

EDITORIALS

Chathurya Srinivasan, Priyanshu Shrivastava, & Simran Bherwani, *Foreword*

Bipin Kumar, *Note from the Chief Editor's Desk*

ARTICLES

Rafael Leal-Arcas et al., *Carbon Markets, International Trade, and Climate Finance*

Pallavi Arora, *WTO Rules on State-Owned Enterprises Revisited: Balancing Fair Competition and Institutional Diversity*

Mira Burri, *Human Rights Implications of Digital Trade Law*

Yifan Li, *Whether and How Amicus Curiae Can Promote Democracy in the DSM*

NOTES & COMMENTS

Robert Wolfe & Peter Ungphakorn, *On the Rocks: The WTO's Member-Driven, Consensus Decision-Making*

Trade, Law *and* Development

Vol. 16, No. 2

2025

PATRON

Hon'ble Prof. (Dr.) Harpreet Kaur

CHIEF EDITOR

Dr. Bipin Kumar

EDITORS-IN-CHIEF

Chathurya Srinivasan

Priyanshu Shrivastava

Simran Bherwani

EDITORS

Samiksha Lohia

(MANAGING)

Alka Nanda Mahapatra

Nandini Tripathi

(TECHNICAL)

Shambhavi Uniyal

Isbaan Pant

ASSOCIATE EDITORS

Aastha Gupta

Bianca Bhardwaj

Y. Leela Krishna Reddy

Akanksha Samantray

Manvi Goyal

Ansh Sethi

Sonali P. Raju

Yug Gandhi

COPY EDITORS

Aaryan Bagrecha

Anshita Tiwari

Abir Balia

Divya Chidambaram

Ruth Sara Abraham

Annette Sara Abraham

Raghunandan N.

CONSULTING EDITORS

Ali Amerjee

Gregory Shaffer

Prateek Bhattacharya

Aman

Manu Sanan

Shashank P. Kumar

Disbi Bhomawat

Meghana Sharafudeen

Steve Charnovitz

Dr. Bipin Kumar

Chief Editor

Robert Wolfe & Peter Ungphakorn, *On the Rocks: The WTO's Member-Driven, Consensus Decision-Making*
16(2) TRADE L. & DEV. 358 (2025)

ON THE ROCKS: THE WTO'S MEMBER-DRIVEN, CONSENSUS DECISION-MAKING¹

ROBERT WOLFE* & PETER UNGPHAKORN**

The buzzword for the troubled World Trade Organization (WTO) is 'reform'. But without a shared view of what that means, reform cannot begin in any meaningful way. There is no doubt that two of the WTO's functions are floundering: negotiating new rules and settling legal disputes about compliance with existing rules — but even then, member governments have found ways of producing some results. A third function is working better: the scrutiny of trade measures in the regular committees on the various WTO agreements. It sustains a considerable amount of rules-compliant trade, although that too should be improved. The failing is collective even if some countries or groups of countries might take more of the blame than others.

There are many reasons for the WTO's troubles. We focus on one that is central to decision-making in all of the main areas of the WTO's work: the consensus rule. Although alternatives are available, members still insist on it. There have been calls for the WTO to vote, which is allowed under the rules but is avoided because it would destroy the WTO. This paper looks at the reasons why. It examines what consensus means, how it works, why it is so often abused, the role of power, various ideas put forward to deal with its

¹ This article draws heavily on: Peter Ungphakorn & Robert Wolfe, *WTO Members Head for Clash on Consensus Decisions and Abuse of Power*, TRADE β BLOG (May 16, 2024, updated on May 25, 2024), <https://tradebetablog.wordpress.com/2024/05/16/wto-clash-consensus-abuse-power/>; Peter Ungphakorn, *WTO-Reform 'Retreat' Designed to Encourage More Free Thinking*, TRADE β BLOG (July 01, 2024, updated on July 16, 2024), <https://tradebetablog.wordpress.com/2024/07/01/wto-reform-retreat-designed-to-encourage-more-free-thinking/>; Peter Ungphakorn, *Voting in the WTO? It Won't Happen*, TRADE β BLOG (May 19, 2021, updated on March 25, 2022), <https://tradebetablog.wordpress.com/2021/05/19/voting-in-the-wto-it-wont-happen/>.

* Professor Emeritus of Policy Studies, Queen's University, Kingston, Ontario. The author may be contacted at robert.wolfe[at]queensu.ca.

** Journalist; Former Member, WTO Secretariat. The author may be contacted using the contact form on the blog (<https://tradebetablog.wordpress.com/about/>) or on Bluesky @coppetainpu.bsky.social.

problems, and what WTO members are saying to each other about it. We conclude that consensus is fundamental yet leaves the WTO on the rocks.

TABLE OF CONTENTS

- I. INTRODUCTION: IT IS NOT JUST ABOUT TRUMP, BUT HE IS MAKING IT WORSE
- II. WHY CONSENSUS?
- III. VOTING IN THE WTO? IT WILL NOT HAPPEN
- IV. HOW TO ACHIEVE CONSENSUS?
- V. POWER, COERCION, AND VETOING
- VI. WORKAROUNDS
- VII. 'RESPONSIBLE' CONSENSUS
- VIII. ACCOUNTABILITY
- IX. DELIBERATION
- X. 'RETREAT': MEMBERS RE-THINK DECISION-MAKING
- XI. USE AND ABUSE OF CONSENSUS

I. INTRODUCTION: IT IS NOT JUST ABOUT TRUMP, BUT HE IS MAKING IT WORSE

That the WTO is in trouble is well known. Negotiations are largely blocked, except for the drip-drop of rare agreements. Dispute settlement is hamstrung because the Appellate Body (AB) no longer has any member-adjudicators to hear appeals. What is not so well known is the exact nature of the problem (or problems), that the faults do not lie with any single member or group of members (although some are less constructive than others), and that some of the WTO's important functions are working reasonably well. Specifically in implementing the existing agreements, even though improvement is always possible. The consensus rule is often blamed for the impasse in the WTO, but the problems are deeper, and a solution is elusive.

This article is not specifically about the unpredictable trade policies of the United States' (U.S.) President Donald Trump. But many of those policies have implications for WTO decision-making. Trump's policies may even become a distraction as WTO members grapple with their responses, diverting attention away from attempts to reform the WTO more fundamentally. In his second term, Trump has been wielding tariffs on imports as if they were super-powered weapons that could beat the rest of the world into submission over trading practices that are 'unfair' to the U.S., i.e., illegal immigration and narcotics. Trump has even threatened to use tariffs in his wish to see Canada and Greenland become part of the U.S.

