

## Reform Proposals on Decision-Making at the WTO: Mapping the Consensus Debate in the light of the Marrakesh Agreement

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### ABSTRACT

This Analytical Note maps the consensus and decision-making proposals advanced in the pre- and post-MC14 WTO reform communications in the light of the Marrakesh Agreement. For each proposal it asks the same question: if the proposal were adopted, what in the Agreement would have to change, and through which legal route? The submissions are sorted into four analytical groups according to their effect on the consensus rule, and for the proposals that engage the Agreement's text, the Note identifies whether the route is amendment, authoritative interpretation, a change to the Rules of Procedure, or an arrangement outside the Agreement, and sets out the procedure the Agreement prescribes.

The Note shows that Article IX:1, the consensus rule, and Article X:9, governing the incorporation of plurilateral agreements into Annex 4, are both entrenched by Article X:2, so that an amendment to either will take effect only upon acceptance by all Members.

A plurilateral agreement concluded and implemented outside the WTO requires no amendment to the Marrakesh Agreement. Article II:3 has no bearing on such an agreement until it is incorporated into Annex 4, and only that step of incorporation engages Article X:9 and its consensus requirement. The authoritative-interpretation power under Article IX:2 cannot be used to undermine Article X and therefore cannot substitute for amendment where the object is to change the consensus or incorporation rules.

**KEYWORDS:** WTO reform; consensus; decision-making; plurilateral agreements; Marrakesh Agreement

### KEY MESSAGES

- Affirming consensus while proposing to qualify, discipline or bypass it is a contradiction the reform proposals do not resolve. The legal route each proposal requires exposes the gap between the language Members use and the outcomes they seek.
- Article IX:1 and Article X:9 of the Marrakesh Agreement are doubly locked. Both require consensus to operate and acceptance by all Members for amendment. No qualified majority, critical mass test, or authoritative interpretation can change either provision without that threshold being met.
- The authoritative-interpretation power under Article IX:2 is expressly prohibited from undermining Article X. It cannot serve as a substitute for amendment where the object is to rewrite the consensus or incorporation rules.
- The amendment procedure of the Marrakesh Agreement is available to all Members on any subject. As the door to amend Article X:9 is open, it is equally open to Members to pursue their longstanding proposals to amend the covered agreements. This is a point the communications on reform proposals leave conspicuously unstated.

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## I. Purpose and Scope

Every submission reviewed for this Note<sup>1</sup> affirms that consensus-based decision-making is fundamental to the WTO and should be preserved. Agreement on the wording, however, does not carry agreement on its meaning. A growing number of reform communications affirm consensus and then, in the same submission, elaborate ways to qualify, discipline or bypass it, by distinguishing consensus from unanimity, by attaching consequences to a Member that objects, or by opening a route to incorporate plurilateral agreements into Annex 4 without the agreement of all Members. In contrast, the communications of the African Group (WT/GC/W/971, WT/GC/W/992), the African, Caribbean and Pacific (ACP) Group and the joint ACP and African Group (WT/GC/W/975, WT/GC/W/932/Rev.1), the LDC Group (WT/GC/W/979), India (WT/GC/W/982) and, in part, Paraguay (WT/GC/W/987) read consensus as the unqualified standard the Marrakesh Agreement provides.

The Note takes each proposal at face value and asks one question: if the proposal were adopted, what in the Agreement Establishing the WTO (Marrakesh Agreement) would have to change, and by which legal route? The aim is not to assess the merits of each proposal. Rather, for each proposal, the Note identifies whether it would require an amendment, an authoritative interpretation, a waiver, a revision to the Rules of Procedure,<sup>2</sup> or an arrangement outside the Agreement, and sets out the procedure the Agreement prescribes. The submissions are sorted into four groups by their effect on the consensus rule, and the analysis concentrates on the groups whose proposals directly engage the Marrakesh Agreement's text.

