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Advancing the Multilateral Trading System: Issues for Further Consideration

**Discussion Paper for the G20
Prepared by the World Trade Organization**

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(The views expressed in this paper do not necessarily represent those of G20 members.)

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1 INTRODUCTION

1. The December 2015 Nairobi Ministerial Conference marked an important moment for the WTO. In addition to delivering the “Nairobi package” of trade reforms—including the agreement to eliminate farm export subsidies, decisions on food security and developing country market access, and measures to assist least-developed country trade—ministers also discussed the state of the current Doha Development Agenda (DDA) and how the WTO’s negotiating function could be strengthened. Although there was no agreement on whether the DDA remained a viable negotiating model, ministers did agree that “officials should work to find ways to advance negotiations” and asked the Director-General “to report regularly to the General Council on these efforts”. The question facing members is how to make progress in WTO negotiations in this new environment. This is a significant challenge, but one with potentially more scope for creativity and flexibility.

2. Given the importance that G20 members attach to a strong and dynamic multilateral trading system—and building the G20’s work last year on strengthening the WTO’s negotiating machinery—the following discussion paper examines the various negotiating approaches currently employed in the system with a view to exploring what is working, why it is working, and where lessons can be drawn about future negotiating challenges. Its core message is that no one negotiating model is optimal for all issues and members, and that the WTO’s flexible architecture provide ample scope for reaching negotiated solutions across a range of issues when members find common ground.

2 THE ‘GLOBAL’ WTO: MORE CENTRAL, MORE COMPLEX

3. In an increasingly open, multipolar and hyper-connected global economy, the WTO is becoming more, not less important. It provides the framework of rules governing international trade relations, an essential mechanism for resolving trade conflicts, and a forum for the discussion and negotiation of the growing number of trade issues that impact all countries collectively. As the multilateral trading system has progressively widened and deepened—with more countries joining, more issues covered, and more economies becoming interlinked—the need for multilateral cooperation and rule-making has correspondingly increased. From subsidies, to regulatory cooperation, to e-commerce, many key trade issues today are inherently global and can best be solved by trade partners—especially the largest—coordinating and negotiating multilaterally. Indeed, the central negotiating challenge facing the WTO—how to encourage integration among an increasingly broad and diverse membership—is a direct result of its success in building an increasingly open, interdependent, and ‘global’ system. Understanding how the system has addressed these challenges in recent negotiations is important to understanding how it can remain relevant to international economic relations in the future.

4. A number of WTO negotiations have made rapid and significant advances in recent years, despite disappointing overall progress in the Doha Round. These include: the 2013 Trade Facilitation Agreement (TFA) which, in simplifying and speeding up border clearance procedures, could reduce average trade costs by over 14 per cent (an impact potentially greater than the elimination of all remaining tariffs); the 2015 expansion of the Information Technology Agreement (ITA) which removes tariffs on high tech products accounting for 7 per cent of world trade (more than trade in textiles, apparel and iron and steel combined); and the 2015 agreement to eliminate farm export subsidies. This is not to mention the Government Procurement Agreement’s (GPA) revision (updating its rules and improving market access commitments) and expansion (through accessions) since 2012, which is progressively opening up public procurement markets—representing 10% or more of countries’ GDP—to global suppliers and competition. Beyond demonstrating that the WTO can deliver results, these negotiating successes highlight new

approaches to designing, structuring, and implementing multilateral trade agreements that warrant further reflection.

3 THE WTO'S GROWING 'MENU' OF NEGOTIATING OPTIONS

Broad multi-issue "rounds" versus narrower and continuous "package" negotiations

5. One issue is whether future WTO negotiations should be structured as large, stand-alone "rounds" or as smaller and more continuous single-issue or "package" undertakings. WTO negotiations succeed when members want something from one another, when they engage in mutually beneficial exchanges, and when they determine that the resulting package of trade "benefits" and "concessions" is preferable to no package. Since WTO members have different interests and priorities, negotiating progress often depends on allowing for trade-offs across a range of issues and sectors. Sometimes these trade-offs can be very broad, as was the case in previous GATT rounds. Central to the Uruguay Round agreement, for instance, was a "grand bargain" between some members' desire to liberalize services trade and strengthen intellectual property protection and other members' desire to liberalize agriculture, textiles and apparel. Even within so-called "single issue" negotiations, such as information technology products, trade-offs occur over various items of export interest to specific countries.

6. However, accepting the need for trade-offs begs the question of how broad or complex a negotiating package needs to be. Some say that negotiating a large, joined-up cluster of issues—the so-called "single undertaking" approach—can provide the trade-offs necessary both to satisfy the varied interests of WTO members and to encourage progress on the toughest and most "sensitive" issues. They point out that a main impetus for launching the Doha Round in 2001 was the pressure to tackle agriculture—an issue which had been largely sidestepped for most of the GATT's history—and to make progress on other sensitive market access issues where developing countries felt that the Uruguay Round results had fallen short of expectations.