Much of Trump's use of tariffs is political. From the perspective of trade law, President Trump is tearing up agreements the U.S. has signed, including the free trade agreement with Canada and Mexico, which he renegotiated himself in his first term. Importantly for the rest of the world, they also include the WTO agreements. The raised tariffs are likely to violate several WTO provisions, not least the non-discrimination norm of Most-Favoured Nation (MFN) under the General Agreement on Tariffs and Trade (GATT),² and the commitments to stay within negotiated and bound maximum tariff rates.³ And as we write, it appears the U.S. is withholding its assessed contributions to the WTO while conducting a review of whether it should withdraw from international organisations.⁴

In his first term, President Trump cited "security" as a catch-all justification for violating WTO commitments. The dispute panels ruled against the U.S.,⁵ which then appealed. Since the AB could not function, the appeals threw the cases into limbo, and WTO members, meeting as the Dispute Settlement Body (DSB), could not adopt the rulings. These cases were "appealed into the void".⁶

The AB cannot function because the U.S. has blocked the appointment of new members (adjudicators) as existing members' terms have expired. The AB had lost its quorum in December 2019 and its final member on November 30, 2020. This

² General Agreement on Tariffs and Trade, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 ILM. 1153, art. 1 [hereinafter GATT]; WTO WEBSITE, *WTO Legal Texts*, WTO: WTO LEGAL TEXTS. https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

³ GATT, *supra* note 2, art. II; See Requests for Consultations by Canada, *United States—Additional Import Duties on Steel and Aluminium Articles from Canada*, WTO Doc. WT/DS635/1 (Mar. 13, 2025); Requests for Consultations by Canada, *United States—Additional Import Duties on Goods from Canada*, WTO Doc. WT/DS634/1 (Mar. 5, 2025); (specifically the legal challenges brought by Canada which also cites the Trade Facilitation Agreement); Request For Consultations By China, *United States—Additional Tariff Measures on Goods from China*, WTO Doc. WT/DS633/1 (Feb. 5, 2025) (on a first set of tariffs); Request For Consultations By China-Addendum, *United States—Additional Tariff Measures on Goods from China*, WTO Doc. WT/DS633/1/Add.1 (Mar. 5, 2025) (on a further increase in tariffs).

⁴ Emma Farge, *Exclusive: US Pauses Financial Contributions to WTO*, *Trade Sources Say*, REUTERS, (Mar. 28, 2025, 7:28 PM), <https://www.reuters.com/world/us-suspends-financial-contributions-wto-trade-sources-say-2025-03-27/>.

⁵ Keith Rockwell, *Recent WTO Ruling Against the United States Highlights Challenges in Dispute Resolution*, WILSON CENTRE (Dec. 15, 2022), <https://www.wilsoncenter.org/blog-post/recent-wto-ruling-against-united-states-highlights-challenges-dispute-resolution>.

⁶ Peter Ungphakorn, *Technical note: Appeals 'Into the Void' in WTO Dispute Settlement*, TRADE β BLOG (Feb. 13, 2021, updated on Feb. 24, 2025), <https://tradebetablog.wordpress.com/technical-note-appeals-into-the-void-in-wto-dispute-settlement/> [hereinafter Ungphakorn-Technical Note].

blockage began with the Obama administration, was accelerated under the first Trump administration, and continued under President Joe Biden. For approaching ninety times, more than three quarters of WTO members have proposed in the DSB that AB appointments resume. Over eighty times the U.S. has been the member refusing to join a consensus on new appointments.⁷

In all of this, the WTO's vulnerability can be seen in, first, the disdain for agreements that form the multilateral rules-based trading system on the grounds that they are "unfair" to the U.S. even though the U.S. negotiated and signed those agreements with all other WTO members; and second, the ability of single countries to block proceedings in the WTO because decisions are always taken by consensus. In the case of AB appointments, the latest numbers are 130 (78% of members) proposing appointments versus one opposing.⁸

The U.S. is not alone. In the second phase of negotiations on a Fisheries Subsidies Agreement,⁹ the chair reported in December 2024 that all the members were prepared to accept his text, except just two members: India and Indonesia.¹⁰ Their objections are technical but are related to the extent of policy space available to them as developing countries that are also major fishing nations. India's objections

⁷ WTO WEBSITE, *Dispute Settlement News Archive*, WTO: NEWS & EVENTS https://www.wto.org/english/news_e/archive_e/dis_arc_e.htm; (At the time of writing (May 2025) there is no sign that the proponents will withdraw their proposal or that the U.S. will drop its objections.); Dispute Settlement Body, *Proposal by Afghanistan; Angola; Argentina; Australia; Bangladesh; Benin; Plurinational State Of Bolivia; Botswana; Brazil; Burkina Faso; Burundi; Cabo Verde; Cameroon; Canada; Central African Republic; Chad; Chile; China; Colombia; Congo; Costa Rica; Côte D'ivoire; Cuba; Democratic Republic Of Congo; Djibouti; Dominican Republic; Ecuador; Egypt; El Salvador; Eswatini; The European Union; Gabon; The Gambia; Ghana; Guatemala; Guinea; Guinea-Bissau; Honduras; Hong Kong, China; Iceland; India; Indonesia; Israel; Kazakhstan; Kenya; Republic Of Korea; Lesotho; Liechtenstein; Madagascar; Malawi; Malaysia; Maldives; Mali; Mauritania; Mauritius; Mexico; Republic Of Moldova; Morocco; Mozambique; Namibia; Nepal; New Zealand; Nicaragua; Niger; Nigeria; North Macedonia; Norway; Pakistan; Panama; Paraguay; Peru; Qatar; Russian Federation; Rwanda; Senegal; Seychelles; Sierra Leone; Singapore; South Africa; Switzerland; The Separate Customs Territory Of Taiwan, Penghu, Kinmen And Matsu; Tanzania; Thailand; Togo; Tunisia; Turkey; Uganda; Ukraine; United Kingdom; Uruguay; The Bolivarian Republic Of Venezuela; Viet Nam; Zambia And Zimbabwe*, WTO Doc. WT/DSB/W/609/Rev.18 (Jun. 19, 2020).

⁸ WTO WEBSITE, NEWS STORY, *Panel to examine measures adopted by Türkiye targeting Chinese electric vehicle imports*, (Feb. 24, 2025), https://www.wto.org/english/news_e/news25_e/dsb_24feb25_e.htm.

⁹ Peter Ungphakorn, *UPDATES: The WTO Fisheries Subsidies Talks 2024*—, TRADE β BLOG (Apr. 21, 2021), <https://tradebetablog.wordpress.com/2021/04/21/update-wto-fisheries/>.