Four provisions govern the analysis. Article IX:1 continues the practice of decision-making by consensus under GATT, with footnote 1 deeming a decision taken by consensus where no Member present formally objects, while voting remains as the fallback where consensus cannot be reached.<sup>3</sup> Article IX:2 confers on the Ministerial Conference and the General Council the exclusive authority to adopt interpretations by a three-fourths majority, subject to the proviso that they may not be used to undermine the amendment provisions in Article X.<sup>4</sup> Article X governs amendment. Article X:2 provides that amendments to Article IX and to the provisions of Article X itself take effect only upon acceptance by all Members, entrenching both the

<sup>1</sup> The submissions reviewed are: EU (WT/GC/W/986); United States (WT/GC/W/984, WT/GC/W/998); United Kingdom (WT/GC/W/993); Australia (WT/GC/REFORM/W/1); Argentina (WT/GC/W/1001); China (WT/GC/W/989); Switzerland (non-paper, June 2026); African Group (WT/GC/W/971, WT/GC/W/992); ACP Group and joint ACP and African Group (WT/GC/W/975, WT/GC/W/932/Rev.1); LDC Group (WT/GC/W/979); India (WT/GC/W/982); Paraguay (WT/GC/W/987, RD/GC/49); Congo (WT/GC/W/1000).

<sup>2</sup> The Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, WT/L/161 (1996), govern the mechanics of meetings, including the agenda, the chairperson, the conduct of business and the voting procedures that apply where consensus is not reached. The subordinate Councils and committees have their own rules modelled on these, and the Dispute Settlement Body and the Trade Policy Review Body apply them *mutatis mutandis*. The rules sit below the Marrakesh Agreement and operationalise Article IX rather than override it, so they can carry procedural mechanics such as silence procedures, notice periods and the referral of deadlocked matters, but cannot alter the consensus standard in footnote 1 to Article IX:1.

<sup>3</sup> Footnote 1 to Article IX:1 provides that a body is deemed to have decided by consensus if no Member present at the meeting formally objects to the proposed decision.

<sup>4</sup> Article IX:2 states that the interpretation power "shall not be used in a manner that would undermine the amendment provisions in Article X".

consensus rule and the amendment procedure.<sup>5</sup> Article X:9 provides that the Ministerial Conference may decide to add an agreement to Annex 4 exclusively by consensus.<sup>6</sup>

## II. The Four Groups of Submissions

The submissions sort into four groups by what they would do to the consensus rule. The grouping is analytical, and a single Member may appear in more than one group where its communication advances several distinct ideas. China (WT/GC/W/989) and Paraguay straddle two groups, as the table below records.

Group	Members and submissions	What it would do, and whether the text changes
<b>Group A</b> <i>Change the practice, not the text</i>	Australia, options 1 to 3 (WT/GC/REFORM/W/1); EU (WT/GC/W/986); United Kingdom (WT/GC/W/993); China (WT/GC/W/989); Switzerland, non-paper of June 2026; <sup>7</sup> African Group, on deadlock-breaking tools (WT/GC/W/992)	Alter how consensus is practised, through reasoned objection, mediation, opt-outs, abstentions, silence procedures, comply-or-explain mechanisms and escalation, while leaving the formal veto in place. On the proponents' framing, no change to the treaty text. Switzerland frames these tools as an understanding or agreement among Members operating below the level of the Agreement. The tools rest on different legal footings. Silence procedures and abstentions sit inside the existing framework as practice. Opt-outs from specific obligations have precedent within individual agreements. A general right of reservation to the Agreement itself is the one tool that engages a prohibition, in Article XVI:5. Australia adds a separate claim that voting is already the lawful fallback under Article IX:1, so that no amendment is needed.
<b>Group B</b> <i>Qualify consensus by decision type</i>	Australia, tiered consensus (WT/GC/REFORM/W/1, option 4); EU, day-to-day compared with substantive decisions (WT/GC/W/986)	Split the single consensus standard into tiers, retaining formal-objection consensus for fundamental decisions and applying a lighter standard to procedural and administrative ones. Engages footnote 1 to Article IX:1, whether by interpretation under Article IX:2 or by amendment of Article IX under Article X:1.

<sup>5</sup> Article X:2 provides that amendments to Article IX, to the provisions of Article X itself, and to Articles I and II of GATT 1994, Article II:1 of GATS and Article 4 of TRIPS take effect only upon acceptance by all Members. Article X:9 is a provision of Article X and is entrenched on this basis.

<sup>6</sup> Article X:9 provides that the Ministerial Conference, upon request of the parties, "may decide exclusively by consensus to add that agreement to Annex 4".

<sup>7</sup> The Switzerland contribution referred to here is an informal non-paper of June 2026. It has not been formally tabled or circulated as a General Council document and carries no WTO document symbol. It is referred to for its bearing on the decision-making questions the note addresses, and not as a formal or settled position.

