# VARIABLE GEOMETRY AND THE WTO


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Variable geometry refers to the adjustment to changing conditions by otherwise fixed elements of a working machine, to make it work more smoothly or efficiently – like the nose of the Concorde.

Is it time for a new approach to the WTO, a move away from the Single Undertaking in favour of more substantive and institutional flexibility?

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## INTRODUCTION

### Definition of variable geometry

The term "variable geometry" originates from engineering. Simply put, this refers to the adjustment to changing conditions by otherwise fixed elements of a working machine, to make it work more smoothly or efficiently – or indeed, to make it work at all.

> **The bending nose of the Concorde, or the moving wings of the F-14 Tomcat are two concrete examples of this concept.**

### Variable geometry and trade

Transposed to trade negotiations, "variable geometry" implies a certain level of flexibility in institutional structures and legal obligations in the WTO. And this, in essence for three reasons: to avoid political deadlock; to respond to the needs of the Membership; or to reflect the nature of the obligations and the principal actors.

## VARIABLE GEOMETRY IN ACTION

Variable geometry could be seen as a conceptual departure from the Single Undertaking.

That is to say, instead of having a single comprehensive set of obligations and mechanisms that may or may not respond to the needs of all Members, the organization would consist of different agreements or mechanisms tailor-made to the needs, capacities and objectives of the specific participants.

> **The WTO Agreement is "a contract, not an inalienable constitution; trade is an instrument, not a collective value."[1]**

[1] "Comments on 'No Global Governance without politics: Why the legitimacy of the WTO cannot be won by architectural reform but demands a political ethics' by R. Howse and C. Nicolaidis".

A contract that purports to govern and serve countries at different levels of development or of readiness ought to make provision, one could argue, for them to integrate or make commitments at different speeds, or indeed make different commitments entirely. Alternatively, a comprehensive contract that contains a large number of diverse obligations, may well require a multiplicity of mechanisms to address these different obligations, or indeed (as the case may be) of players.

## A long, but not unique, history

The question has a long history and distinguished provenance. It is a subject of discussion in each organization where consensus rules and where, as a result, the organization fails to address the needs or objectives of a sub-group.

Under GATT 1947, of course, there were the plurilateral codes – and some of these have lived on in the WTO. In the context of the EU, the debate has been particularly intense as the level of integration of the member States, or indeed their demands, increase. In fact, each time Spain or Poland, or Britain, threatens to veto deals between Paris and Berlin, or Denmark or Sweden refuses to go along with the latest initiative for greater political integration, there is talk of a two-track or a multi-tiered Europe. And it is the same principle at work: an organization, the argument goes, should be supple enough to address the needs of the Members, rather than the needs of the Members being squeezed into the strictures of a rigid framework.

## The causes of variable geometry

At least three general concerns give rise to a proposal for "variable geometry", and I mentioned this before:

- first, the need to avoid political stalemate (particularly in consensus driven organizations);
- second, the political sensibility of adjusting the obligations to the individual needs and the capabilities of the Membership; and
- third, the idea that institutions and mechanisms should be adjustable to reflect the nature of the obligations in question.

Let me say at the outset that I find much attraction in the concept.

### Avoiding stalemate

There is no reason why an organization aimed at advancing the interests of *all* of its Members, should stall and fail to achieve anything whatsoever, simply because *some* of its Members have doubts about the speed or the direction of the others.

In the context of dispute settlement – which is, I guess, at least one of the reasons I have been invited to speak to you about – the question of external transparency is a perfectly good example of where "variable geometry" could be particularly useful.

It is no secret that for some time now, many developed countries have been persuaded that it makes little sense to keep panel and Appellate Body proceedings closed to the public (except of course where business confidential information is before the panel). Certain other Members continue to hold fast to the diplomatically-inspired closed proceedings that we have inherited from GATT 1947 – where diplomats met behind closed doors to do what only diplomats were thought able to do – as the model to pursue. The end result is impasse and the *status quo* – and the potential crisis of confidence in the WTO that the absence of transparency to civil society could give rise to in some countries.