¹⁰ Einar Gunnarsson, *Report by the Chair, H.E. Mr Einar Gunnarsson to the Trade Negotiations Committee: Negotiating Group on Rules — Fisheries Subsidies*, WTO Doc. TN/RL/37 (Dec. 12, 2024).

are extensive and include renegotiating some parts of the 2022 agreement, which was approved by consensus by WTO ministers, including its own.¹¹ India, sometimes with a handful of supporters, has also blocked agreements negotiated among subsets of WTO members from being annexed to the WTO Agreement.¹²

At the same time, some countries have been searching for ways to break the deadlocks so that WTO members can continue to negotiate new and updated rules and to continue to use the dispute settlement system, such as with an ad-hoc way of appealing first-stage panel rulings via, for example, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).¹³

In one sense, the latest U.S. actions are a distraction as WTO members are diverted from work on reform by trying to assess the possible new U.S. trade measures, i.e., how to react and how to deal with the uncertainty. They may have little energy left to deal with broader issues of WTO reform. In another sense, the non-functioning AB might just help remove the WTO as a target since WTO dispute settlement is no longer a threat to the Trump Administration. As previously pointed out, the U.S. can simply ignore adverse dispute rulings by appealing “into the void”, even though new cases are being launched against its unilateral trade restrictions.¹⁴ This would leave reform-minded WTO members with some room to continue their work. But as we write, the signs are not good.

¹¹ Peter Ungphakorn, *UPDATED India and Indonesia Block Agreement on Chair's New Fish Text*, TRADE β BLOG (Dec. 03, 2024, updated on Dec. 13, 2024), <https://tradebetablog.wordpress.com/2024/12/03/new-fish-draft-deadline-looms/>; Peter Ungphakorn, *Reactions to New Draft Cast Doubt on Setting WTO Fish Talks This Month*, TRADE β BLOG (July 12, 2024, updated on July 14, 2024), <https://tradebetablog.wordpress.com/2024/07/12/reactions-draft-cast-doubt-settling-fish-july/>.

¹² Peter Ungphakorn, *E-commerce Initiative is the Latest WTO Rule-making Effort to be Blocked*, TRADE β BLOG (Feb. 19, 2024, updated on Feb. 24, 2025), <https://tradebetablog.wordpress.com/2025/02/19/e-commerce-initiative-latest-blocked/> [hereinafter Ungphakorn-E-Commerce].

¹³ Peter Ungphakorn, *Arbitration — The Stop-gap when WTO Appeals are Unavailable*, TRADE β BLOG (Aug. 04, 2020, updated on Apr. 13, 2022), <https://tradebetablog.wordpress.com/2020/08/04/arbitration-wto-appeals/>.

¹⁴ See WTO WEBSITE, *Chronological list of disputes cases*, WTO: TRADE TOPICS: DISPUTES, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm; (by the end of March 2025 and before the U.S. announced a much larger package of new tariffs on exports from many more countries on April 2, 2025, three WTO dispute settlement cases had already been brought against the U.S.: one by China, DS633 on additional tariffs in general and two from Canada, DS634 on tariffs in general and DS635 on steel and aluminium tariffs).

This article looks behind these issues, focusing particularly on the difficulty of progressing when the decision-making rule is consensus. We consider why members prefer consensus, why voting could wreck the WTO, how consensus is achieved, the role of power, ways of working around blocked consensus (sometimes themselves requiring consensus), ideas for consensus-building (being responsible, being accountable, talking issues through carefully and constructively), what WTO ambassadors actually discussed in a 2024 retreat, and a round-up of the use and abuse of consensus. We conclude that members can only get the WTO off the rocks if they can find a consensus on consensus.

II. WHY CONSENSUS?

The practice of consensus-based decision-making was inherited from the pre-WTO GATT. WTO rules allow voting in most cases when consensus cannot be achieved,¹⁵ but members have always resisted this option. So, consensus-based decision-making is now part of the deep institutional structure of the WTO, in common with all multilateral economic bodies and many other international organisations where decisions could affect sovereignty, including the North Atlantic Treaty Organization (NATO).¹⁶ This was not deliberate; it simply evolved over the decades before being written into Article IX of the new WTO Agreement in 1994. The definition in that article is clear that consensus differs from unanimity: a matter is decided by consensus if no member present at a meeting objects to it.

The pros and cons of consensus in the WTO have been debated for decades. It was discussed in the 2004 Sutherland Report,¹⁷ without a convincing recommendation.¹⁸ Alternatives were considered more recently by a distinguished

¹⁵ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, arts. IX & X [hereinafter WTO Agreement].

¹⁶ *Consensus decision-making at NATO*, NORTH ATLANTIC TREATY ORGANIZATION (June 30, 2023), https://www.nato.int/cps/bu/natohq/topics_49178.htm.

¹⁷ WTO Consultative Board, *The Future of the WTO: Addressing institutional challenges in the new millennium*, 61, 68 WTO (2004), https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf [hereinafter The Sutherland Report].

¹⁸ Robert Wolfe, *Decision-Making and Transparency in the 'Medieval' WTO: Does the Sutherland Report Have the Right Prescription?*, 8(3) J. INT'L. ECON. L. 631 (2005).

group of experts.¹⁹ Academics continue to work through the challenges,²⁰ and former officials see reform as a priority.²¹

And yet here we are. There are several reasons why WTO members feel they need decisions to be made by consensus, even when the rules allow voting.

One is that it means no country is forced by a majority vote into an obligation it cannot accept. This is political. Whatever is agreed in the WTO has to be sold back home, to parliaments, to various interest groups and to the public at large. Often it requires implementing legislation, which stands an even lesser chance of being passed if the decision is forced down the country's throat by being outvoted in the WTO.

The principle of not being forced to do something even extends to the system for settling legal disputes. Countries cannot be compelled to obey a ruling, and occasionally they don't. The rules even acknowledge this by allowing the other side in the dispute to retaliate or seek compensation if the ruling is not implemented.

Some, such as the African-Caribbean-Pacific (ACP) and African groups, also argue the consensus rule gives all countries "an equal say in the WTO which is not based on political power or level of development."²²

It is important to bear in mind that almost all the ideas for dealing with blocked consensus also come under the consensus rule or practice, one way or another. So, the underlying question for each proposal for reform is: does this stand any chance of being accepted by consensus?

¹⁹ Prof. Bernard Hoekman, *Revitalizing Multilateral Governance at the World Trade Organization: Report of the High-Level Board of Experts on the Future of Global Trade Governance*, BERTERLSMANNSTIFTUNG 27-29 (2018), https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/MT_Report_Revitalizing_Multilateral_Governance_at_the_WTO.pdf.

²⁰ Americo Bevilgia Zampetti et al., *Consensus Decision-Making and Legislative Inertia at the WTO: Can International Law Help?*, 56(1) J. WORLD TRADE 1 (2022); Claus-Dieter Ehlermann & Lothar Ehring, *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?*, 8(1) J. INT'L. ECON. L. 51 (Mar. 1, 2005).

²¹ Alan Wolff, *The Future of the Multilateral Trading System*, PIIE (Apr. 10, 2024), <https://www.piie.com/sites/default/files/2024-04/2024-04-10wolff.pdf> [hereinafter Wolff].