Group	Members and submissions	What it would do, and whether the text changes
<b>Group C</b> <i>Open the plurilateral route</i>	Argentina (WT/GC/W/1001); United States (WT/GC/W/998, WT/GC/W/984); United Kingdom (WT/GC/W/993); EU (WT/GC/W/986)	Ease incorporation of plurilateral agreements into Annex 4 on a critical-mass or qualified-objection basis. Engages Article X:9 and its requirement of a decision exclusively by consensus. The proposals most directly aimed at the treaty text. Because Article X:9 sits within Article X, an amendment to it takes effect only on acceptance by all Members under Article X:2.
<b>Group D</b> <i>Defend the existing text</i>	African Group (WT/GC/W/971, WT/GC/W/992); ACP Group and joint ACP and African Group (WT/GC/W/975, WT/GC/W/932/Rev .1); LDC Group (WT/GC/W/979); India (WT/GC/W/982); Congo (WT/GC/W/1000); Paraguay in part (WT/GC/W/987)	Preserve Article IX:1 and footnote 1 unqualified, and uphold the exclusively-by-consensus requirement of Article X:9. India is the principal textual defender on Annex 4 incorporation. Congo adds an institutional proposal, an ad hoc Working Group under General Council authority with a consensus-elected chair and consensus-based facilitator reports, holding that the reform process itself should be consensus-governed. Paraguay appears here only in part, since it also supports exploring a minimum threshold to launch plurilateral initiatives and mechanisms to incorporate their outcomes, which leans towards Group C. These submissions seek no change to the Agreement and locate their procedural asks in the Rules of Procedure and General Council practice.

The note concentrates on Groups B and C, since their proposals would qualify or change the treaty text, and on the single element of Group A that engages a prohibition. Group A is otherwise reachable below the level of the Agreement, and Group D seeks to preserve the text. Group D positions are noted where they bear on a contested provision, most directly India's reading of Article X:9.

### III. Mapping of Text-Engaging Proposals

Each row in the following table records a proposal, the provision it engages, the current wording in the Marrakesh Agreement, what that wording would have to become, and the legal route required. Rows are grouped by the provision affected, since the provision sets the requirement for a change.

Proposal	Provision engaged	Current text	What the text would become	Route required
Australia, tiered consensus by decision type (WT/GC/REFORM/W/1, option 4)	Art. IX:1 and footnote 1	One uniform standard; consensus exists where no Member formally objects.	Footnote 1 split into two standards, formal-objection consensus retained for fundamental decisions and a lower no-sustained-opposition standard applied to procedural and administrative decisions.	Authoritative interpretation under Art. IX:2, contestable, or amendment of Art. IX under Art. X:1, which takes effect only on acceptance by all Members under Art. X:2.
EU, differentiated procedures for day-to-day and substantive decisions (WT/GC/W/986)	Art. IX:1 and footnote 1	One consensus standard for all matters, no procedural carve-out in the text.	Consensus may no longer block agenda-setting or the monitoring and deliberative function; a separate lighter standard governs procedural matters.	Authoritative interpretation under Art. IX:2, or amendment of Art. IX under Art. X:1, subject to all-Member acceptance under Art. X:2.
EU, responsible consensus and accountability for blocking (WT/GC/W/986); Switzerland, Pareto-improvement understanding (non-paper, June 2026)	Art. IX:1 and footnote 1	Footnote 1 carries no qualifier; a formal objection by any Member present is decisive.	An objection may be set aside, or required to be substantiated, where the objecting Member has no obligation to implement and its interests are unaffected; the unqualified veto narrowed in practice.	Understanding or change to the Rules of Procedure if framed as practice; authoritative interpretation under Art. IX:2 if framed as a reading of footnote 1, contested by Group D Members.

