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**VARIABLE GEOMETRY FOR THE WTO:
CONCEPT AND PRECEDENTS**

Andrew Cornford

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DISCUSSION PAPERS

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VARIABLE GEOMETRY FOR THE WTO: CONCEPT AND PRECEDENTS¹

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Abstract

In the aftermath of the breakdown of the multilateral trade negotiations in Cancun in mid-September 2003, various ideas have been put forward not only for their re-launching but also more broadly for the reform of the WTO as an institution and as a repository for agreements on trade and related matters. Amongst the latter is the idea of a WTO characterized by variable geometry, in other words of a WTO that would serve as an umbrella framework for agreements on trade issues whose signatories would not necessarily include all its members, and thus as a vehicle for some countries to undertake deeper integration or liberalization regarding selected subjects without trammels due to the unwillingness of other members to go along. This paper reviews this concept in the context of the history of the GATT/WTO and of different views as to its underlying rationale. It also takes a preliminary look at what a framework of variable geometry might involve and considers some of the benefits and problems likely to be associated with a multi-tier WTO.

The paper begins with a review of features of the rules of the GATT which allowed for various kinds of non-uniformity in their application. While some of these were of a highly specific nature, others involved more fundamental departures from the principle of universal applicability. Of particular interest in this context are the Codes negotiated during the Tokyo Round. In the discussion of pertinent issues regarding the rationale and function of the GATT/WTO which follows, attention is drawn to the contrast between those who emphasize the role of non-discriminatory trade rules as a vehicle for reducing sources of economic and ultimately political and military conflict, on the one hand, and those who give greater importance to the WTO's role as an instrument for achieving convergence in business regimes worldwide, on the other.

In a sketch of possible solutions to some of the problems of reconciling variable geometry with WTO rules, the paper devotes special attention to the deviations from the MFN principle which would be involved, and to accession conditions for plurilateral agreements. The idea of variable geometry was raised during the Uruguay Round when the constitution of the new multilateral organization (which was eventually to be the WTO) was under consideration. However, the structure eventually adopted reflects the concept of a "single package" or "single undertaking". More recently the European Union has floated recourse to a plurilateral approach as a way of getting out of the present negotiating impasse regarding certain subjects. However, developing countries have not proved receptive partly, it is reasonable to assume, because the approach would not do anything to resolve the major conflicts in the areas of tariffs and subsidies currently blocking resumption of the negotiations or to deal with features of the outcome of the Uruguay Round which some consider should actually be rolled back. The counterargument, which refers as much to the longer term as to the present impasse, is that a multi-tier framework may enable the WTO to avoid the paralysis which could result from attempting to reach uniformly applicable agreements on trade-related subjects among countries with interests and concerns reflecting different levels of economic development.

¹ The principal works on the global regime for international trade consulted for this paper, which are not cited under particular topics subsequently, are as follows: E. McGovern, *International Trade Regulation: GATT, the United States and the European Community* (Exeter, Globefield Press, 1986); J.H. Jackson and W.J. Davey, *Legal Problems of International Economic Relations*, second edition (St. Paul, Minn., West Publishing Co., 1986); G.R. Winham, *International Trade and the Tokyo Round Negotiation* (Princeton, Princeton University Press, 1986); J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, Mass. and London, The MIT Press, 1989); J.H. Jackson, *Restructuring the GATT System* (London, Pinter Publishers for the Royal Institute of International Affairs, 1990); J.H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London, The Royal Institute of International Affairs, 1998); B.L. Das, *The World Trade Organization: A Guide to the Framework for International Trade* (London and New York, Zed Books and Penang, Malaysia, Third World Network, 1999); and J.H. Jackson, W.J. Davey and A.O. Sykes, *Legal Problems of International Economic Relations*, fourth edition (St. Paul, Minn., West Group, 2002). On the concept of "single undertaking" (see below) the author benefited from the discussion of its historical origins, the alternative meanings attributed to it, and its role in the negotiating process of GATT/WTO in C. Patel, "Single undertaking: a straitjacket or variable geometry?", *Trade-Related Agenda, Development and Equity (T.R.A.D.E.) Working Paper 15* (Geneva, South Centre, May 2003).