²² Communication from Samoa on behalf of the African, Caribbean and Pacific Group and, the African Group, *Preserving the current practice of consensus-based decision-making in the WTO*, WTO Doc. WT/GC/W/932/Rev.1 (May 22, 2024), <https://web.wto.org.tw/file/PageFile/398703/WTGCW932R1.pdf>.

III. VOTING IN THE WTO? IT WILL NOT HAPPEN

WTO members did vote once, by mistake. In the WTO's first summer (July, 1995), the General Council voted to accept Ecuador as a new member.²³ This was quickly considered to be a mistaken reading of the rules since there was a consensus for that decision anyway. There has never been voting in the WTO since then on any type of decision, on any subject. No other new member has been accepted by formal vote, always by consensus.

And yet calls for voting are heard periodically. Often, they are from outside the WTO, but occasionally some members themselves make the call, such as when the membership was deadlocked over the appointment of a new director-general in 1999. But even for a decision that would not seem to affect member governments' rights and obligations, voting was rejected for fear of setting a precedent that would lead to voting on bigger issues.

Outsiders also suggested voting when Ngozi Okonjo-Iweala's appointment as director-general seemed to be in doubt in 2021, which ultimately proved unnecessary, and over actions that might be taken in the WTO against Russia for invading Ukraine.

And in November 2020, a group of academics and activists signed an open letter, organised by the Global Development Policy Center's Working Group on Trade and Access to Medicines, about a deadlocked proposal to waive intellectual property obligations in the WTO related to the COVID-19 pandemic. The letter included this:

We remind Member States that countries that prefer not to implement the waiver domestically will not be obliged to do so. We also remind Member States that a three-quarters vote will be sufficient for passage of the waiver request and that they should not allow the call for 'consensus' to permit upper-income Member States that have secured preferential and disproportionate access to promising diagnostics, therapeutics, and vaccines, to veto their collective right to safeguard their populations as well. Global

²³ WTO General Council, *Decision on the Accession of Ecuador*, WTO Doc. WT/ACC/ECU/5, (Aug. 16, 1995); WTO General Council, WTO Doc. WT/GC/M/64 (Jul. 31, 1995).

solidarity and the imperative of truly equitable access require passage of the proposed waiver.²⁴ (emphasis added)

Note that the argument for voting and against consensus in that open letter is the opposite of the ACP/African Group's May 2024 General Council paper. That paper said consensus gives smaller countries more power. In the open letter, consensus is seen as weakening smaller countries' power by allowing a rich minority to dominate, implying a majority is morally legitimate, an argument that carries little weight among WTO members, whether large or small.

But the reason why WTO members generally oppose voting is practical and more fundamental for the organisation than those arguments.

The biggest and most important decisions in the WTO is to discipline governments' actions in trade. They are decisions on the outcome of negotiations, producing agreed rules. All WTO members insist that these agreements must be reached by consensus, meaning the eventual deal has to be crafted so that any remaining opponents drop their objections. Indeed, the need for an eventual consensus puts pressure on the preparatory process and the negotiations; consensus is facilitated when everybody understands the issues.

The consensus rule is preferred because the WTO's agreements constrain governments. Some people call it "affecting sovereignty". The agreements clarify governments' rights in trade policy, but they also create obligations. Countries are obliged not to discriminate between each other, except in defined circumstances. Their freedom to raise import duties is limited to the ceilings they accepted in WTO negotiations. They are only allowed to subsidise farmers within negotiated limits. Where they have agreed to allow service providers to operate in their countries, they cannot normally close that market. They must give at least 20 years' protection for patents. And so on, in hundreds of pages of agreements and tens of thousands of pages of commitments.

Because of the consensus rule, each government was able to accept the WTO agreements, and the commitments made on market access and subsidies. Voting on those would have meant countries being forced to accept obligations against their will.

Imagine a vote telling the U.S. it has to tear up its Farm Bill or the European Union (EU) to allow the rest of the world to make a cheese, call it feta, and sell it

²⁴ *Open Letter to TRIPS Council Members: Remove Barriers to Access for Critical COVID-19 Supplies*, BOSTON UNIVERSITY GLOBAL DEVELOPMENT POLICY CENTER (Nov. 18, 2020), <https://www.bu.edu/gdp/2020/11/18/open-letter-to-trips-council-members/>.

in Greece. Or Japan to fully open its rice market. Or India to stop subsidising agricultural inputs. What would happen?

If the U.S. lost a WTO vote on a new rule that could not pass Congress, it simply would not comply. Moreover, the U.S.'s own law prevents the government from agreeing on a vote.²⁵ Nor would the EU comply with a decision that was unacceptable to its member states and institutions. Nor would China comply with a vote Beijing could not agree with. Nor would anyone else, from Afghanistan and Australia to the U.K. and Zimbabwe.

The WTO's rules-based multilateral trading system would simply unravel. But its members would never let it get to that stage. At least some of them would block any attempt to vote. There are many ways of doing this, including blocking the agenda of a meeting that was to hold the vote.

Because of the difficulty in securing consensus agreement in some negotiations, WTO members have turned to talk among only part of the membership — known as “plurilaterals” — we will come back to this. In a way, this is a kind of vote since they would create obligations only for participants. It is also voting by excluding members who do not want to participate.

And that is exactly why a handful of countries are determined to block plurilateral rule-making too.

IV. HOW TO ACHIEVE CONSENSUS?

Countries arrive at consensus by persuasion or by bargaining trade-offs or a combination of both. Domestic politics plays an important part.

This can be complicated. The trade-offs can be within a subject or across a package of different subjects, with multiple trade-offs. They can involve “diffuse

²⁵ Amy Porges (@AmyPorges), X/TWITTER (Mar. 21, 2022, 11:48 PM), https://twitter.com/AmyPorges/status/1505972207062863876?s=20&t=FRxEA07voOUdumP4o0Bc_A. (In a discussion on voting to expel Russia for invading Ukraine in 2022, the tweet states: “Congressional direction on the issue of voting in the WTO was made clear in 1994 and it is very unlikely that anything has changed. It’s in §122(a) of the Uruguay Round Agreements Act (19 USC §3532). In the implementation of the [UR] Agreements and the functioning of the [WTO], it is the objective of the United States to ensure that the [Min. Conf] and the [GC] continue the practice of decision-making by consensus followed under the GATT 1947, as req’d by [WTO Art IX:1]. Legis. History (Sen. Finance Cttee report) also notes USTR assurances then that the WTO would continue consensus as a norm. Congress never wanted voting in the WTO and still doesn’t.”)

reciprocity” – wherein Country A gets what it needs from Country B, which gets what it needs from Country C, and so on.²⁶ It is complicated, but it may make consensus easier to obtain because there are more opportunities for everyone to say what they gain from the deal.

This worked in the 1986-94 Uruguay Round negotiations, which created the WTO in 1995. Among the trade-offs in what’s called the “single undertaking” were the new rules on intellectual property in return for lower trade barriers on textiles and an agreement to protect geographically linked names (geographical indications) of food and drinks in return for reforming agricultural trade.