It seems to me that many developed countries may well appreciate the concerns of Members that continue to expect dispute settlement meetings to be closed. Whether, however, those developed countries should be forced to go along, indeterminately, with that desire because there is resistance by some to greater transparency, is a different issue.

Frankly, it is becoming increasingly difficult for us, for Canadian officials and our political masters, when we talk to the representatives of the interests that are broadly referred to as "civil society", to say, "but there are other countries opposed to transparency and without their agreement, nothing can get done." The answer – and it is not an unreasonable one – would be: "So what? Let them do what they will; you do what you should."

There are many other questions and issues the resolution of which could benefit from variable geometry. I note – and this in passing – my own personal experience in the negotiations for the reform of the DSU. In one session alone, we spent ten hours discussing various aspects of consultations, the first step in the dispute settlement process where parties are to try to reach a mutually agreeable solution. Now, having been through a few consultations myself, I found the discussions interesting but rather abstract, and the solutions proffered were conceptually sound but of little practical moment. If, however, these *other* countries consider that consultations need fixing, there is no reason why they should not go ahead and fix them, and leave the rest, which may for various reasons have a jaundiced perspective on the whole exercise, to their own rather narrow viewpoint.

### Diversity of membership

Political or policy imperatives may in themselves justify variable geometry, but only up to a point. There is another reason to embrace the concept – and that is simply the considerable diversity of the capacities of Members in carrying out their obligations and exercising their rights. Perhaps, some argue, the treaty rights and obligations of Members should reflect those different capacities.

Again let me turn to dispute settlement to illustrate the point. I think it beyond question that Canada or the European Union, or indeed Switzerland or Norway, are better able to deal with, let's say, an unexpected WTO dispute than any number of Central American, Caribbean or African Members. This is not to suggest unlimited resources on our part, as some might argue – it is, rather, a simple recognition of an objective reality: most developed countries have an experienced cadre of

trade lawyers and policy experts, to begin with, and more resources generally. Normally, when faced with an imbalance of resources, WTO Members try somehow to make do, to accommodate one another. To the extent that by variable geometry one refers to the *formal* flexibility of the institution to address these differences – rather than the *ad hoc* approach I just mentioned – then one can certainly see a measure of common sense in this.

The question of timelines, for example, is one that we come back to with charming regularity. Any official who has ever been at the receiving end of a consultations request can sympathize with some of the concerns developing countries raise in respect of the 30-day deadline to schedule consultations, or the 60-day deadline for the whole process before there is a panel request. Of course we can point to the fact that hardly any consultations in the past nine years have resulted in a panel request on the 60th day – but there have been such cases, and so "past practice" is cold-comfort to developing countries who need to plan for the future based on legally-mandated deadlines.

In this respect, it might well make sense to allow the consultations period to contract or expand, depending on the means of the disputing parties.

#### Institutional flexibility

Finally, one aspect of variable geometry – though it is not one that is discussed much – is flexibility of an institution – a diversity of mechanisms - in respect of different obligations and participants or players.

A good example of this – if I may step outside the framework of the WTO Agreement – is the dispute settlement mechanism of the North American Agreement on Labor Co-operation. This is one of the two "side-agreements" to the NAFTA. I will not go into the details – but note that the Secretariat of the NAALC has some investigatory authority at the early stages of a dispute, launched at the request of private sector complainants. The results of these can then be used later on if the formal dispute settlement mechanism of the NAALC is engaged. This is of course fundamentally different from the dispute settlement mechanisms of the NAFTA itself, but the negotiators considered that given the different interests involved, the parties needed different mechanisms to different obligations – and, in this instance, different players entirely.

## A legal framework for variable geometry

Let me now turn my attention to a *legal* analysis of the concept, from both a *substantive* and also a *dispute settlement* perspective.

#### Variable geometry in the law

Substantive variable geometry implies the imposition of different obligations on different members.