A. INTRODUCTION

The breakdown of the multilateral trade negotiations in Cancun in mid-September has provoked various reactions in different quarters both as to future directions for international trade negotiations and as to possible changes in the functioning of the WTO. At one extreme the United States trade representative has declared that the breakdown will push his country into giving greater emphasis to bilateral trade negotiations. This, however, has the drawback that the results are likely to be difficult to reconcile with the most-favoured-nation principle (MFN) which has been an important feature of United States policy towards international trade since it was adopted by the administration of Franklin Roosevelt in the 1930s, and which has been a central element of the construction of the international trading system since World War II. Other reactions have focused more on the WTO itself. Some involve proposals which do not go beyond providing greater support to developing countries to enable them to participate more effectively in trade negotiations and in the opening-up to world markets which ensues. Slightly more far-reaching are proposals for reforming the decision-making process in the WTO to make it more difficult for a minority of countries to frustrate the will of a substantial majority. The difficulty here is the belief of many countries that WTO processes are already dominated by small groups which take the key decisions concerning the agenda for negotiations and the principal features of texts submitted for agreement by the whole membership. Indeed, the view that the breakdown in Cancun was due simply to the obduracy of the resistance of a small number of countries to proposals commanding broad consensus on the part of most of the WTO's membership is implausible. More fundamentally there is also renewed interest in the idea of a WTO which would be characterized by variable geometry, in other words of a WTO that would serve as an umbrella framework for agreements on trade issues whose members would not necessarily include all the members of the WTO, and thus as a vehicle for some countries to undertake deeper integration or liberalization regarding selected subjects without trammels due to the unwillingness of important parts of WTO's membership to go along.

Different views on the institutional issues raised by the Cancun breakdown were succinctly set out in an editorial in the *Financial Times* of 23 September ("Lessons from Cancun: the answer is new negotiating geometries, not WTO reform"), which is worth quoting at length:

The European Union wants changes to what Pascal Lamy, trade commissioner, calls the institution's "medieval" structure and decision-making methods. But such proposals are unlikely to get far because they miss the real target.

The organization's 148 members will find it no easier to achieve consensus for such reforms than to agree on trade liberalization. In any case, the main problem is not WTO procedures: it is the gaping disparity between its members' levels of development, a disparity which has grown still wider with the admission of steadily more poor countries. Any attempt to restart the Doha round must grasp that central point.

It is absurd to push, as the EU has done, to impose rules in complex areas such as competition and investment on countries so poor that some cannot even afford WTO diplomatic representation. If such rules have any place in the WTO, all but its richest members should be free to opt in or out of them. Refusing such flexibility will only lead to a repetition of the deadlock that sank Cancun.

The idea of variable geometry was raised during the Uruguay Round when the constitution of the new multilateral organization (which was eventually to be the WTO) was under consideration. Attention was drawn to problems concerning the reconciliation of a multi-tier system of agreements with MFN, and proponents sought a way to minimize such conflicts. Eventually this approach was not adopted

and the structure adopted for the WTO reflects the concept of a “single package” or “single undertaking”.

Consideration of the concept of giving the WTO a variable geometry can usefully start from a review (section B) of features of the rules of its predecessor, the GATT which allowed for various kinds of non-uniformity. Some of these were of a highly specific nature and were intended to facilitate political acceptance of the GATT by accommodating particular features of certain countries’ trade regimes or other obstacles to GATT-based trade relations between certain countries. Others involved more fundamental departures from universally applicable rules or acknowledged at least in principle the special position of developing-country members. Section C takes up basic issues regarding the rationale and function of the GATT/WTO which bear on incorporation of variable geometry into the WTO structure. Among views on these issues there is a contrast between those who emphasize the role of non-discriminatory trade rules as a vehicle for reducing sources of economic and ultimately political and military conflict, on the one hand, and those who give greater importance to the WTO’s role as an instrument for achieving convergence in business regimes worldwide, on the other. Section D sketches possible solutions to some of the problems of reconciling variable geometry with WTO rules without attempting an exhaustive treatment of an inevitably complex set of institutional and legal issues. Section E considers some more general questions associated with recourse to variable geometry as one approach to accommodating the interests of countries at different levels of development within a global agreement.