Proposal	Provision engaged	Current text	What the text would become	Route required
Australia, voting as the existing lawful fallback (WT/GC/REFORM/W/1, annex)	Art. IX:1	Where a decision cannot be reached by consensus, the matter is to be decided by voting, except as otherwise provided.	No change; the voting fallback and the one-Member-one-vote rule are read as already available, so the veto is treated as practice rather than law.	No amendment; reliance on the existing text of Art. IX:1, operated through the Rules of Procedure.
Australia, reservations as a tool short of veto (WT/GC/REFORM/W/1, option 3)	Art. XVI:5	No reservations may be made in respect of any provision of this Agreement.	A general right to enter reservations to decisions would sit outside what Article XVI:5 permits.	Amendment of Art. XVI:5 under Art. X:1; Art. XVI:5 is not entrenched by Art. X:2, so two-thirds acceptance under Art. X:3.
Argentina, criteria-based Annex 4 incorporation with disciplined objection (WT/GC/W/1001)	Art. X:9	Ministerial Conference may decide exclusively by consensus to add an agreement to Annex 4.	Incorporation proceeds on critical mass plus stated criteria; an objector files written reasons citing a vital national interest and bears the burden of proof; exclusively by consensus displaced.	Amendment of Art. X:9 under Art. X:1; because Art. X:9 falls within Article X, it takes effect only on acceptance by all Members under Art. X:2.
United States, interim plurilaterals and second-stage incorporation (WT/GC/W/998, WT/GC/W/984)	Outside the framework, then Art. X:9 on incorporation	No provision governs agreements concluded outside the framework; incorporation into Annex 4 requires a decision exclusively by consensus, after which Article II:3 confines the agreement to its parties.	The interim stage operates outside the WTO as a free-standing agreement and needs no change; after a fixed period the agreement is folded into Annex 4 on a critical-mass test rather than unqualified consensus.	First stage, no amendment, since the agreement operates outside the WTO, though servicing it through WTO organs raises institutional-authority questions; incorporation stage, amendment of Art. X:9 under Art. X:1, subject to all-Member acceptance under Art. X:2.

Proposal	Provision engaged	Current text	What the text would become	Route required
United Kingdom, IFD and AEC should be incorporated and blocking should end (WT/GC/W/993)	Art. X:9	A single Member present may withhold consensus.	Incorporation can no longer be blocked by a single Member or small group of non-participants; the veto under Art. X:9 removed or qualified.	Amendment of Art. X:9 under Art. X:1, subject to all-Member acceptance under Art. X:2.
EU, plurilaterals that cannot be blocked by a single or small group (WT/GC/W/986)	Art. X:9	Decision exclusively by consensus.	A pathway for MFN-based and club plurilaterals that does not depend on unanimous consent at the point of incorporation.	Amendment of Art. X:9 under Art. X:1, subject to all-Member acceptance under Art. X:2.
United States, essential security authoritative interpretation (WT/GC/W/998, WT/GC/W/984)	Art. IX:2 applied to GATT Art. XXI, GATS Art. XIV bis, TRIPS Art. 73	Article IX:2 allows interpretation by three-fourths majority; no bar in the text to a self-judging reading.	No change to the consensus rule; Article IX:2 used to render the security exception self-judging, with an adjudicator noting rather than reviewing an invocation.	Authoritative interpretation under Art. IX:2, three-fourths majority, bounded by the proviso on Article X.
Route question for any plurilateral or tiered-consensus reform pursued by interpretation	Choice between Art. IX:2 and Art. X	Article IX:2 may not be used in a manner that would undermine the amendment provisions in Article X.	An interpretation that rewrote Art. X:9 or footnote 1 in substance would fall foul of the proviso.	Tension resolved in favour of the amendment route under Art. X:1.

## IV. The Procedural Routes Under the Marrakesh Agreement

The proposals above fall into four legal categories. Each carries a defined procedure in the Marrakesh Agreement. Setting out the procedure shows what a Member would have to do to obtain the outcome it seeks.

### **4.1. Amendment under Article X**

Amendment is the route for any change to the wording of the Marrakesh Agreement, including footnote 1 to Article IX:1, Article X:9 and Article XVI:5. The procedure runs in stages. A Member initiates a possible change by submitting a proposal to amend the Agreement or a Multilateral Trade Agreement in Annex 1 to the Ministerial Conference under Article X:1, while the Councils listed in Article IV:5 may submit proposals for the agreements they oversee. For ninety days after the proposal is tabled, unless the Conference sets a longer period, the Conference will seek to decide by consensus whether to submit the amendment to Members for acceptance. Where consensus is reached, the Conference submits the amendment forthwith. Where consensus is not reached within the period, the Conference may decide by a two-thirds majority whether to submit the amendment to Members for acceptance.

The threshold for the amendment to take effect then depends on the particular provision that is targeted. Amendments to Article IX and to the provisions of Article X, together with Articles I and II of GATT 1994, Article II:1 of GATS and Article 4 of the Agreement on TRIPS, take effect only upon acceptance by all Members under Article X:2. Amendments to other provisions of the Agreement and of Annexes 1A and 1C that would alter Members' rights and obligations take effect for the accepting Members upon acceptance by two-thirds, and for each other Member on its own acceptance, under Article X:3, with the possibility for the Conference to decide by three-fourths that a non-accepting Member must withdraw or remain with the consent of the Ministerial Conference. Amendments that would not alter rights and obligations take effect for all Members on acceptance by two-thirds, under Article X:4.

