mandate for including market access and subsidies in the reform track.
- Ensure that any new negotiating areas or disciplines are pursued only with explicit consensus and a clear legal basis.

[4] Daniel C.K. Chow and Ian Sheldon, *Is Strict Reciprocity Required for Fair Trade?*, Public Law and Legal Theory Working Paper Series No. 454, 27 August 2018. Available at: https://aede.osu.edu/sites/aede/files/imce/images/SSRN-id3237796_0.pdf

c. Track 3: Future (Issues of Our Time)

- **Legal and Institutional clarity**

21. The grouping of climate change, digital trade, artificial intelligence (AI), and economic security as "issues of our time" lacks precise legal definition in the WTO framework. These topics differ significantly in their legal status, negotiation history, and the extent of existing WTO disciplines.
22. The term "economic security" is not defined in WTO law. It is presumed to refer to national security-based exceptions (e.g., Article XXI of GATT), industrial policy, or other justifications for potential trade restrictions and measures. Without agreed parameters, this ambiguity could indeed open the door to broader and potentially unchecked invocation of security exceptions, undermining the predictability and integrity of the multilateral trading system

- **Selectivity and Development dimension**

23. The current framing seems to prioritize issues advanced by some Members, while omitting challenges critical to developing countries such as food security, green industrial policy space, climate-related trade measures, trade-debt nexus, crisis management frameworks, etc. A balanced agenda on the future should be inclusive of the lived realities and pressing needs of developing countries, including the preservation of policy space for structural transformation and sustainable development.

- **Process and Mandate concerns**

24. Many topics listed in Track 3 are already under discussion in various WTO bodies. Their inclusion in a reform pillar could be interpreted as a move toward negotiations. If so, it will be essential for Members to have a common understanding on the scope of issues under this track.
25. The lack of clear boundaries between institutional reform, rulemaking, and agenda-setting creates uncertainty as to whether this track is intended to support exploratory discussions or initiate formal negotiations. This ambiguity risks accelerating new rulemaking processes while longstanding development mandates remain unresolved and unimplemented.

- **Anchoring in WTO Principles**

26. The track does not clearly articulate how these emerging issues relate to the foundational WTO principles including non-discrimination, and the right of Members to regulate in pursuit of public policy objectives. Without such anchoring, there is a risk of marginalizing the development dimension and undermining the legitimacy of the reform process.

<u>Suggested considerations</u>

- Clarify the scope and legal meaning of each "issue of our time," especially ambiguous terms like "economic security," to avoid undermining existing WTO disciplines. In determining whether a new issue is appropriately taken up by the General Council, it must fall within the scope of the Council's functions under Article IV:2 of the Marrakesh Agreement and align with the objectives of the WTO as set out in Article III:2.

Discussions that fall outside this remit risk diluting the multilateral agenda and diverting attention from longstanding, unresolved development mandates.

- Expand the agenda to include issues central to longstanding developing countries' interests.
- Clearly distinguish between exploratory discussions and formal negotiations, ensuring that any shift to rulemaking is Member-driven and based on positive mandates.
- Explicitly link new topics to foundational WTO principles, including S&DT, non-discrimination, and the right to regulate, to safeguard the development dimension of these issues.

Possible responses to the Facilitator's questions

Track 1: How can we improve decision-making and negotiation processes to rebuild trust and to better deliver outcomes?

The rule of consensus-based decision-making is foundational to the WTO's institutional design and is explicitly provided for in Article IX:1 of the Marrakesh Agreement. This principle underpins both the equality of Members and the legitimacy of outcomes in WTO processes. Any proposal to alter or reinterpret this rule including concepts such as "responsible consensus," voting thresholds, or differential weighting of voices would constitute a modification of institutional decision-making procedures and therefore require formal amendment under Article X. Such changes cannot be effected through informal reinterpretation.