B. SOME DEPARTURES FROM UNIVERSALLY APPLICABLE RULES IN THE GATT

The GATT accommodated various deviations from uniformity in both its rules and their application. Some of these deviations involved relations among its members and others the application of its rules. Illustrations of such deviations are provided by non-application of the Agreement between particular Contracting Parties under GATT Article XXXV and the Grandfather Clause under which the original parties to the GATT agreed to apply major obligations of the agreement only to the fullest extent not inconsistent with existing national legislation. A particularly important application of this clause was to agricultural imports of the United States, which was eventually followed by a waiver. Another sector not subject to GATT disciplines was textiles and clothing which, unlike agriculture, was explicitly accorded its own trade regime. More interesting from the point of view of attributing a variable geometry to the WTO are the special treatment of a number of socialist countries at the time when they joined GATT, and the set of free-standing agreements and understandings which were among the results of the Tokyo Round of Multilateral Trade Negotiations which ended in 1979.

1. Non-application of the agreement

Under GATT Article XXXV the agreement does not apply between two contracting parties either if the two parties have not entered into tariff negotiations with each other or if one of the two parties does not consent to its application at the time either becomes a contracting party. This Article has been invoked several times, for example, in 1948 by India against South Africa and by several countries against Japan. At the time of the latter there had been discussion of amending Article XIX (which covers action in the form of sectoral safeguards against imports) to allow application on a discriminatory rather than a MFN basis. In the absence of such amendment several countries invoked Article XXXV in maintaining restrictions on Japanese exports.

2. Grandfather Clause

In the early years of the GATT United States agricultural imports escaped the rules of the GATT through the Grandfather Clause under the GATT's original Protocol of Provisional Application (under which countries could be exempted from implementing parts of the GATT inconsistent with existing legislation) or under exemptions for quantitative restrictions on imports of agricultural products under Article XI.2(c) in cases where such restrictions are necessary to the enforcement of government measures limiting the production or marketing of the like domestic product or are designed to eliminate temporary surpluses. In 1955 these exceptions were replaced by a more general waiver granted by the Contracting Parties under GATT Article XXV.5. This waiver appears to have been regarded by several other members of the GATT as providing a precedent for similar exemptions of their agricultural imports from GATT disciplines. Another example of the application of the grandfather clause, which figured importantly in discussion among GATT member countries in its early years, was United States legislation on countervailing duties antedating GATT, which permitted their imposition without prior determination that a subsidy in the exporting country had caused material injury to domestic firms.

3. Textiles and clothing

A sector which has been characterized by extensive deviations from GATT rules designed to eliminate quantitative restrictions on imports is textiles and clothing. The protection afforded by trade regimes for this sector from the 1950s onwards was increasingly directed against competition from low-wage producers in Asia. Eventually a special regime formalizing quantitative restrictions for trade in this sector was agreed in the form of the Short-Term Arrangement Regarding International Trade in Textiles in 1961, followed by the Long-Term Arrangement Regarding International Trade in Cotton Textiles in 1962 and the Multi-Fibre Arrangement in 1974.

4. Special Treatment of socialist countries

That international trade was carried out mainly in accordance with the principles of a free market was a basic assumption of the GATT, and this assumption is widely reflected in its rules. However, the GATT had also to accommodate the reality that in some of its member countries state agencies or state-controlled companies controlled significant parts of international trade, and that in a small minority (Cuba and Czechoslovakia of its original members, Yugoslavia which joined in 1966, Poland which joined in 1967, Romania which joined in 1971, and Hungary which joined in 1973) state trading dominated the economy. Problems here were how to apply GATT's rules against quantitative restrictions when exports and imports were decided through the decisions of state-controlled companies, and what significance should be attributed to bound tariff levels in such cases. The main obligations of the GATT regarding state trading are to be found in Article XVII and in Article II.4. Provisions of these Articles regarding the obligations of state-controlled firms to apply MFN principles to member countries in purchases and sales and regarding transparency among member countries concerning such firms are considered straightforward (although member countries nonetheless decided to revisit the definition of state-trading enterprises and transparency procedures in the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994 agreed during the Uruguay Round), but those regarding treatment of imported goods once within the country have proved more difficult to interpret and apply.