7. Others question whether bigger packages always make for easier trade-offs and more ambitious outcomes when some issues are less 'ripe' for agreement than others—with the result that the difficult or intractable ones hold the more doable ones back. One of the justifications for creating the WTO in 1995—with its stronger institutional foundations and more extensive technical expertise—was to move towards continuous, sector-by-sector negotiations—focused on those issues where members could more easily agree—and away from the increasingly lengthy and cumbersome "all or nothing" rounds that attempted to solve every outstanding issue simultaneously.

8. Recent WTO negotiating successes offer several insights into this question of the scope of negotiating agendas. Although the range of subjects covered was narrower—either single issue negotiations, such as the ITA expansion talks, or smaller clusters of issues, such as the Bali and Nairobi "packages"—they also involved trade-offs; indeed, the Bali and Nairobi breakthroughs were possible only because the respective "packages" included issues of interest to a range of members, developing as well as developed. Key to success was the fact that members were negotiating on subjects where a convergence of interests was possible, where the trade-offs were balanced, and where members had a shared stake in bridging differences and reaching agreement.

Full membership versus limited membership negotiations

9. Another issue is whether WTO negotiations should involve the membership as a whole or if—under certain instances—negotiations should involve only a limited group of members—often called "plurilateral" approaches. Here a distinction needs to be made between plurilateral negotiations and plurilateral outcomes or agreements. Many, if not most, previous multilateral trade negotiations were plurilateral in practice, with larger trade powers—a "critical mass"—seeking reciprocal market access bargains amongst themselves, the benefits of which were then extended to smaller or less developed members on a non-reciprocal basis through the operation of the MFN clause. What has changed over time is that the needed "critical mass" of participants has grown larger as the number of significant trade powers has increased and concerns about "free riding" have grown.

10. Another option involves the negotiation of plurilateral agreements whose obligations and benefits would apply only to signatories, and which would be conditionally open to non-signatories if and when they met its terms. This is how several of the Tokyo Round's side agreements or "codes" were structured,¹ and how the GPA (the key left over code) continues to operate. In principle, such an approach would only lend itself to the negotiation of subjects where WTO rules do not exist, since in the GATT, the GATS and the TRIPS Agreement the MFN principle applies.

11. Some say that an "opt in", "opt out" approach to negotiating new agreements could potentially further fragment the trading system—a key concern with the Tokyo Round's codes which the Uruguay Round's single undertaking approach was designed to address.² They also say that universal adherence to non-discriminatory rules ensures that larger trade powers, in pursuing reciprocal agreements, have an incentive to include smaller members in their negotiations to minimize "free riding". They also note that a number of key issues—such as subsidies—can only be resolved in multilateral agreements that require commitments by all members. A related point is that rules in many new areas—such as trade facilitation, services, or competition policy—are often inherently non-discriminatory in their application—embedded as they are in domestic regulations that cannot be easily tailored to benefit specific trade partners—rendering calculations of reciprocity and free riding less relevant, and increasing the incentive to negotiate full-membership or at least "critical mass" agreements.

12. Others say that WTO architecture is already multi-speed or variable geometry both in terms of market access commitments and the application of trade rules.³ They also say that the breadth and diversity of the WTO's membership today makes the goal of "one-size-fits-all" commitments and rules increasingly unrealistic and counterproductive. Rather than asking some members to negotiate new obligations for which they are unprepared—and holding back other members from negotiating in areas where they are willing to make deeper commitments—the WTO system should instead recognize its diversity and explore ways to tailor its negotiation and rules to different needs without diminishing members' rights and obligations.

13. Each of these approaches has been used in recent WTO negotiations. The Trade Facilitation Agreement, for example, was negotiated multilaterally with all members involved in a "bottom up" process of discussion and design—resulting in the most inclusive and transparent negotiation in the GATT/WTO's history. Moreover, the TFA breaks new ground in its flexible design. Not only did developing and least developed-country members determine their own "individualized" implementation schedules, but their commitment to implement the Agreement is explicitly linked to their technical and resource capacity.⁴ The fact that many of the issues under negotiation were

¹ To solve the challenge of reaching unanimous agreement on rules reform, The Tokyo Round sought to clarify and strengthen GATT rules in key areas, such as subsidies, anti-dumping, technical standards, import licensing, customs valuation, and government procurement, by creating six new side agreements or codes (modelled on the Kennedy Round's Anti-Dumping Code) which members were free to either join or opt out of. As well as being less than universal, most of these codes were in principle subject to the same MFN treatment as other GATT rules, meaning that members who opted out could benefit from the commitments of members who opted in. Addressing the status of the codes was important to many developing as well as developed members during the Uruguay Round, but for opposite reasons. While code members were concerned about non-members "free riding" on their commitments, non-members were concerned about ambiguity surrounding the code's non-discriminatory application.