Consensus when negotiating a package can also be a straitjacket. It is part of the reason why the multi-issue WTO talks launched in 2001 (known unofficially as the “Doha Round”) failed after 2008.

Persuasion is also complicated. Part of it comes from exchanging views, sharing experiences, and building confidence. Part of it risks accusations of coercion.

V. POWER, COERCION, AND VETOING

Underlying this is power. There are two relevant types, in varying degrees:

- ‘Material’ power: what we mean when we say a country is powerful. In the WTO that can come from being a major trader.
- ‘Institutional’ power: created by the rules and practices of the institution. The consensus rule creates the power to delay or block decisions.²⁷

When the U.S. threatens to raise tariffs and assumes others cannot respond, or that their response will be weak, that is material power. When it believes that it can ignore rulings on whether the tariffs violate WTO agreements or commitments because it can appeal “into the void”, that is ‘institutional’ power.²⁸

Some members think rich countries abuse their ‘material’ power, through coercion, side payments, or linkages, to force others to accept new rules and to join a consensus. The ACP/African Group countries are naïve to claim that consensus-based decision-making protects the smallest members “from the vagaries of power

²⁶ Robert O. Keohane, *Reciprocity in International Relations*, 40(1) INT’L. ORG. 1, 4 (1986).

²⁷ Michael Barnett & Raymond Duvall, *Power in International Politics*, 59(1) INT’L. ORG. 39, 43 (2005).

²⁸ See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56(2) INT’L ORG. 339, 341 (2002) (this can also be conceptualised as “law-based bargaining” versus “bargaining in the shadow of power”).

dynamics”.²⁹ Power imbalances are an unavoidable reality, even among developing countries.

Others think some members abuse ‘institutional’ power — by denying consensus or legitimacy — to slow the process down, to veto outcomes or even to claim high moral ground. Large and small groups and even individual members do this frequently. Large countries can act alone; small countries usually aggregate their institutional power in groups.³⁰ The U.S. has blocked consensus on appointing new adjudicators to hear appeals in legal disputes — the members of the AB. It wants to force dispute settlement reform.

This is partly because rulings are adopted automatically by the WTO’s membership in the DSB unless there is consensus to reject them, known as “reverse” or “negative” consensus. Negative consensus deprives members like the U.S. of the institutional power to prevent rulings that they dislike from being adopted.

But the U.S. has found an alternative route to institutional power, not by acting on the rulings themselves but by appointing AB judges. The appointments are by (normal) consensus. First, by blocking new appointments, the U.S. has left the AB with no adjudicators. Then, still using its institutional power, it has appealed rulings, which cannot be heard and therefore fall into a void. Some other countries have followed suit.³¹

The U.S.’ concern is about the role of international adjudication in settling conflicts among sovereign countries. And yet the reason why reform in the mid-1990s led to the negative consensus rule was precisely to avoid single countries blocking rulings that went against them.

At the 2024 WTO Ministerial Conference in Abu Dhabi, India blocked a decision on agriculture that would have been no more than a plan for continuing negotiations over the next two years. The decision itself would not have created any new rules or obligations. India held that plan as a hostage because it demanded a decision on its pet subject, over-the-limit subsidies in public food stockholding — an issue that in practice only affects India, while harming other developing countries.³² There was never going to be consensus on what India wanted,³³ so

²⁹ Wolff, *supra* note 21.

³⁰ See also Benjamin Daßler et al., *Insuring the Weak: The Institutional Power Equilibrium in International Organizations*, 69(1) INT’L. STUD. Q. 1 (2025).

³¹ See Ungphakorn-Technical Note, *supra* note 6.

³² Peter Ungphakorn, *Simply put: PSH, the Biggest Controversy in the WTO Agriculture Talks*, TRADE β BLOG (Feb. 25, 2024, updated on Dec. 05, 2024), <https://tradebetablog.wordpress.com/2024/02/25/simply-psh-biggest-controversy-wto/>.

India refused to join consensus even on a broad decision on what to talk about. It knew exactly what the result would be.

A precedent with a different outcome was in 2014,³⁴ when India blocked consensus on the final text of the Trade Facilitation Agreement. India had no objection to the text itself. It used its blocking to squeeze concessions out of other members on the same pet subject, over-the-limit subsidies in food stockpiling, which had already been agreed by consensus (including by India) in the 2013 Bali Ministerial Conference.³⁵ This time India was successful. The 2013 deal on food stockpiling was revised.

VI. WORKAROUNDS

In a few cases, members have found a way to avoid the need for WTO-wide consensus. The new plurilateral approach was developed in the WTO in the last decade as a means to avoid the straitjacket of negotiating a package of diverse subjects.³⁶ Five were announced in 2017 and another three since then. A few are only for discussion, at least at the start, not necessarily negotiations. They are often called “joint-statement initiatives” (JSIs).³⁷

Here, the primary features are:

First, participants have negotiated among only those countries that are willing to do so, meaning the numbers are smaller (in “plurilateral” negotiations). Second, the participants have taken care to ensure that they treat each other and non-participants equally (meaning non-participants are free-riders). This has been the case with most of the post-2017 talks, although there are indications that some, such as on e-commerce, might include benefits granted only to fellow participants.

³³ Peter Ungphakorn, *Mission Impossible' and 'Mission Essential' Collide in WTO Farm Talks*, TRADE β BLOG (Jan. 17, 2024, updated on Jan. 18, 2024), <https://tradebetablog.wordpress.com/2024/01/17/mission-impossible-and-mission-essential-collide-in-wto-farm-talks/>.

³⁴ WTO WEBSITE, NEWS STORY, *WTO Work is Back on Track', Says Azevêdo*, (Nov. 27, 2014), https://www.wto.org/english/news_e/news14_e/gc_rpt_27nov14_e.htm.

³⁵ WTO WEBSITE, NEWS OF THE NINTH MINISTERIAL CONFERENCE, *Days 3, 4 and 5: Round-the-clock Consultations Produce 'Bali Package'*, WTO: NEWS & EVENTS (Dec. 5-7, 2013), https://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm.

³⁶ See also TU Xinquan & Robert Wolfe, *Reviving the Negotiation Function of the WTO: Why the onus falls on the Three Major Powers*, in REBOOTING MULTILATERAL TRADE COOPERATION: PERSPECTIVES FROM CHINA AND EUROPE 29-43 (Bernard Hoekman et al. eds. 2021).

³⁷ Peter Ungphakorn, *Explainer: The 18 WTO Plurilaterals and Joint-Statement Initiatives*, TRADE β BLOG (Jan. 3, 2022, updated on May 08, 2025), <https://tradebetablog.wordpress.com/2022/01/03/17-wto-plurilaterals-joint-statement/>.