Of the socialist countries which joined the GATT in the 1960s and 1970s, only Yugoslavia benefited from an accession process which contained no special provisions. The agreements with Poland and Romania (but not with Hungary) specified obligations as to the pace of expansion of imports. And the agreements for all three countries contained two provisions which qualified the obligations of other GATT members towards the new entrants: firstly, safeguard action under Article XIX (namely, action to protect a particular industry against serious injury due to imports) was permitted on a discriminatory basis (i.e. not in accordance with MFN); and, secondly, consultations could be initiated with the socialist country which could lead to the withdrawal by the member country in question of any concession or other obligation under the GATT if the consultations did not lead to a satisfactory result.

5. Tokyo Round Codes and Understandings

The outcome of the Tokyo Round of multilateral trade negotiations completed in 1979 included nine agreements (Tokyo Round Codes) concerning rules and standards for, and non-tariff barriers to, trade and concerning international cooperation to expand and liberalize trade in dairy and meat products in stable market conditions as well as four Understandings, two of which gave special attention to developing countries and one of which set out an agreed description of GATT's dispute procedures.

The subjects of the nine Tokyo Round Codes were as follows:

- technical barriers to trade
- government procurement
- subsidies and countervailing duties
- customs valuation
- import licensing procedures
- anti-dumping duties
- trade in civil aircraft
- the arrangement on bovine meat
- the international dairy arrangement

The four Understandings were as follows:

- Decision on Differential and More Favourable Treatment and Reciprocity and Fuller Participation of Developing Countries (the "enabling clause")
- Declaration on Trade Measures for Balance-of-Payments Purposes
- Decision on Safeguard Action for Development Purposes
- Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance

The Tokyo Round Codes are stand-alone agreements with their own signatories and institutional procedures. With the exception of those on the arrangement on bovine meat and on the international dairy arrangement the codes are equipped with dispute settlement procedures with a general pattern (except in the case of that for trade in civil aircraft) similar to that of the GATT itself, namely consultation, conciliation, a panel investigation followed by a report, recommendations to the parties, and finally, if necessary as a last resort, the authorization of countermeasures such as the suspension of GATT obligations or concessions (the procedures for the code on trade in civil aircraft being simpler and faster). At the end of the 1980s as a proportion of the GATT's membership signatories of the Codes varied from about 20 per cent to about 40 per cent.

The first of the Understandings enabled member countries to accord differential and more favourable treatment to developing countries in four areas: (1) preferential tariff rates for the imports of developing to developed countries under the Generalized System of Preferences; (2) differential and more favourable treatment for developing countries under agreements concerning non-tariff measures negotiated multilaterally in the GATT; (3) regional or global arrangements among developing countries for the mutual reduction or elimination of tariffs or non-tariff measures; and (4) special treatment for least developed countries in the context of any general or specific measures in favour of developing countries. This Understanding also exempted developing countries from obligations as to reciprocity for the commitments made under this heading. The second Understanding covers obligations under the GATT regarding restrictions on imports taken for balance-of-payments reasons. And the third Understanding made more explicit the right of developing countries to take safeguard action as part of the development, modification or extension of production structures in accordance with the priorities of their development policies. The Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance contained an agreed description of GATT practice regarding dispute settlement.

As part of the WTO agreements five of the Tokyo Round Codes as renegotiated during the Uruguay Round became part of Annex 1A of GATT 1994. These agreements are now part of the “single package” or “single undertaking” and bind all member countries. The other four agreements, however, were not included in the “single package”, becoming under their new designation, “plurilateral agreement”, Annex 4 of GATT 1994. The International Dairy Agreement and the International Bovine Meat Agreement have been terminated, leaving only the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement as agreements applicable only to the member countries which have accepted them.