² The Uruguay Round's innovation, marking a departure from previous rounds, was the "single undertaking" approach—the idea that all WTO members were now committed, not just to negotiating a single package of trade reforms, but to adhering to all aspects of it as well—replacing the Tokyo Round's à la carte approach to signing new agreements.

³ Obligations vary widely across WTO members. In the GATT, members schedule country-specific commitments for tariffs on goods (agricultural and non-agricultural) as well as in other quantifiable areas such as agricultural subsidies. In the GATS, there are even more detailed means of scheduling country-specific commitments (including the extent to which members are prepared to offer national treatment in specific services sectors). In addition, there are the special and differential treatment provisions for developing and least-developed countries across the GATT, GATS and TRIPS agreements. There are also voluntary agreements—such as the Code of Good Practice for the Preparation, Adoption and Application of Standards (annexed to the Agreement on Technical Barriers to Trade)—and plurilateral agreements—such as the Government Procurement and Civil Aviation agreements. Finally, the WTO's rules allowing for preferential trade agreements (i.e., GATT article XXIV and GATS article V) clearly envisage that sub-sets of WTO members can and will pursue deeper agreements.

⁴ The Trade Facilitation Agreement states that assistance and support should be made available to help members achieve the capacity to implement the Agreement—and a new Trade Facilitation Agreement Facility has been launched to help achieve that objective.

inherently global underscored the logic of reaching flexible, inclusive solutions in the WTO. It made little sense, for example, to streamline customs procedures or create a "single window" for documentation on preferential basis—doing so for one member effectively meant doing it for every member. In this respect, the TFA offers potentially useful lessons for future rules negotiations in the WTO.

14. In contrast, the recently concluded expansion of the Information Technology Agreement was negotiated among a sub-set of WTO members but its benefits are extended to non-signatories as well. However, the negotiations were based on an explicit understanding that the agreement needed to attract a sufficient level of market access commitments—or "critical mass"—to be concluded. Then there is the "plurilateral" Government Procurement Agreement whose benefits and obligations are limited to its signatories—but to which a number of WTO members, both developing and developed, are now actively seeking accession, not as a trade-off for gains elsewhere or as part of a "single undertaking", but because they are attracted to the inherent benefits of belonging to the GPA itself.⁵

Market access bargaining versus rules and regulatory cooperation

15. A related question is about how WTO negotiations can address different kinds of trade outcomes—such as cooperating on cross-border regulatory objectives, as well as advancing traditional market access goals. The exchange of market access "concessions" worked well to reduce tariff and other border barriers over the course of eight GATT 'rounds'—average MNF industrial tariffs have fallen from almost 40 per cent in 1947 to less than 5 per cent today and over 60 per cent of world trade flows tariff free. But this bargaining approach seems to work less well when the "concessions" being exchanged are diverse and often politically sensitive inside-the-border regulations—a growing focus of trade negotiations now that tariffs are so low. In these areas, the issue is less about how to open protected markets than about how to advance broad public policy objectives in the most cooperative and least trade restrictive way. If in the past, trade negotiations were more focused on reducing tariff and non-tariff barriers, in the future they are increasingly likely to involve countries working together to share information, harmonize processes, and cooperate on regulatory and policy goals. Too much focus on mercantilist bargaining—and trade negotiators' tendency to view acquiescing to others' concerns as "concessions"—can limit the scope for productive rule-making in these critical areas.

16. Here again the recent TFA offers a useful model for future WTO rule-making negotiations. The Trade Facilitation negotiation was driven, not by market access trade-offs, but by the search for cooperative solutions to shared challenges, such as standardizing customs procedures, harmonizing documentation requirements, or improving information exchanges. There was broad recognition that while members would benefit by individually reforming their trade procedures, they would benefit even more by collectively taking these steps. This collaborative approach was further reinforced by allowing developing and least-developed country members to determine their own implementation schedules and by explicitly linking implementation to their technical and resource capacity. And since WTO members have a shared stake in facilitating trade—especially in a world of global value chains and integrated production networks—richer members had a direct interest in helping poorer members implement the agreement with technical and resource assistance.

