MULTILATERALIZING REGIONALISM AND THE FUTURE ARCHITECTURE OF INTERNATIONAL TRADE LAW AS A SYSTEM OF LAW

This panel was convened at 1:00 p.m., Thursday, March 26, by its moderator, Amelia Porges of the Law Offices of Amelia Porges PLLC, who introduced the panelists: Alberta Fabbricotti of the University of Rome, Faculty of Law; Gabrielle Marceau of the University of Geneva, Cabinet of the WTO Director General; Joost Pauwelyn of the Graduate Institute of International and Development Studies; and Kati Suominen of the Inter-American Development Bank.*

THE PARADOX OF MULTILATERALIZING REGIONALISM THROUGH FLEXIBILITY

By Alberta Fabbricotti†

I am greatly honored to have been invited to speak on this panel today. I consider this invitation a unique privilege. Let me start with a fact we must reckon with. The proliferation of Regional Trade Agreements (RTAs) has accelerated exponentially since the years of the Uruguay Round negotiations. In fact, it is only after the world trading order shifted its legal foundation from the 1947 GATT to the 1994 World Trade Organization (WTO) that centripetal forces creating regional groupings inevitably generated. And it is not a pure coincidence that this shift meant a dramatic expansion and strengthening of WTO rules concomitantly with considerable enlargement of WTO membership. Fragmentation and, hence, calls for defragmentation, are viewed as being physiological outputs of a fully-fledged worldwide WTO.

Legally, the attitude towards regional negotiations was, and still is, admitted and even encouraged by GATT Article XXIV, permitting the formation of regional groupings, provided certain requirements were fulfilled. But I will not dwell on Article XXIV here. Should Article XXIV have worked effectively in governing the formation and further enhancement of RTAs, we would not be here today to discuss how to multilateralize regionalism.

So let us begin again from where we were before digressing on Article XXIV. I would like to recall the remarks regarding the interplay between multilateralism and regionalism made by the International Law Commission’s (ILC) Study Group on Fragmentation of International Law. The Study Group pointed out the unusual role of regionalism in international trade law compared to the functions it normally performs within other sub-systems of international law. The starting standpoint being the common assumption that international law develops in a regional context because the relative homogeneity of the interests of actors will then ensure a more efficient or equitable implementation of the relevant norms. The ILC’s Study Group noted that this general assumption is clearly contradicted by the proliferation of RTAs since the stronger the pull for a global trade regime within the GATT/WTO system, the faster the escalation of RTAs!

So, in practice, efforts made at a global level to reach the same standards of deeper economic integration pursued regionally do not act so much as convergence factors to cement WTO membership. On the contrary, they push WTO members to embark on regional initiatives or to intensify those regional dealings already in place.

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This apparent paradox—that is, the existence of a direct dynamic relation between strengthening of legal ties among states at a global level, on the one hand, and the upsurge of RTAs, on the other hand—suggests the prospect of a paradoxical strategy in parallel. I will use the somewhat provocative slogan “multilateralizing regionalism through flexibility” to define this strategy.

As I am aware of the negative connotations often attached to the term “flexibility,” it is important to understand what exactly this word entails. What I am talking about comprises different techniques or formulas introducing adaptable options in the WTO rules, so as to allow WTO members to undertake different levels or sets of commitments. These techniques are often identified with the more sophisticated terminologies of “enhanced cooperation,” “by concentric circles,” “variable geometry,” and “integration à la carte.” The first two formulas allude to different rhythms in integration—that is, gradations in economic integration depth—while the third refers to geographical differentiations and the fourth to different substantial or functional spheres of application. Sometimes, these terms are used interchangeably. Also, there are more denominations. From now on, however, I will use the term “variable geometry,” as it is the most frequently used in WTO language.

A common denominator of all these approaches is that they undermine the single undertaking achievements of the Uruguay Round Agreements, that is, all the instruments composing the complex body of WTO law, with the exception of a few plurilateral agreements, are equally binding upon all members, irrespective of level of economic and social development or of differences in domestic legal systems. The launching of the single undertaking approach was greeted enthusiastically by most economists and lawyers, as they regarded it as putting an end to the fragmentation created by the plurilateral regime under the Tokyo Round Agreements (the so-called Tokyo Round Codes). Given this background, should the WTO now return to a variable geometry?