C. VARIABLE GEOMETRY AND THE UNDERLYING RATIONALE OF THE GATT/WTO

It is natural to try to associate radical rethinking of the function and structure of the WTO with a view of the institution’s basic rationale and broader role in world affairs. This is an area where consensus is lacking, although the disagreements are rarely given a thorough public airing owing to the understandable tendency of member governments and of the WTO secretariat to devote their attention to technical and practical questions, on the one hand, and to the focus on particular issues and to the more diffuse hostility of the organization’s non-governmental critics, on the other. However, in discussions bearing on the issue it is possible to discern basic differences as to the WTO’s rationale and function with an emphasis at one end of the spectrum on progressive harmonization around one business model and at the other on the WTO’s role as an instrument for accommodating differences between economic models as part of a process of facilitating trade relations between them. These views are not exclusive, and advocates of one or the other would generally acknowledge that both should be reflected in the work in the WTO but would give them differing weights. The second view is more easily associated with a WTO including variable geometry, though not all the proponents of variable geometry would necessarily subscribe to it.

Pressure for harmonization around one business model has been most notable in the stance of the United States not only in negotiations in the WTO but regarding other international economic initiatives concerning subjects such as financial systems and corporate governance. Some have associated such pressure with a doctrine forming part of a long-standing school of United States political thinking (which some trace to Thomas Jefferson) that the safety of the United States depends

significantly on the adoption of the country's ways and norms elsewhere in the world. This doctrine – not always easy to separate from another closely related idea that adoption of the United States model is a sure route to eventual prosperity – has received a fillip in recent years from the defeat of Soviet communism. But probably most importantly it has been an important part of Washington's reaction to the terrorist attacks on New York of 11 September 2001. Thus, for example, on the front of trade negotiations Robert Zoellick, the United States Trade Representative has emphasized (in an interview in *Institutional Investor* of April 2003) “the importance of trade in the global system as part of sustaining America's values abroad”.

The other view starts from the vision of the Bretton Woods system at the end of World War II as a set of institutions and rules which would make possible the peaceful ironing out of differences among countries and thus the avoidance of their becoming an eventual source of conflicts and possibly even of war. This view has its roots in a widely held interpretation of the role of economic conflicts in the political and military tensions of the 1930s, and thus eventually in the outbreak of global war. The view emphasizes that the WTO as part of the Bretton Woods system has an essential role in this process but one which requires a broad membership necessarily including countries with different economic models. Perhaps curiously considering pressures exerted by the United States in recent years in favour of economic harmonization, a strong proponent of this view has been John Jackson, General Counsel to the Office of the United States Representative in the 1970s, in the works authored or co-authored by him cited at the beginning of this paper. For a long time concerns in this context as to the dangers which might result from differences between economic models focused principally on differences between the so-called East and West or between market and socialist economies. The need on the trade front was for institutional means incorporating what Jackson called “the interface principle”, which would enable trade to take place between such economies on a mutually acceptable basis. As the danger of conflict between countries belonging to these two camps has receded, so has the need for rules to accommodate countries whose economic activity is carried out predominantly through state trading (though the scale of state trading in some candidate countries for accession to the WTO means that such rules remain important). Major differences between economic and business models nonetheless remain among WTO member countries. Some of these differences are due to the large disparities in levels of development (emphasized in the editorial in the *Financial Times* cited at the beginning of this paper). Others are due to differences in legal regimes and economic structures even among countries not characterized by such large disparities. These differences can be reflected in the ways in which prices are formed and in various effects, indirect as well as direct, of economic policies on cross-border transactions. And proponents of this alternative to global harmonization of business models could be expected to argue that the disappearance of such differences is unlikely and indeed undesirable. A WTO with variable geometry has features well suited to serving as an “interface” mechanism, and has thus been proposed for this purpose by writers such as Jackson.

D. A FRAMEWORK OF VARIABLE GEOMETRY

The underlying principles of a framework of variable geometry within the WTO can be simply sketched, even though their achievement would almost inevitably entail a complex and gruelling process of negotiation. What follows is no more than a discussion of some key issues which is intended to be illustrative of the problems involved rather than complete. The central concept is that of a WTO which serves an umbrella institution for agreements, not all of which would be binding on the

whole membership², the major historical precedent for such a role being the Tokyo Round Codes, although other features of the GATT described above are also relevant.