Two consequences follow for the proposals in Groups B and C. A change to footnote 1 to Article IX:1 engages Article IX and so requires acceptance by all Members to take effect. A change to the exclusively-by-consensus rule in Article X:9 engages Article X.2 and equally requires acceptance by all Members. Under Article X:1, the Ministerial Conference may decide by a two-thirds majority to submit either proposed amendment to Members for acceptance, but submission and entry into force are separate steps. For both provisions, entry into force waits on unanimity. A Member opposed to the change may withhold acceptance indefinitely, and the amendment will not bind it.

### **4.2. Authoritative Interpretation under Article IX:2**

Interpretation is the route where a Member seeks to settle the meaning of existing text rather than alter it. The Ministerial Conference and the General Council hold the

exclusive authority to adopt interpretations. For a Multilateral Trade Agreement in Annex 1 the authority is exercised on the basis of a recommendation by the Council that oversees the agreement. The decision is taken by a three-fourths majority of the Members. The power to interpret carries one internal limit, since Article IX:2 may not be used in a manner that would undermine the amendment provisions in Article X. An interpretation that in substance rewrote footnote 1 or Article X:9 would exceed that limit and would be open to challenge as an amendment in the guise of interpretation. The authoritative interpretation route is available for genuine questions of meaning and is foreclosed where the real object is to change the consensus rule or the rules governing incorporation, without recourse to amendment.

#### **4.3. Waiver under Article IX:3**

A waiver is the route where a Member seeks release from an obligation for a defined period rather than a permanent change to the text. A request concerning an agreement is to be submitted to the Ministerial Conference and considered first under the practice of consensus, within a period not exceeding ninety days, and where consensus is not reached the waiver may be granted by three-fourths of the Members. A waiver states the circumstances, the terms and the expiry date, and is reviewed annually where it runs beyond a year. Several proposals suggesting the introduction of flexibility resemble waivers in substance. The temporary non-application of specific obligations proposed by Switzerland (non-paper, June 2026), and the time-bound opt-outs raised by the EU and the United Kingdom, could in principle be delivered through a waiver under Article IX:3 for existing obligations, without amending Article IX or X. Where flexibility of this kind is sought for future agreements, it would need to be negotiated into the text of those agreements rather than derived from the waiver mechanism.

#### **4.4. Arrangements outside the framework**

A plurilateral agreement may be concluded among a subset of Members outside the WTO, relying on their general treaty-making capacity under international law rather than on any provision of the Marrakesh Agreement. An agreement of this kind is not a covered agreement and creates no WTO rights or obligations. Article II:3 has no bearing on it, since this provision governs only the relationship between Members pursuant to agreements already placed in Annex 4. An agreement that has not been incorporated sits outside the WTO framework entirely. Only the step of incorporation engages Article X:9 and its consensus requirement.

The first stage of the United States interim-plurilateral concept is an arrangement of this kind. The United States proposes that parties to an interim plurilateral would not pursue incorporation into the WTO framework for a specified period, allowing the agreement to operate and be observed before any decision on incorporation is taken. That first stage requires no amendment to the Marrakesh Agreement. The United States fallback confirms the same point. If a non-party objects at the incorporation stage, the parties would keep the agreement outside the WTO rather than attempt to override Article X:9's consensus requirement from within the Agreement. No provision

of the Marrakesh Agreement permits the Membership to bypass that requirement, and the fallback reflects an acknowledgment that it cannot be circumvented.

Operating outside the WTO framework carries institutional consequences where an agreement draws on WTO organs or resources without having been incorporated into Annex 4. Questions about the institutional authority to provide such support arise in those circumstances that the Marrakesh Agreement does not specifically address.<sup>8</sup>

Whether a consensus decision of the Ministerial Conference or the General Council would be sufficient to authorise such support, or whether the nature of the support would require an amendment under Article X, depends on what specifically is being authorised. A decision that directs WTO organs to service an agreement outside the covered agreements, or that modifies the application of WTO procedures to such an agreement, may engage the amendment provisions rather than the general decision-making power under Article IX:1. The question is most acute if it were intended to apply the Dispute Settlement Understanding (DSU) to disputes under an agreement outside Annex 4. The DSU is a Multilateral Trade Agreement in Annex 2, and its scope is defined by reference to the covered agreements listed in Appendix 1. Extending DSU procedures to a non-covered agreement would alter the DSU's coverage and engage Article X:8, which requires consensus of the full Membership for any amendment to Annex 2 to take effect. That threshold cannot be bypassed by a general consensus decision under Article IX:1.