Finally, in some cases the participants have been able to insert new rules into each of their individual lists of commitments, in documents called “schedules”. This works best in services where objections can hold up the process but not indefinitely. Consensus is only needed among the participants, not across the whole of the WTO.

All three featured in the talks on new rules on domestic regulation of services, agreed in December 2021, with participants now numbering about seventy WTO members. Most of the participants have inserted the rules into their schedules of services commitments, allowing the deal to take effect without the need for WTO-wide consensus. Resistance from India and South Africa did delay the process, with some technical quibbles about simply cross-referencing the agreed text versus pasting it wholesale into the schedules (arbitration has overruled objections to cross-referencing). Most of the proposed new schedules have now been certified (officially recognised as correct).³⁸

But it comes at a cost: lack of transparency. The plurilateral rules can only be found by digging deep into complicated documents.

Thus, this kind of workaround is only possible in a few cases. WTO-wide (multilateral) decisions need consensus. So do plurilateral agreements that do not fall easily under “goods” or “services” — they can only become official WTO plurilateral agreements through WTO-wide consensus to add them to Annex 4 (on plurilateral agreements) of the WTO Agreement.

The rules are clear: “[t]he Ministerial Conference, or the General Council acting on its behalf, upon the request of the Member parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4” as per the WTO Agreement Article X:9.³⁹

Two recently concluded plurilateral negotiations have now reached that crunch point: on investment facilitation and e-commerce.

In Abu Dhabi in early 2024, India single-handedly blocked the desire of about three quarters of WTO members for their deal on investment facilitation to be an officially recognised WTO “plurilateral” agreement. Recently and more tentatively,

³⁸ Peter Ungphakorn, *India Loses Challenge, Allowing Australia to go ahead with Services Commitment*, TRADE β BLOG (Feb. 4, 2025, updated on Feb. 20, 2025), <https://tradebetablog.wordpress.com/2025/02/04/india-australia-arbitration-services-plurilateral/>.

³⁹ WTO Agreement, *supra* note 15, art. X:9.

South Africa and Türkiye have supported India. The e-commerce plurilateral deal was proposed for an Annex 4 decision in February 2025. This was also blocked.⁴⁰

Investment facilitation is not specifically about “goods” or “services”. The talks met the first two criteria: plurilateral and without discrimination. The third feature was not available: inserting the disciplines into schedules.

India’s position is a contradiction.⁴¹ It wants to lead the “global south”, but it blocks a negotiation pushed by developing countries. India has called the investment facilitation agreement “illegal”, accusing the participants of overturning previous decisions, smuggling investment into a trade organisation, and ignoring the multilateral nature of the WTO — charges many delegates and legal experts reject.⁴²

India, joined by South Africa and Namibia in a 2021 diatribe,⁴³ sees plurilateral talks generally as an abuse of power that would divert time and attention from difficult issues which are priorities for developing countries. The number of small countries supporting the investment facilitation agreement casts doubt on that assertion.

But despite the claims, the alternative approach has not spelt the end of consensus or bundling issues as a single undertaking,⁴⁴ which still has a role to play in enabling consensus.

The ultimate way to work around blocked consensus is to push for a vote where the rules allow it. But as we have seen, votes never happen, and if they did, they could destroy the WTO, not save it.

⁴⁰ Ungphakorn-E-Commerce, *supra* note 12.

⁴¹ Inu Manak & Manjari Chatterjee Miller, *Responsible Consensus at the WTO can save the Global Trading System*, COUNCIL ON FOREIGN RELATIONS (Jan. 22, 2024), <https://www.cfr.org/blog/responsible-consensus-wto-can-save-global-trading-system>.

⁴² Peter Ungphakorn, *Comment: on India’s claim that a plurilateral WTO deal is ‘illegal’*, TRADE β BLOG (Jan. 12, 2024, updated on May 10, 2024), <https://tradebetablog.wordpress.com/2024/01/12/comment-india-plurilateral-illegal/>.

⁴³ WTO General Council, *The legal status of ‘joint statement initiatives’ and their negotiated outcomes*, WTO Doc. WT/GC/W/819/Rev.1 (Apr. 30, 2021).

⁴⁴ Robert Wolfe, *The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor*, 12(4) J. OF INT’L. ECON. L. 835 (2009); Robert Wolfe, *Have We Just Seen the Funeral of the WTO ‘Single Undertaking’?*, TRADE β BLOG (Jun. 21, 2022), <https://tradebetablog.wordpress.com/2022/06/21/have-we-just-seen-the-funeral-of-the-wto-single-undertaking/>.

VII. “RESPONSIBLE” CONSENSUS

One of the recent proposals in the General Council calls for “responsible” consensus, meaning everybody should play nicely together.⁴⁵ The paper comes from Costa Rica, Gambia, South Korea, Norway, Peru, Singapore, Switzerland, and Taiwan.

The term was first used by Singapore in the General Council in December 2022.⁴⁶ It gathered support and was discussed when senior officials from capitals met in October 2023,⁴⁷ to prepare for the following year’s Ministerial Conference in Abu Dhabi.

As members prepared for the conference, India called for the ministerial declaration to assert “member-driven” and “consensus” at the top. Sources said that Canada wanted to add “flexible” and Singapore “responsible” in front of consensus. India could accept neither, so the draft text was not changed.

The paper from Costa Rica and others seeks a General Council decision. Members would agree to uphold the consensus principle “responsibly” by:

- a. “Pursuing national interests while supporting the systemic interests of the WTO;
- b. Adopting a win-win approach in negotiations by exercising *flexibility* and making *compromises* in order to reach agreement;
- c. Engaging in negotiations based on facts and evidence.” (*italics added*).

We would normally assume that has always been the case. And yet, a counter-proposal, that paper from the ACP and African groups,⁴⁸ says nothing should be done to undermine a practice that supposedly gives all members an equal say in the WTO. That includes rejecting qualifiers like “responsible”, “constructive”, or “flexible” in front of “consensus”.

⁴⁵ WTO General Council, *Responsible Consensus — Communication from Costa Rica; The Gambia; Korea; Republic of Norway; Peru; Singapore; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WTO Doc. WT/GC/W/933 (May 7, 2024).

⁴⁶ WTO General Council Meeting Minutes December 19–20, 2022, WTO Doc. WT/GC/M/2022.

⁴⁷ WTO General Council, *Senior Officials Meeting — Chairpersons’ Summary and Oral Reports by the Facilitators on 23rd – 24th Oct.*, WTO Doc. WT/GC/259/Rev.1 (Dec. 28, 2023).

⁴⁸ WTO General Council, *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*, WTO Doc. WT/GC/W/932/Rev.1 (May 22, 2024).

Lawyers may debate whether terms such as “responsible”, “flexible”, “constructive”, and “compromise” can be legally binding, but for most of us, they sound more political than legal. It would not be difficult for India or the U.S. to argue that its lone opposition on some issue or other is totally “responsible” and that it has been “flexible” by changing its preferred wording. This is about goodwill rather than legality.