**Purely as a matter of legal drafting, there is nothing inherently wrong or problematic with substantive variability of legal obligations.**

Indeed, right now, such diversity, such variability, already exists in the WTO Agreement, even if in small measure: there is the Enabling Clause, Article 27 of the SCM Agreement, and so on. Naturally, the more obligations you have and the more exemptions or derogations, the more complex – if not complicated – your legal regime gets. But we should guard against exaggerating the difficulties. Canada, for example, has free trade agreements with a number a countries, and so in respect of any trade-related issue, we already have to look at a variety of international legal instruments, depending on the subject matter and the other party. This has led to a tripling of the average length of the legal opinions – but, despite the complexity, we somehow manage to keep things in relative order. In itself, therefore, variable geometry in the form of variable substantive obligations inside the WTO would not pose an insurmountable problem.

### Dispute resolution and variable geometry

Nor can one argue, from a *dispute settlement* perspective, that "variable geometry", if it were to come to pass, would be problematic in itself. And by this, I mean *both* the application of variable obligations under the existing dispute settlement procedures, as well as a diversity of procedures itself.

For one thing, one may consider the dispute settlement mechanism of the WTO a sort of court of general jurisdiction that adjudicates different legal instruments between different sets of parties. Now, there are, occasionally different rules that apply to the procedures, but by and large the single-desk model of dispute settlement may, indeed, cover many different legal obligations.

For another, there is nothing conceptually problematic about having multiple dispute settlement mechanisms: as I have already mentioned, the NAFTA, for example, provides for a number of different dispute resolution options, depending on the subject matter of the obligation and, in fact, the nature of the disputing parties.

**Indeed, it would not be an exaggeration to state that the dispute settlement mechanisms of the NAFTA represent, in their totality, the most sophisticated example of procedural variable geometry in a treaty instrument.**

Let me, very briefly, set these out to illustrate the point.

The NAFTA has a general dispute settlement mechanism under Chapter 20. There is, in addition, special provisions governing trade remedy – or commercial defence – measures, in Chapter 19.

Chapter 11 of the NAFTA sets out the investor-state arbitration mechanism. There are also two side agreements dealing with labour and environmental measures, each of which has its own dispute settlement mechanism – and each adapted to the special characteristics of the subject area, and the obligations.

This experience is instructive because it demonstrates that it is not imperative, in principle, to have a one-size fits-all dispute settlement mechanism in a trade agreement. And of course the WTO Agreement may also benefit from such flexibility – or "variable geometry".

## IS PLURILATERALISM THE ANSWER?

So far so good.

Does this mean that we ought to rush headlong - or, rush back - into plurilateralism in the context of the WTO Agreement?

I suggest not - for three reasons.

### Existing variable geometry in the WTO

First, variable geometry is already there in the WTO Agreement, both substantively and institutionally.

Substantively, in addition to existing special and differential obligations, countries that wish to enter into deeper integration, may indeed do so - so long as they meet the requirements for regional trade agreements, or, depending on the nature of the "geometry" you are trying to vary, simply obtain a waiver.

This is not a theoretical or an abstract observation about the *possibilities* of the institution. A simple look at the web of trade agreements to which, for example the EU, is party underlines with unusual clarity the "variability" of the geometry of the WTO Agreement – in the sense that all of these different sorts of arrangements are possible under its general umbrella.

There is the European Economic Area, the Swiss sectoral agreements, the Customs Union with Turkey, the co-operation agreements with Bulgaria and Romania, the free trade agreements with the old Soviet republics, the more comprehensive free trade agreements with South Africa and Mexico, the Cotounou Convention, the various GSP arrangements … and so on. And of course there is the EU itself. This, by the way, is only *one* player.

If other Members of the WTO do not exploit the existing flexibility of the institution, why should anyone listen to the complaints? Is it absolutely necessary to institutionalize *inside* the WTO Agreement this wonderful diversity that already exists under its general exemption for regional trade blocs? I am not so sure – and, in any event, we should do so if we are convinced that the existing mechanisms are inadequate to the task.