Under Article 31 of the Vienna Convention on the Law of Treaties, the provisions of the Marrakesh Agreement are to be interpreted taking into account their context and in the light of the Agreement's object and purpose. That context includes Articles II:1 and III:2. Article II:1 establishes the WTO as the common institutional framework for the conduct of trade relations in respect of the agreements in its Annexes. Article III:2 provides that the WTO may serve as a forum for further negotiations and a framework for implementation of their results "as may be decided by the Ministerial Conference." An agreement drawing on WTO organs and resources while remaining outside Annex 4 operates in a space those provisions do not expressly authorise.

## V. How Each Provision Would be Engaged

### 5.1. Article IX:1 and footnote 1, the consensus rule

Footnote 1 applies a single standard to every consensus-based decision, namely that consensus exists where no Member present formally objects. Three proposals would qualify it. Australia's fourth option would introduce differentiation in applying the standard, keeping formal-objection consensus for decisions of fundamental importance and applying an ISO-style test of no sustained opposition by any important part of the concerned interests to procedural and administrative decisions. Australia

<sup>8</sup> The Agreement on Electronic Commerce (ECA, WT/MIN(26)/42), concluded among 66 Members on the sidelines of MC14, illustrates the point. The General Council was asked twice to add the ECA to Annex 4, in February 2025 and December 2025, and on neither occasion was consensus reached. The Participants have nonetheless proceeded through interim arrangements under which the ECA is serviced within WTO institutional infrastructure. The institutional and legal questions that arrangement raises are further addressed in a separate South Centre Analytical Note.

notes that this change would require an interpretation of footnote 1 or changes to the Rules of Procedure. The EU's call to differentiate day-to-day from substantive decision-making is the same proposal in lighter language, as is its call to operationalise 'responsible consensus'. Switzerland's Pareto-improvement understanding (non-paper, June 2026) approaches the same end through an agreement among Members not to block where their interests are unaffected and they bear no obligation to implement.

Under these proposals, footnote 1 would cease to state one single rule and would state a tiered rule keyed to the subject matter or consequence of the decision. The obstacle is the entrenchment of Article IX by Article X:2. An amendment of footnote 1 requires acceptance by all Members, so the developing-country groups defending the unqualified standard would hold the decisive vote on the change. The interpretation route under Article IX:2 carries no unanimity requirement and is for that reason attractive, yet would be contestable, since footnote 1 contains no qualifier and reading a sustained-opposition or material-interest threshold into it can be characterised as amendment, which Article IX:2 forbids.

Australia advances a further argument that sidesteps both routes. On Australia's reading, voting is already the lawful fallback under Article IX:1, the absence of voting is a matter of practice rather than law, and footnote 1 does not preclude a finding of consensus by other means. On that reading no amendment is needed, and the veto rests on practice alone. The counter-reading, set out by the ACP and African Group, is that three-quarters of a century of constant practice has fixed the consensus finding as the operative rule, so that reviving the voting fallback would itself depart from established practice. The disagreement is therefore about the status of practice rather than the text of footnote 1, and that disagreement can be addressed and resolved without any textual amendment, which places the Australia proposal in the category of reforms that do not require recourse to Article X.

### **5.2. Article XVI:5 and the tools short of a veto**

The proposals under Group A are often described together as ways to register concern without a formal veto. For the legal analysis, however, they need to be separately considered, since they rest on different grounds and only one meets a prohibition. A formal reservation to the Marrakesh Agreement is barred. Article XVI:5 provides that no reservations may be made in respect of any provision of the Agreement, and confines reservations under the Multilateral Trade Agreements to what those agreements allow. A general right to enter reservations to General Council or Ministerial Conference decisions would sit outside that text and would require amendment of Article XVI:5. Unlike Articles IX and X, which Article X:2 protects against amendment except by unanimous acceptance, Article XVI:5 is not among the entrenched provisions. The applicable threshold is therefore acceptance by two-thirds of the Membership under Article X:3, though the change would alter a structural feature of the Agreement.