VIII. ACCOUNTABILITY

One way to read the debate about reforming consensus is as a demand for countries to be accountable when they are seen to abuse their power.⁴⁹

At the March 21, 2024, General Council meeting, South Korea called for ways to “raise the cost of objection” when a tiny number of countries persists in blocking consensus. It suggested increasing transparency, so the blocking members are identified and their justifications scrutinised in order to increase pressure from fellow members and public opinion.⁵⁰

This idea is not new. It can be found in the 2004 Sutherland Report commissioned by the Director-General at the time, Supachai Panitchpakdi.⁵¹

There are two ways of looking at it. Sometimes even big countries do not like to be seen in a negative light. So, they follow WTO rules and comply with dispute settlement adjudications, perhaps because they want others to do the same. On the other hand, there are all sorts of reasons why a country may not be prepared to answer why it is not going to join a consensus. There could be commercial reasons that it cannot mention in public, or there could be domestic political reasons that it is not going to admit. Therefore, being hauled on to the carpet to justify a veto may scare a small country, but not India or the U.S. Attempting to secure a decision on this is also unlikely to succeed.

⁴⁹ Robert Wolfe, *An Anatomy of Accountability at the WTO*, 6(1) GLOB. POL’Y. 13, 14 (2015).

⁵⁰ WTO General Council Meeting, WTO Doc. WT/GC/M/210, ¶ 2.223 (Mar 21-22, 2024).

⁵¹ The Sutherland Report, *supra* note 17.

IX. DELIBERATION

deliberative *adj.* /dɪˈlɪb.ər.ə.tɪv/ /dɪˈlɪb.ə.ə.tɪv/

- “Involving careful thought and discussion when making decisions.”⁵²
- “A deliberative institution or procedure has the power or the right to make important decisions.”⁵³

Most of the attention is on when consensus is used to block formal decisions. But there is another aspect to this because decisions are not only about agreements, and WTO work is not only about negotiating them.

The ability to block consensus on agendas is also important. It constrains what members can discuss. Sometimes they need to explore issues that are important, including when the WTO itself cannot do much. This might even help with arriving at consensus, eventually.

Some specialists call this a “deliberative” activity — not just deliberating in the sense of “discussing carefully in order to decide”, but also using discussion to shed light on new ground (such as trade and the environment) to lay the basis for future decisions. To work, it needs good design and confidence-building.

“Deliberation” in this sense should be a useful means of easing delegations into unfamiliar territory so they understand the subject. They should know that their counterparts are listening and taking their concerns seriously. If they then decide they do not want to take the subject further, that should be fine. The WTO can still be a useful forum without necessarily contemplating immediate negotiations on new rules.

Success is not guaranteed. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Council has spent years on various aspects of geographical indications (names used to identify the origin and characteristics of products) and issues such as biopiracy and the protection for local communities of genetic material and traditional knowledge.

Ever-deeper exploration into these subjects has introduced delegations to large amounts of information. But it has brought members no closer to a consensus on any of the topics or to modifying what they have always considered to be their

⁵² *Deliberative*, CAMBRIDGE DICTIONARY (4th ed., 2021).

⁵³ *Deliberative*, COLLINS COBUILD ADVANCED DICTIONARY (14th ed., 2024).

interests. It has consumed negotiating resources when little can be done in the WTO.

Occasionally, but not often, members do realise the futility and agree not to waste time, such as when the chair of “special session” negotiations on a register for wines and spirits geographical negotiations reported in 2022: “I understand that none of the delegations has engaged with others on any specific suggestions, and no novel ideas were put forward on how to advance the work of the Special Session.... Members’ willingness to engage substantively in the TRIPS Special Session remains scant.”⁵⁴

But consensus has been used as a tool to block even opening a discussion on subjects many consider to be important, such as industrial policy and sustainability. India has resisted by arguing that expanding the WTO’s agenda is unhelpful when “development” issues are still being debated, as if industrial policy and sustainability have nothing to do with development.

In other words, this debate about consensus is ultimately about what the WTO is for, who it should serve, and who has the power to decide.

X. “RETREAT”: MEMBERS RE-THINK DECISION-MAKING

Following the failure of the Abu Dhabi Ministerial Conference in early 2024, when “WTO reform” was on the agenda but achieved nothing, WTO ambassadors attended a “retreat” on decision-making on July 8, 2024. It was a serious effort to ensure the discussion was freer and more interactive than previously — “deliberative”.

Preserving consensus decision-making was one of the themes, along with managing disagreements, trust, and the lessons learnt from Abu Dhabi, where a number of key decisions were blocked by lack of consensus.⁵⁵

Afterwards, the General Council Chair, Petter Ølberg, reported on the discussion.⁵⁶ Among the main points were:

⁵⁴ Council for Trade-Related Aspects of Intellectual Property Rights, *Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits*, WTO Doc. TN/IP/31 (Nov. 30, 2022).

⁵⁵ Peter Ungphakorn & Robert Wolfe, *What Next? Seven Talking Points after the WTO’s 2024 Ministerial Conference*, TRADE β BLOG (Mar. 13, 2024, updated on Mar. 20, 2024), <https://tradebetablog.wordpress.com/2024/03/13/next-7-talking-points-abu-dhabi-conference/>.

First, recognising that “Green Room” sessions, up to about 20 ambassadors in the Director-General’s meeting room, and other small-group meetings are needed, but they can be organised better to be more transparent and representative. This came under the heading of improving “trust”. We have argued that this is essential for proper negotiations on difficult issues.⁵⁷

Second, preserving consensus decision-making while finding ways to prevent endless blockages, for example, by requiring reasons to be clarified and finding acceptable solutions for members that have problems.

Third, improving preparations for the biennial Ministerial Conferences (the WTO’s highest decision-making body) so that the ministers are left with issues that are manageable both in number and in complexity. This includes ideas for making the ambassador-level General Council, which has the power to act on behalf of the Ministerial Conference, more effective, with the possibility of senior officials from capitals meeting periodically and having genuine engagement with stakeholders.

Fourth, strengthening the role of the chairs elected by the members to preside over negotiating bodies and other councils and committees so they can be more effective in developing substance instead of focusing mainly on process.

Fifth, enhancing the role of the WTO Secretariat in analysis and technical work. This has proved controversial, with some members being in opposition to allowing the Secretariat too much initiative, most recently the U.S.⁵⁸ For example, there are unconfirmed reports that a March 2025 conference on industrial policy had to be held outside the WTO, with a university sponsor, apparently because of resistance from some members. But the U.S. is not alone. In the past others have blocked proposals for the Secretariat to undertake analysis that they fear will undermine their position on a particular issue.