1. MFN and safeguard action

Reconciliation of the principle of MFN, on the one hand, and access to the benefits of agreements binding only part of the WTO's membership, on the other, is perhaps the most immediately striking of the problems which would have to be resolved in a WTO with variable geometry. The simplest approach here would be simply to grant access to these benefits only to those countries which were signatories of an agreement. However, there is an argument for attempting to preserve MFN for all WTO members as far as possible even in the case of such agreements owing to the bed-rock role of this principle in WTO rules and to the desirability of extending as far as possible any benefits of the agreement to non-signatory developing countries, many of which may be opposed to the very idea of the deviation from MFN which a WTO with variable geometry would imply. One approach here would be to qualify MFN for non-signatories of the agreement by permitting signatories greater latitude regarding safeguard action where its producers or suppliers could demonstrate injury resulting from transactions or access to the rules covered by the agreement on the part of non-signatories. The precedent here would be the special safeguard action permitted against imports of socialist countries mentioned above in section B.4. However, it should be noted that the definition of injury is likely to be more complex when the agreement in question concerns standards and rules than when it can be measured in terms of increases in imports, which were the intended target of the special provisions regarding safeguard action in the accession agreements of the socialist countries.

It is worth recalling that the position of the Tokyo Round Codes in relation to MFN was not completely clear-cut. Where the Code, as in the case of that on subsidies and countervailing duties, actually specifies the signatories as the beneficiaries, there would appear to be no doubt on this point. Here disagreements concerned the conditions under which even initial signatories were beneficiaries and those which countries applying to join subsequently were required to meet (matters taken up in section D.2). As part of a decision taken at the end of the Tokyo Round (L/4905, 28 November 1979) it is stated that "The contracting parties also note that existing rights and benefits under the GATT of contracting parties not being parties to these Agreements (the Tokyo Round Codes), including those deriving from Article I (MFN), are not affected by these Agreements". This reaffirmation would appear to reflect the objective of minimizing conflicts between the Tokyo Round Codes and MFN.

2. Accession conditions for agreements under a new framework

It is reasonable to assume that a country joining one of the agreements which would be part of a WTO with variable geometry would undertake any actions required to bring its legal or policy regime into conformity with the agreement's objectives. While this condition may seem straightforward, it might lead to disagreements in practice regarding subjects for which what would or would not be permissible or prescribed was not defined with sufficient clarity in the agreement. It should be possible to resolve such disagreements through conciliation and consultations, and if necessary, further work by

² The appropriate subjects for plurilateral agreements are difficult to define a priori. They would not be those of major negotiations of the whole WTO membership on tariff levels, market access and national treatment, and on forms of protectionism regarded as integrally related to these subjects in such a negotiation. But the distinction between subjects which are considered appropriate for a major negotiation involving the whole WTO membership and those which are not is a somewhat fluid one, may often be susceptible to disagreement among the members themselves, and can be expected to evolve with changes in the nature of trade and related cross-border transactions themselves.

signatories on definitions. Agreement as to accession conditions and procedures would need to cover not only initial signatories but also countries seeking to join an agreement later.

The application of the Tokyo Round Code on subsidies and countervailing duties provides cautionary stories here. In the Act implementing the agreements of the Tokyo Round in the United States, there was a clause to the effect that the code would apply only to countries which were not only signatories but also “assumed obligations to the United States which are substantially equivalent to obligations under the Agreement”. On the basis of this clause the United States refused to apply the code to India, a signatory, in a case involving imports of industrial fasteners (nuts and bolts), and in response to India’s complaint a GATT panel was appointed.³ The case was eventually settled through bilateral consultations before the panel reported but still exemplifies problems which can arise in this context. Moreover the conditions governing accession to Tokyo Round Codes for countries other than initial signatories were also to be a source of disagreements among GATT member countries.

3. *Trade, investment and competition*

Since the breakdown of negotiations at Cancun the EU has floated the idea that negotiations on certain issues which were widely opposed amongst developing countries could proceed on a voluntary basis, and that agreements reached on subjects such as trade and investment or trade and competition policy would not have to apply universally, countries which were not initially signatories having the right to join later. The issues in question included trade and investment and trade and competition. Such negotiations would *de facto* be a step in the direction of a WTO with variable geometry. The idea may not be accepted and even if it is, there is no assurance that eventual agreements would cover elements covered by the Doha declaration and the draft Cancun ministerial text. As a hypothetical exercise it may nonetheless be of interest to look at examples of the way in which rules along the lines set out in sections D.1 and D.2 might work in the sort of agreements indicated by these documents.