Silence procedures and abstentions do not engage Article XVI:5. A silence procedure, under which a failure to object within a set period is treated as consent, operates inside

the consensus framework rather than as a reservation. A Member retains its right to prevent consensus by formally objecting within the applicable period; failure to do so is treated as acquiescence, not as a waiver of rights in the sense Article XVI:5 addresses. Constructive abstention sits in the same place. Both are practice changes, available through the Rules of Procedure or a General Council understanding. The point of attention for developing countries is capacity rather than text, since a silence procedure converts the failure of an under-resourced delegation to follow a proceeding into consent. Opt-outs from specific obligations have precedent within individual agreements rather than as a general rule. The opt-out under Article 31bis of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), cited by the ACP Group, is the clearest example of differentiated participation written into the text of an agreement, exercised under a hook the agreement provides and not a reservation to the Marrakesh Agreement. New opt-out hooks would be a matter for the agreement concerned, not for Article XVI:5.

### ***5.3. Article X:9, the plurilateral incorporation route***

Article X:9 is the provision that controls the addition of agreements to Annex 4, and it is the focal point of the most consequential proposals in the current reform debate. It provides that the Ministerial Conference may decide exclusively by consensus to add an agreement to Annex 4. The word 'exclusively' forecloses any route to Annex 4 that does not run through consensus. Four proposals aim at reinterpreting or replacing it. Argentina would allow incorporation on a critical-mass basis subject to stated criteria, with any objector required to file written reasons citing a vital national interest and to bear the burden of proof. The United States interim-plurilateral concept would fold an agreement into Annex 4 after a fixed period on a critical-mass test. The United Kingdom states that incorporation should no longer be blocked by a select few. The EU seeks plurilateral pathways that cannot be blocked by a single or small group of Members. Each of these proposals removes or qualifies the veto that 'exclusively by consensus' preserves, and each therefore requires the deletion or replacement of those words.

The threshold for a change to Article X:9 is at the heart of current debates on decision-making. Article X:9 is a provision in Article X and, as noted above, Article X:2 provides that amendments to the provisions of Article X take effect only upon acceptance by all Members. An amendment to Article X:9 therefore requires unanimous acceptance, on the same footing as an amendment to the consensus rule in Article IX. The provision is doubly locked, since its own text requires consensus to use it and Article X:2 requires unanimity to change it. India's submission reminds Members that there is also a prior condition: Article X:9 is confined to "trade agreements," and an agreement that does not meet that threshold condition cannot invoke the provision at all. The consequence is not that such an agreement escapes any requirement, but that it is entirely excluded from the Annex 4 route: it cannot be incorporated through Article X:9, and no other provision of the Marrakesh Agreement provides an alternative path into Annex 4. The consensus requirement in Article X:9 is therefore only engaged, and only capable of being satisfied, where the agreement in question first qualifies as a trade agreement.

The first stage of the United States concept of ‘interim-plurilateral’, as noted above, requires no change to Article X:9, since an agreement among a subset of Members outside the WTO is not a covered agreement and does not seek incorporation. Article II:3 has no bearing on it, governing instead the relationship between Members under agreements already placed in Annex 4, where an agreement binds only those who accept it and creates no rights or obligations for others. Only the step of incorporation into Annex 4 engages Article X:9, and the servicing of such an agreement through WTO organs raises the separate questions of institutional authority referred to in section 4.4 above. The United States fallback, that the agreement be kept as a non-WTO instrument where a non-party objects, confirms that Article X:9 cannot be circumvented from outside the framework any more than it can be amended from within without unanimous acceptance.

#### ***5.4. Article IX:2 as an interpretation route***

One possible use of the Membership interpretation power has been raised. It concerns essential security. The United States proposes an authoritative interpretation of GATT Article XXI, GATS Article XIV bis and TRIPS Article 73, adopted by three-fourths majority under Article IX:2, establishing that the exception is self-judging and that an adjudicator would record the invocation without conducting a substantive review of whether the invoking Member’s security interests were genuinely at stake. The consensus rule is untouched, and Article IX:2 is used for the purpose the text contemplates.

The second use is contested. Where a Member proposes to reach plurilateral or tiered-consensus reform by interpretation rather than amendment, it runs against the Article IX:2 proviso that interpretation may not undermine the amendment provisions of Article X. As noted above, an interpretation that in substance rewrote Article X:9 or footnote 1 would breach the proviso, regardless of how it is framed. Amendment, for all the difficulty its unanimity requirements create in practice, is therefore the legally admissible route to any genuine change of the consensus standard.