⁵⁶ General Council & Trade Negotiations Committee Division, *Takeaways and follow-up suggestions from the 8 July retreat on WTO decision making & way forward*, WTO Doc. JOB/GC/402 (July 15, 2024) (although the seven-page report has a ‘JOB’ number, meaning it is semi-official, it is formatted as a glossy publication complete with photographs)

⁵⁷ Peter Ungphakorn & Robert Wolfe, *How Wide Should the WTO Window be Set? 3 Negotiations*, TRADE β BLOG, (Apr. 6, 2021, updated on June 06, 2022), <https://tradebetablog.wordpress.com/2021/04/26/wto-transparency-3/>.

⁵⁸ WTO Council for Trade in Goods, *Communication from the United States to the Council for Trade in Goods Regarding Systemic Concerns About the Secretariat Properly Informing and Consulting with Members prior to Undertaking Certain Activities*, WTO Doc. G/C/W/860 (Mar. 25, 2025).

One point that the report on the retreat misses is the need for external transparency,⁵⁹ if stakeholders are to be involved properly. Ironically, two documents cited in the chair's public report are secret: the agenda (although it has been leaked) and the logistics.⁶⁰

The way the retreat was organised shows a considerably greater effort to make the discussion freer and more interactive than previous events, such as retreats in 2022, or the “conversation” sessions held at the Abu Dhabi Ministerial Conference in early 2024, which lasted only two or three hours each with around 100 ministers lining up to speak.

This time, the organisers wanted to avoid yet another series of statements, often repeating countries' well-known positions, and to encourage genuine exchanges between the participants, and certainly not in the Abu Dhabi ministerial discussions.

Ambassadors attended alone to keep the numbers down and were only addressed by their names rather than by country so that they could speak personally rather than from official positions.⁶¹

None of this is about radical change — for example, the previously floated idea of setting up an executive board was not mentioned. Instead, the focus was more on practical ways to improve how the WTO currently works. The views came from ambassadors directly involved in the WTO, whereas previous reports on reform were by arm's-length experts or ‘eminent persons’.⁶²

However, in the first General Council meeting of 2025, Director-General Okonjo-Iweala proposed that members should appoint a new independent panel of eminent persons, chaired by a respected political leader and comprising experts in both technical trade issues as well as the political economy of trade, according to

⁵⁹ Peter Ungphakorn, *WTO Reform: 39 Members Call for More Information to be Made Public*, TRADE β BLOG (July 31, 2023, updated on Dec. 15, 2023), <https://tradebetablog.wordpress.com/2023/07/31/wto-reform-39-members-derestrict-docs/>.

⁶⁰ WTO General Council, *Communication from the Chairperson of the General Council – H.E. Mr. Petter Olberg: Offsite Retreat on WTO Decision Making & Way Forward, Modalities and Retreat Agenda*, WTO Doc. JOB/GC/399 (June 28, 2024); (restricted but leaked); General Council paper, *Logistics Note for Participants*, WTO Doc. JOB/GC/400 (July 3, 2024) (restricted).

⁶¹ See Peter Ungphakorn, *WTO-Reform ‘Retreat’ Designed to Encourage More Free Thinking*, TRADE β BLOG (July 01, 2024, updated on July 16, 2024), <https://tradebetablog.wordpress.com/2024/07/01/wto-reform-retreat-designed-to-encourage-more-free-thinking/>.

⁶² The Sutherland Report, *supra* note 17.

the WTO website. Members would have a chance to nominate persons to this group to enable balance and ownership, but the group would operate independently, the website news story says.⁶³

In other words, less than a year later, the July 2024 retreat seems to have been forgotten, and yet another “WTO reform” exercise is being launched, this time to set up another eminent persons’ group, two decades after its predecessor’s report also came to nothing.

XI. USE AND ABUSE OF CONSENSUS

If one big member consistently blocks decisions, then the organisation cannot function.

Is abuse of consensus a strategy or a tactic? India has long wanted to roll back some of the obligations it undertook as part of the 1994 Uruguay Round package — the WTO agreements. This was camouflaged by India claiming to speak for all developing countries and when it argued that issues arising from “implementing” the Uruguay Round deal,⁶⁴ had to be tackled alongside new negotiations launched in Doha in 2001.

India’s more recent actions, including at the Abu Dhabi Ministerial Conference in early 2024, still seem to be part of that strategy. It includes India’s opposition to new plurilateral negotiations that might produce new WTO rules without the full participation of all members.

India is now blocking adding plurilateral investment facilitation (126 participants) and e-commerce and digital trade (72 participants) to the WTO’s plurilateral rulebook via Annex 4 of the WTO Agreement. Consensus is a way to control the evolution of the WTO. Some countries may suspect that new plurilateral rules may impose new disciplines on them, even when the texts say they will not. And that fear may extend to discussing new topics, which might lead to new obligations that they had no hand in shaping and are unable to implement. Better not to discuss at all, they may think.

On the other hand, the 126 participants in the completed plurilateral investment facilitation deal include large numbers of developing and least-developed countries.

⁶³ *Need to Deepen Discussions on WTO Reform Highlighted at General Council Meeting*, WORLD TRADE ORGANIZATION (Feb. 19, 2025), https://www.wto.org/english/news_e/news25_e/gc_19feb25_e.htm.

⁶⁴ *The Doha Implementation Decision Explained*, WORLD TRADE ORGANIZATION https://www.wto.org/english/tratop_e/dda_e/implem_explained_e.htm.

The e-commerce draft allows each developing country to define its own transition period when it will not be subject to litigation in WTO dispute settlement. Fear of being subject to dispute settlement may be a reason that some developing countries resist consensus on new rules.

Altogether, 154 out of 166 WTO members (93%) have participated in at least one plurilateral activity.⁶⁵ The only countries that have not are Bangladesh, Cuba, Egypt, Ghana, India, Jordan, Nepal, Pakistan, South Africa, Sri Lanka, Tanzania, and Tunisia. So, by now, almost all smaller countries have experienced some plurilateral activity. They are learning what they can and cannot manage.

Nevertheless, this is the accountability challenge where both sides see an abuse of power. One side accuses the other of trying to go too far. The other accuses the first of trying to prevent the system from evolving.

Hence, the WTO is on the rocks. If some members want to conclude an agreement anyway, they can always go outside the WTO. They often do. But that deprives the group of support from the WTO Secretariat, from organising meetings to circulating notifications and other papers. It also deprives non-participants of being able to walk into the meeting room to learn what is going on — plurilateral talks in the WTO are usually open to all WTO members. And WTO dispute settlement is not available. Therefore, going outside the WTO risks fragmenting the trading system even more.

Members can only get the WTO off the rocks if they can find a consensus on consensus.

⁶⁵ Peter Ungphakorn, *Technical Note: Participation in WTO Plurilateral Talks*, TRADE β BLOG (Nov. 24, 2021, updated on Mar. 27, 2024), <https://tradebetablog.wordpress.com/participation-wto-plurilaterals/>.