To enhance institutional trust and transparency in negotiations, developing countries should support improvements in working practices, including:

- Limiting the use of exclusive informal negotiating formats, such as "green rooms" and small-group configurations. Where such formats are used, they should remain exceptional and subject to procedural safeguards ensuring inclusivity and feedback loops.
- Institutionalising clear and transparent rules of engagement across all formats of consultations and negotiations, including Facilitator-led processes. These should include timely advance notice of meetings, open-ended participation unless otherwise justified, transparent reporting of discussions, and the right of Members to respond to or correct summaries.
- Adherence to agreed negotiating mandates, particularly with regard to pending or unfinished issues. WTO reform discussions should not displace existing mandates, including unresolved areas under the Doha Work Programme.
- Chairpersons and Facilitators should be guided by the WTO's established rules of procedure and should ensure that all Members have equitable opportunities to engage and intervene.
- New plurilateral initiatives intending to produce legally binding outcomes must be subject to prior formal negotiation mandates adopted by the Ministerial Conference.
- Enhancing Secretariat accountability and neutrality, including through clearer delineation of its technical and procedural roles. The Secretariat must provide equal support to all Members and avoid taking positions that influence negotiation outcomes or the reform discourse.

- More broadly, the reform process must restore the reciprocal and mutually advantageous nature of negotiations i.e., balancing overall negotiating concessions. Rebuilding trust requires rebalancing negotiating dynamics so that developing countries are not continually placed in a defensive posture, expected to give up policy space or development flexibilities without commensurate outcomes in areas of their interest. A rules-based system must function on the basis of negotiated balance, not incremental asymmetry.

Track 2: What should be our priority for making the WTO fairer, and how?

- The starting point must be a reaffirmation that S&DT is a treaty-embedded legal entitlement, not a concession to be re-negotiated. It is codified in Part IV of GATT 1994, operationalised through the Enabling Clause, and further reflected across the covered agreements. The preamble to the Marrakesh Agreement explicitly recognises the need to ensure developing countries secure a share in the growth of world trade commensurate with their development needs. S&DT is not an exception to the rules; it is part of the rules. It is therefore deeply problematic that developing countries are now being placed in a position where they are expected to defend, justify, or trade away these rights as a condition for engaging in WTO reform. This reverses the burden in a way that is neither legally warranted nor procedurally acceptable. There is no mandate to reopen the legal structure of S&DT, and its inclusion in this track under the guise of "fairness" risks distorting its status by treating it as a deviation from normative disciplines rather than a structural element of the WTO's design. Where specific flexibilities or commitments are under negotiation, those discussions must take place in context-specific negotiations, and not through a reform process that repositions foundational principles as liabilities.
- In considering what would make the WTO "fairer," developing countries should firmly reject recent efforts to reinterpret core legal principles to suit a shifting political narrative. The introduction of undefined and politically constructed terms such as *"unfair practices"* and *"non-level playing fields"* has no basis in WTO law. These are not recognised legal categories, nor are they grounded in any agreed interpretive framework. Their inclusion in reform discussions risks importing unilateral trade policy language into a multilateral setting, thereby undermining legal certainty and distorting the purpose of the rules-based system.
- Equally, the concept of reciprocity must be understood in its correct legal and historical context. WTO law has never equated reciprocity with symmetry of commitments. Instead, it reflects a commitment to balanced outcomes that account for structural differences in levels of development, consistent with the logic of non-reciprocal preferences enshrined in Part IV of GATT 1994 and the Enabling Clause. Attempting to reframe reciprocity as a justification for limiting S&DT or imposing equal obligations on unequal Members departs from the GATT/WTO's foundations and contradicts both the Marrakesh Agreement and the WTO's negotiating history.
- Demand clarity on the status of existing mandates. For any reform process to be credible and conducted in good faith, Members must clarify the legal status of existing mandates, in particular the Doha Work Programme and its associated negotiating tracks. The Doha Ministerial Declaration, subsequent Ministerial Decisions (notably those at Hong Kong and Bali), and the continuous reaffirmation of Paragraph 44 of the Doha Declaration establish a set of obligations that have not been formally rescinded,

amended, or concluded in accordance with WTO rules. Under Article IX of the Marrakesh Agreement, the authority to adopt negotiating mandates resides with the Ministerial Conference and in-between sessions, the General Council. Until such mandates are explicitly withdrawn or superseded by consensus, they remain legally binding on the WTO's work programme. Reform discussions cannot substitute or bypass these decisions through informal re-prioritisation or restructuring of the negotiating agenda. Further, the introduction of new issues (Track 3) into the WTO rulemaking function including through the reform track must be clearly distinguished from exploratory dialogue. Where new negotiations are envisaged, they must be launched pursuant to formal decisions adopted by the Ministerial Conference, with clearly defined scope, modalities, and a basis in consensus. In the absence of such clarity, the reform process risks being procedurally incoherent and legally contested.