The elements of an agreement on trade and investment set out in the Doha Declaration and in the pre-conference draft ministerial text for the Cancun meeting included the following: the scope and definition of investment covered; transparency; non-discrimination (MFN and national treatment); negotiated commitments based on a positive-list approach similar to that used for the General Agreement on Trade in Services (GATS), i.e. one under which commitments apply only to listed sectors or activities; exceptions and balance-of-payments safeguards; consultations and dispute settlement; special and differential treatment for least developed countries; and provisions clarifying the relation between this agreement, on the one hand, and other WTO agreements and existing bilateral and regional arrangements on investment, on the other. In view of the network of existing agreements on cross-border investment already in place and the liberal regimes for incoming investment in many developed countries one may doubt that, if such an agreement were applied on a MFN basis to all WTO members and not just to its signatories, it would be followed by a surge of investment from non-signatory countries (probably mainly developing ones) into signatory ones (probably mainly developed ones) of a kind requiring a special provision for discriminatory safeguard action (which would be analogous in some ways to that included in the GATT accession agreements for socialist countries discussed in section B.4).

Indeed, a major target of those promoting such an agreement is presumably regimes for foreign investment in developing countries, and this helps to explain the widespread reticence among such

³ Part of the controversy associated with this case was due to acceptance by the United States of Pakistan’s accession to the code on the basis of a weaker commitment to eliminate subsidies than that demanded of India.

countries to negotiate commitments on the subject in the WTO. There have been some very rapid increases in foreign direct investment in particular sectors of some countries in recent years. The case of the banking sectors in Mexico and certain economies of Central and Eastern Europe spring to mind in this context. A WTO agreement on foreign investment could include provisions for safeguard action to deal with such cases to the extent that signatories consider them necessary, and such provisions could include features allowing for discrimination between signatories and non-signatories, though for reasons just mentioned there are grounds for scepticism that recourse to these features would actually be necessary in view of the likelihood that the source of surges in foreign investment in a particular signatory would be other signatory countries rather non-signatory ones.

The elements of a possible agreement on trade and competition policy are even less well defined and the remarks which follow correspondingly more hypothetical. Annex E of the pre-conference draft ministerial text for Cancun states that the objective of such an agreement would be “to secure better and more equitable conditions for international trade, by facilitating effective voluntary cooperation on anti-competitive practices which adversely affect international trade, in particular hardcore cartels which have an impact on developing and least developed countries’ economies, and assisting WTO members in the establishment, implementation and enforcement of competition rules within their respective jurisdictions”. Considerable discretion would nonetheless be reserved for the actions of national competition authorities, and flexibility would be accorded to developing countries regarding industrial and social policies (presumably in areas where there were possible conflicts between such policies and the promotion of competition). The agreement would include provisions for technical assistance to developing countries to enable them to achieve the policy goals of the agreement. To the extent that such an agreement achieved a reduction in restrictive business practices in international trade non-signatory as well as signatory countries could be expected to benefit. Indeed, it is difficult to visualize ways in which non-signatories could be excluded from such benefits. The more politically sensitive areas of an agreement on trade and competition policy would be likely to involve measures to achieve a degree of harmonization of national competition policy, at least concerning certain subjects. These are the areas where the differing requirements of countries at different levels of development would be likely to emerge most strongly, and where the wording of the discretion and flexibility reserved for national economic policy would become highly important. One subject regarding which non-signatories could obviously be excluded from benefits under the agreement would be technical assistance. But the loss of any benefit from such assistance would presumably have been weighed by non-signatory countries as part of their decision not to join the agreement.