## **VI. The Amendment Thresholds at a Glance**

The threshold for change is different across the Marrakesh Agreement’s provisions in play. The table below summarizes the acceptance requirement for each, since the requirement decides where a qualified-consensus outcome is reachable.

Provision	Acceptance required	Significance for the reform debate
Art. IX:1 and footnote 1, the consensus rule	All Members, under Art. X:2	Any amendment to how consensus works requires unanimous acceptance. The Members most opposed hold the decisive vote on the change.
Art. X:9, Annex 4 incorporation	All Members, under Art. X:2	A provision of Article X, so entrenched on the same footing as Article IX. Its own text also requires consensus to use it. Amendment is not a two-thirds route.
Art. XVI:5, no reservations	Two-thirds, under Art. X:1 then Art. X:3	Not entrenched. Could be amended to permit reservations to decisions, though the change would alter a structural feature of the Agreement.
Art. IX:1 voting fallback, as a matter of practice	No amendment	On Australia's reading, voting is already available where consensus fails. The question is the status of practice, not the text.
Art. IX:2, interpretation power	Used, not amended	Operates by three-fourths majority. Attractive because it avoids the Art. X:2 bar, and constrained by its own anti-circumvention proviso.

## VII. Consensus Over the Process, Not Only the Outcome

One dimension of the debate turns on no single article yet bears on all of them. Several Group D submissions argue that the reform process itself should be consensus-governed, not only the decisions it produces. Congo's submission is the clearest instance, proposing an ad hoc Working Group to be established under the authority of the General Council, with its chairperson elected by consensus, thematic facilitators appointed only after consultation with all Members, and facilitator reports issued factually on a consensus basis rather than under their own responsibility. Paraguay's draft decisions including RD/GC/49 and the ACP and LDC submissions make the cognate point through their insistence on open-ended formats, full document access and adequate time to consult capitals.

Where the procedural architecture of reform is itself locked to consensus, the proposals that seek to change the consensus rule, whether by amending Article X:9 or footnote 1, or by using Article IX:2 to reinterpret them, become harder to reach in practice. The working groups and facilitators that would have to develop, negotiate, and recommend those proposals are bound by consensus at each procedural step, so a dissenting minority can slow or stall the process without ever having to cast a formal vote against the substantive proposal. Process design and textual outcome are therefore connected. A consensus-governed process is the procedural complement to the substantive defence of the consensus rule, and the two reinforce each other.

## VIII. Conclusion

Read against the Marrakesh Agreement, the proposals to change the consensus rule divide clearly by the legal instruments they require for implementation. The proposals that change how consensus is practised, in Group A, can be reached under the framework the Marrakesh Agreement already provides, through the Rules of Procedure, a General Council understanding, or reliance on the existing voting fallback in Article IX:1. The proposals that tier the consensus standard, in Group B, and those that ease plurilateral incorporation, in Group C, engage the Agreement's text. Changes to footnote 1 to Article IX:1 and Article X:9 can be cleanly reached only by an amendment. Amendment, for both provisions, runs through Article X:2, so that an amendment to either takes effect only upon acceptance by all Members. A two-thirds majority in the Ministerial Conference can submit such an amendment, but its entry into force requires the agreement of the full Membership, including those Members whose blocking power under the current rule the amendment is designed to remove. The amendment procedure thus requires the consent of the Members most likely to withhold it.

The only route that escapes the amendment requirement is the route that preserves the rules of the Marrakesh Agreement, namely a plurilateral agreement concluded outside the WTO, with incorporation into Annex 4 left for a later consensus under Article X:9. The escape is clean only where the agreement stays genuinely outside the WTO framework, since servicing it through WTO organs raises questions of institutional authority that are themselves subject to the consensus rule, as the experience of the Agreement on Electronic Commerce illustrates.

The mapping in this Note yields one observation. The shared statement that consensus is fundamental sits in tension with proposals that would, if adopted, qualify or remove it. Each such proposal carries a defined legal route and a defined threshold. Identifying the route and the threshold is what allows Members to see, for any given proposal, whether they are being asked to accept a change of practice, an interpretation, an arrangement outside the Marrakesh Agreement, or an amendment that cannot take effect without their acceptance.

*The South Centre is the intergovernmental organization of developing countries that helps developing countries to combine their efforts and expertise to promote their common interests in the international arena. The South Centre was established by an Intergovernmental Agreement which came into force on 31 July 1995. Its headquarters is in Geneva, Switzerland.*

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