As a caveat, I should say that to make Article XXIV of GATT 1994 or indeed the waiver possibility proper instruments of "variable geometry" would require something of a paradigm shift for many academics and observers alike: it would mean seriously rethinking the usual characterization and critiques of regional trade agreements as fundamentally undermining the WTO. They do not. They allow the WTO to exist and flourish, while those Members that feel they can go further in economic integration proceed and do so.

Institutionally, the dispute settlement mechanism of the WTO does not want for variability. There is Article 5 of the DSU – good offices and mediation – and the arbitration mechanism provided for in Article 25, in addition to the formal dispute settlement mechanisms. There are many different rules that apply to different legal obligations – and of course, the fact of the matter is that disputing Members remain in control of any disputes they launch, and so they would be free, up to a point, to adopt or adapt different mechanisms as they wish. If they do not do so, it is not because of a structural deficiency in the organization that needs to be remedied.

## Global commercial contract or framework legal system?

My second observation is perhaps more principled.

After all, do we consider the WTO Agreement to constitute a mere commercial contract, in which we can select paragraphs, articles or whole sections by which we will be bound? Or rather, is this a system of laws, with all that the simple word "law" implies?

If a commercial contract merely, then by all means – let there be diversity! But if law, then, I suggest, we are looking at a different set of considerations.

> **The law is a system inside which concepts travel and settle down as a matter of course, rather than of expedience.**

That is, you can have your variable geometry, but any attempt at creating artificial barriers between different disciplines or obligations may well prove illusory at best: interpretations and interpretive principles will ooze from one agreement into another; legal obligations will drift across the dykes; and what you end up with is both less diversity *and* less certainty than you began with, with all the attendant ills that it would breed.

Let me illustrate this by using a simple example.

When the Appellate Body talks of due process, fundamental fairness, or burden of proof, you need not look for these concepts in the DSU or the WTO Agreement – you will not find them there, and nor should you. These concepts, and many more besides, are branded upon the professional conscience of even the least lettered lawyer.

In addition, we should recall the statement of the Appellate Body in *Reformulated Gasoline*: the WTO Agreement is not to be interpreted "in clinical isolation from public international law." Well, if it is not to be interpreted in clinical isolation from public international law, can we expect, let's say, general provisions to be interpreted in isolation from plurilateral ones?

In other words, you might *think* you are creating different obligations, but at the end of the day, it is not clear how these different obligations would relate to one another, what impact each will have on the others, and how they will be shaped by these other general rules of law. The only certainty is that by the operation of interpretation rules, they *must* be shaped by them.

## The end of a unified dispute resolution mechanism?

The third observation relates to dispute settlement mechanisms.

I think I can say without much fear of contradiction that the dispute settlement mechanism of the WTO Agreement is the most remarkable achievement of the Uruguay Round, and perhaps among the most far-reaching and clear-sighted international institution-building exercises in the past half-century.

It is not just the fact of mandatory jurisdiction, or the Appellate Body.

> **Remarkably, the negotiators managed to come up with a *unified* dispute settlement mechanism, a one-stop shop, to manage 500 pages of legal obligation in a dozen highly diverse agreements.**

And what's more, it seems to work – the same panel can examine claims under the GATS, the GATT, the various covered agreements, and even the DSU itself, not to mention concepts and obligations borrowed from international law.

Will "variable geometry" affect this unified system? Will we, in going back to legal plurilateralism, also adopt the "fragmented" dispute settlement system of the Code system?

The experience of NAFTA might, in this respect, be instructive. There, as I have mentioned, under the general agreement, you have three dispute settlement mechanisms: Chapter 11 arbitrations for investor-state disputes, Chapter 19 judicial review panels for commercial defence disputes, and then Chapter 20, which is the general dispute settlement mechanism.