In my view, promoting pluralism through variable geometry could be the way—by accommodating the factual differences among WTO members—to reduce outward pressures giving rise to RTAs. Partly as a result of the single undertaking approach, in fact, regionalism has become the “first best” for a majority of WTO members. Regionalism has attracted both members criticizing the WTO for not going far enough, especially in avoiding commitments on issues such as investment, labor standards, competition, and environment, and members charging the WTO with having gone too far by having forced them to accept undertakings which were not in their interest and beyond their implementation capacities.

Mirroring these two opposite frustrations, the reasons for resorting to variable geometry are essentially twofold. The first reason is that certain Member States are reluctant to take part in some form of deeper or wider integration while other members wish to pursue it. The second reason is the fact that, because of their political, economic, or social conditions, some WTO members are incapable of implementing their present undertakings and obviously of taking part in further integration. The launch of enhanced cooperation among European Union (EU) members in 1997 was based on similar reasons.

As far as plurilateral agreements work as “meeting points” or “recipients” for a significant number of WTO members sharing interests and outlooks on specific trade or trade-related issues on a trans-regional basis, I would assume that variable geometry could be instrumental in multilateralizing regionalism.

Also, is the Baldwin theory on the RTAs’ domino effect and on sequencing applicable to larger plurilateral agreements as well? I do not feel very comfortable with pure economics, but it seems to me that if the answer is in the affirmative, then an additional aggregating
effect would seize up from plurilateral agreements, progressively bringing in WTO members that originally did not want to take part in these agreements. The EU experiences that are likely to be viewed as instances of enhanced cooperation, such as the Schengen Agreement, show that flexibility can foster both cohesion among the members and advancement of the integration process, generally disclosing an aggregating effect. In the context of the WTO, it is worth considering the plurilateral Information Technology Agreement (ITA) as a similarly successful step towards multilateralization. At the same time, however, flexibility expediends, whatever shape they take, should not compromise the coherence of the WTO legal system. WTO coherence should rise to sacred parameter for assessing the legitimacy of any flexibility initiative.

It is beyond my capacities to go into the various guises of flexibility and their potentially innumerable applications within the WTO legal system. It should be emphasized, however, that, notwithstanding the fact that under the single undertaking approach WTO Agreements bind all members equally, only in part do they provide for uniform principles and rules. Many consist instead of individualized commitments, and several arrangements leave room for the special and differential treatment of developing countries. Thus, adding flexibility into the WTO system is not a one-size-fits-all solution.

Anyhow, unlike the Tokyo Round Codes, many of which had their own dispute settlement mechanisms, any variable geometry output injected into the WTO system should come within the exclusive jurisdiction of the WTO system for settling disputes. Fragmentation of the dispute settlement function under the Codes was justified by the weakness of the GATT dispute settlement system. The opposite is true of the WTO mechanism for settling disputes. Apart from improved effectiveness, more and more often the WTO settlement mechanism attracts disputes that the litigants could have also submitted to the RTAs’ forums, that is, in cases where WTO and RTA rules were broadly equivalent. Therefore, the WTO system for settling disputes appears sufficiently structured to act not only as supreme guarantor of the system’s coherence but also as the main engine for achieving convergence of variable geometries.

It would be desirable, in disputes among WTO members enforcing a variable geometry arrangement, that WTO panels be drawn from neutral members taking part in such a narrower initiative, not more broadly from the WTO. The major challenge for the WTO dispute settlement system would, however, consist in guarding the rights of the members not participating in the variable geometry agreement. Also, it would be important to prevent discriminatory interpretations of the WTO legal order. Indeed, the interpretation of one provision of the WTO system in its normative context may well lead to different results, and could lead to cases of unjustifiable discrimination, according to whether a WTO Member participates in variable geometry or not.

I would like now to conclude with my particular angle. I think that the structure of the WTO-RTAs’ legal relationship is already characterized by “variable geometry” rather than by hierarchical order. Empirical observation indeed shows that RTAs choose to abide by WTO obligations, more or less. A first step towards multilateralizing regionalism would be to overturn the perspective from which the issue of WTO-RTAs’ relationship is usually considered, switching from a “top-down” approach (meaning that it is the WTO which determines the conformity requirements for RTAs), to a “bottom-up” approach (meaning that it is the RTAs themselves which determine the degree of their adherence to WTO law, through their concrete behavior). Variable geometry as described earlier could be the second step.