"Hard" versus "soft" rule making

16. Another issue is whether the WTO should only negotiate "hard" rules—subject to binding dispute settlement—or if there is a value in pursuing "soft" rules as well—subject to monitoring, peer review, and other less adversarial conflict resolution mechanisms. Advocates of binding rules say that they maximize predictability and compliance; indeed, that the comparative advantage of the WTO lies precisely in its enforceable system of binding rules. Others say that the increasingly binding nature of WTO rules can be counterproductive to making process on certain sensitive

⁵ In addition to the 45 WTO members that already participate in the GPA (including the European Union and its 28 member states), the WTO members that have started the process of accession are Albania, Australia, China, Georgia, Jordan, the Kyrgyz Republic, Oman and Tajikistan. Moldova and Ukraine successfully concluded their accession negotiations last year and are expected to become parties to the Agreement in the coming months. A further five members — the Former Yugoslav Republic of Macedonia, Mongolia, Russia, Saudi Arabia, and Seychelles — have provisions regarding accession to the Agreement in their respective protocols of accession to the WTO.

issues—especially when members have concerns about the unintended consequences of legally enforceable commitments in new or untested areas. They also say that many problems in today's global economy are less about "binding" members' policies than about encouraging members—through policy dialogue and information sharing—to enter into constructive and mutually-beneficial international undertakings.

17. Here too the TFA breaks new ground in combining binding obligations in certain areas with best endeavour commitments in others. Moreover, by linking developing members' commitments to their technical and resource capacity to implement them, the Agreement also serves as an innovative way to encourage, not just compel, compliance. As a way of facilitating agreement—and because it was often the optimal way of addressing issues—the Trade Facilitation Agreement's "softer" and more "individualized" approach to rule-making offers a possible model for other WTO agreements that could combine best endeavour commitments with more binding undertakings—or even WTO agreements that begin as codes of conduct with the option of evolving into firmer rules in the future. While such agreements would in no way replace the need for binding WTO rights and obligations in core areas, in certain instances the incentives to comply with these informal or soft rules could be greater—and more effective—than the incentives to comply with hard rules.

4 THE FUTURE OF MULTILATERAL TRADE NEGOTIATIONS: DIFFERENT APPROACHES FOR DIFFERENT ISSUES

18. After the success of the Nairobi Ministerial Conference—and differences over the future of the Doha Round—it is inevitable that members are increasingly asking whether, and how, multilateral trade negotiations can be improved. Could more progress be made in focused, continuous negotiations than in large multi-issue rounds? Should certain new agreements be optional—allowing some members to go further and faster than others—rather than universal? Should negotiations be driven by the search for cooperative solutions to collective action problems as much as by the exchange of market access concessions? Is there scope for negotiating "soft" rules—backed up by best endeavour commitments and monitoring mechanisms—as well as "hard" rules—enforceable through binding dispute settlement?

19. Three observations are relevant to these questions.

First, the WTO is already a highly flexible and adaptable system—combining multi-issue with single-issue negotiations; universal with variable geometry rules; hard law with soft law. It is this mix of approaches which has made far-ranging trade integration possible among an increasingly broad and diverse membership. Recent innovations in negotiations on trade facilitation, information technology products, government procurement, and other issues have only reinforced—and expanded upon—the flexibility and adaptability of the system.

Second, no single negotiating approach is appropriate for all issues. Some subjects—such as trade facilitation—can be solved in single-issue negotiations, whereas others—such as agriculture—are more likely to advance when combined with other issues in a more comprehensive negotiation. On certain issues—such as government procurement—only a sub-set of members may choose to negotiate, whereas on other issues—such as subsidies—universal engagement is needed. Small groups may make agreement easier but the coverage is narrower; single-issue negotiations will address some members' concerns but not necessarily others; full-membership, multi-issue negotiations are more inclusive and comprehensive but they can also be less ambitious and take longer. There is no "one-size-fits-all" model. And every negotiating approach involves trade-offs.

Third, multilateral negotiations advance when members agree, and stall—or fragment into regional efforts—when members disagree. The biggest challenge is not the structure of negotiations, but the issues being negotiated—and members' willingness to find common ground. When these conditions are met, an appropriate architecture can be found within the WTO. Likewise, while more innovative approaches, flexible structures, or inclusive participation can help to focus and streamline negotiations, they cannot, in themselves, resolve fundamental differences of substance among members.

20. Multilateralism has become increasingly important even as it has become increasingly complex. The Bali and now Nairobi successes have restored confidence in the WTO and demonstrated that progress in multilateral negotiations is possible when members find common ground—and when Bali-like innovation and flexibility is embraced. Ultimately, the challenge facing members is to find ways to negotiate on more trade issues inside the WTO—with its shared rules, transparency mechanisms, and dispute settlement procedures—rather than leaving this to bilateral, regional or plurilateral approaches outside the WTO which are less inclusive and potentially more fragmented.