As sophisticated as the agreement is in dealing with bilateral disputes, we should not, in my judgement, expect that a similarly fragmented system is transposable to other trade agreements, or would even work inside one as varied and comprehensive as the WTO. Although the NAFTA has been a relative success, we should not hesitate to identify some of its problems. Chapter 11 arbitrations, for example, tended to operate outside the framework envisaged for them by the NAFTA parties – so much so that one award was overturned on review and others forced the NAFTA

parties to issue an interpretation. There have been few Chapter 20 cases – only three in 10 years. And Chapter 19 judicial review mechanisms exist only because the parties failed to agree on substantive rules governing commercial defence, and work only under certain specific cultural and legal conditions.

In other words, although the institutional variable geometry of NAFTA is in some respects highly functional, it is so, it strikes me, in the light of certain factors that are, or at least might well be, difficult to replicate *effectively* inside the WTO. (There have been 61 adopted AB Reports and 89 adopted panel reports involving more than 50 distinct parties.) In effect, the very diversity of the WTO militates in favour of a simple, single dispute settlement mechanism, rather than one as complex, and perhaps complicated, as that of the NAFTA.

## CONCLUSION

Where does that leave us?

I began this talk by noting that variable geometry was a concept borrowed from engineering sciences. Engineering – what we in North America call *applied* sciences – is a concrete science, in a way that trade negotiations are not. If we are to draw any inspiration from the sciences, or borrow any concepts, it would be more appropriate to look not into Euclidian geometry or Newtonian physics but rather, I suggest, Einsteinian physics.

That is, an area of objective reality where normal laws of the physical universe do not apply, where an unseen dimension permeates and shapes, and occasionally distorts, the three observable ones.

**Clearly the institutional dynamics of the WTO do have an impact on the performance of the organization, but to the extent that there is paralysis, and to the extent that there are difficulties in the implementation of obligations, the problem is not the geometry of the institution or of the obligations, but of the Members' political will.**

This is the unseen and unspoken dimension that shapes the functioning of the WTO, regardless of how you structure the organization or the substantive obligations.

The political dimension pushes variable geometry in two opposing directions.

On the one hand, there is every reason to believe that an increase in the variability of WTO geometry may result in – for lack of a better metaphor – a vicious circle. After all, we may conceive of variable geometry as a way of breaking the deadlocks that arise from time to time in negotiations when participants cannot see their way to a negotiated compromise. Now, once it is established that there is an alternative to compromise, subsequent compromise becomes increasingly difficult.

Plurilateralism, in other words, begets plurilateralism; would it then be difficult to envisage that the smallest unit of compromise and agreement – two countries – will become the norm?

On the other hand, to even take the first step, you need the consent and compromise of the Membership – and this is not at all a given.

Let me go back to an example that I mentioned earlier: the opening up of panel proceedings to the public. If we cannot make the institution more transparent right now, is it the institution that is the problem, or does the responsibility for the blockage rest elsewhere?

The solution, to me, appears within reach: the organization is Member-driven; disputing parties are, in principle, masters of the proceedings; if they decide to open up the proceedings, why would, or should, others object? But they do. And the reasons for the objections would not disappear overnight by going from the single undertaking to a code system. In fact, if anything, the mere possibility of losing that control over the process would make an orderly refragmentation of the WTO nearly impossible.

**That is, you'd have to break the organization and try to rebuild it before Members consent to losing their voice in the affairs of the institution as a whole.**

I do not wish to end my discussion with this rather downbeat note. On the contrary, it is because I do not think that there is anything fundamentally wrong with the organization that I puzzle over the proposals for a return to the past.

After all, before the entry into force of the WTO, the world of the GATT resembled pretty much the state of the general theory of relativity today. Each of the Codes served, in effect, as an independent force of nature. The Uruguay Round changed all that: it identified a unifying force, a general theory of trade law – a single undertaking – something that still eludes physicists and relativisits alike. To give up this unifying force in favour of the fragmented system would not save the WTO, but rather represent a major step backwards in the ongoing progress of international trade law.

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