- Members must engage with the inherent contradictions that continue to undermine the institutional coherence of the system. For example, this includes a honest reckoning with the status of, for instance, the Paragraph 44 mandate in the Committee on Trade and Development in Special Session (CTD-SS), where many developing countries have long sought to develop precise, effective, and operational S&DT provisions across the Uruguay Round agreements. These negotiations remain unfinished. At the same time, the notion of fairness cannot be divorced from consistency. It is difficult to reconcile the position of certain developed Members who reject reopening existing agreements, while simultaneously introducing subsidy programmes, local content requirements, and other measures that violate those very same agreements. If fairness is to have any legal and institutional meaning, it should apply equally to all Members and be reflected in both the interpretation of obligations and the implementation of commitments.
- The inclusion of market access under this track is questionable and its placement risks creating the impression of a push for tariff liberalisation without addressing unresolved asymmetries and the negotiating concessions made in the Uruguay Round (and the subsequent negotiating impasse in 2008). It also seems to align with the priorities of certain Members, particularly the U.S. despite its continued use of unilateral measures that raise legal questions about their compatibility with WTO rules. The reform process should not be used to accommodate actions that depart from agreed disciplines or compel others to give up negotiated rights.
- Seek clarification on the reference to subsidies. It is unclear whether this refers to the ongoing fisheries subsidies negotiations, to industrial subsidies introduced under national programmes such as the Inflation Reduction Act, or to disciplines under the Agreement on Subsidies and Countervailing Measures (ASCM). These issues raise distinct legal and systemic questions. Conflating them under a single track obfuscates the scope and purpose of the reform process and may undermine the ability of developing countries to assert differentiated positions on each.

Track 3: some of these issues are already being discussed in the WTO and have a longer perspective. Which ones, if any, should we address within the reform process and how?

- A distinction must be made between discussing new or emerging issues and negotiating binding disciplines. The fact that some of these topics are already being examined in committees, thematic discussions, or plurilateral formats does not in itself create a mandate to elevate them into the reform agenda. Without an explicit decision by the Membership, exploratory dialogue should not be used to justify or accelerate new rulemaking.
- It is also not appropriate to treat national security concerns and related unilateral measures as part of a "future" agenda. These are not forward-looking policy questions but ongoing systemic behaviours that directly implicate existing WTO obligations, particularly under GATT Article XXI and the DSU. Their inclusion in this track risks normalising behaviour that is legally contested and distracts from genuine emerging issues that require discussion. It may be more appropriate to address such issues under a dedicated track on institutional integrity or systemic disruptions, where their legal implications can be properly assessed. The reform agenda should not conflate structurally distinct matters, particularly when they concern compliance with foundational rules.
- If the reform process is to engage with "issues of our time", then it should also reflect the priorities of developing countries. This includes the development dimensions of digital industrialisation (a limited mandate obtained under the Work Programme on Electronic Commerce at MC13),[5] the design of climate-related trade measures (Committee on Trade and Environment discussed this)[6], etc.
- It is important to ensure that reform does not become a platform for backdoor norm-setting. It should instead reaffirm that any consideration of new issues is Member-driven, responsive to the development needs of developing countries, and explicitly mandated by the Ministerial Conference.

For enquiries, please contact: Naidu@southcentre.int or visit https://www.southcentre.int/

[5] South Centre, *Unpacking the WTO MC13 Decision on the Work Programme on Electronic Commerce*, Policy Brief No. 130, May 2024. Available at: https://www.southcentre.int/tag/work-programme-on-electronic-commerce-wpec/

[6] WTO, *Principles Guiding the Development and Implementation of Trade-Related Environmental Measures*, Communication from the African Group, WT/GC/W/894, WT/CTE/W/255, G/C/W/830, IP/C/W/703, G/AG/W/239, 13 July 2023. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W894.pdf&Open=True