E. MULTIPLE TIERING AND GLOBAL AGREEMENTS

Increasing interdependence is now accepted as a feature of relations between countries, as is the need for a system of global governance, though there is much less consensus as to the kind of governance required and as to obligations under such a system for particular countries. An inescapable reality for such a system is the huge disparities in levels of economic development among countries. These disparities have to be accommodated in agreements covering several subjects of global governance, and this accommodation generally complicates negotiating and drafting processes. Various approaches can be visualized for this problem and international initiatives in different areas frequently combine more than one. That involving a single, comprehensive package applying to all participants will often require the insertion of provisions applying only to certain countries, for example, exempting them from certain rules or according them certain special benefits, and typically becomes correspondingly more difficult to draft to the satisfaction of all participants in negotiations. The difficulties being experienced in the drafting of a New Basel Capital Accord for banks worldwide are a topical example.

Moreover even after agreement on a single, comprehensive package has been reached, as it was in the Uruguay Round of multilateral trade negotiations, the resulting agreement may not prove a satisfactory framework for further international negotiations on the subjects covered. According to the proponents of variable geometry for the WTO this has proved to be the case in the new Doha Round.

An approach to the problem posed for global governance by disparities of economic development, which allows recourse to special agreements within an umbrella framework reached by countries wishing to achieve certain objectives not accepted by all members has its attractions. Some of these relate to the economy of effort likely to be involved in negotiations where all participants are committed to achieving the same or similar objectives. And the set of agreements eventually reached within the umbrella framework may be better crafted to meet the requirements in the areas covered than corresponding provisions of a single, comprehensive agreement within which greater compromise to satisfy conflicting positions may be necessary.

But these attractions have to be balanced against possible problems. Reconciling provisions of the special agreements with the objectives of the umbrella framework is a likely source of difficulties. Many developing countries would probably be reticent as to the effects of the deviations from MFN which recourse to special agreements within an umbrella framework might imply. There would also almost inevitably be a feeling among such countries that the mere existence of an agreement in an area would be a source of pressure on them eventually to come on board in spite of continuing reservations which they might have. The latter consideration is apparently particularly important for several developing countries which see plurilateral agreements as a Trojan horse for eventually making contentious subjects such as trade and investment and competition rules part of the WTO's regular agenda. Moreover another possible feature of such agreements which was hinted at in the discussion in section D.3 of elements of an agreement on trade and competition policy should not be lost from sight, namely the use of such agreements as a vehicle for achieving global convergence in particular areas of economic policy. This is a particularly complex and potentially sensitive area since drawing the line between indispensable levels of minimum convergence with respect to regimes of economic policy in a system of global governance and exerting pressure on countries to adopt features of such regimes which are currently fashionable but not demonstrably superior in the light of longer historical experience is not an easy task but one where the preferences of minorities of countries have historically often exerted a powerful influence. It would be ironical if recourse to agreements within an umbrella framework which included only part of the framework's membership were actually to serve as a vehicle for pressures among countries for a questionable degree of convergence in economic policy, thus contradicting the aims of major proponents of this approach, rather than for protecting a widely desired level of global policy pluralism.

As part of attempts to restart the negotiations after the breakdown at Cancun there has been a *ballon d'essai* from the EU as to possible recourse to a plurilateral approach to the Singapore issues in which only those interested WTO members would participate (despite the fact that such an approach would deviate from the "single undertaking" pledged in the 2001 ministerial declaration at Doha). Such an approach would do nothing to resolve the major conflicts in the areas of tariffs and subsidies currently blocking resumption of the negotiations. Moreover it would not be an appropriate vehicle for dealing with aspects of the outcome of the Uruguay Round where many developing countries believe that a fair balance of costs and benefits has not resulted and that some rolling-back of the agreements reached therein may be required. Reasons such as these as well as other problems mentioned earlier no doubt help to explain the unfavourable reception widely accorded to the EU suggestion among developing countries. The potential usefulness of the plurilateral approach concerns the longer-term

future in which, subject to safeguards designed to handle risks mentioned above, it may enable the WTO to avoid the paralysis which could prove to be the consequence of attempting to reach uniformly applicable agreements on subjects pertinent to trade relations but among member countries with interests and concerns that reflect different levels of economic development. The objective of this paper has been to review the antecedents of such an approach in GATT's history and in debate concerning its rationale.

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