



Chapitre d'actes

2016

Published version

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How to cite

MARCEAU, Gabrielle Zoe. Comments on Blázquez and Illy. In: Select Proceedings of the European Society of International Law, Volume 4, 2012. [s.l.] : Hart Publishing, 2016. p. 299–306. doi: 10.5040/9781474201582.ch-025

This publication URL: <https://archive-ouverte.unige.ch/unige:101319>

Publication DOI: [10.5040/9781474201582.ch-025](https://doi.org/10.5040/9781474201582.ch-025)

Comments on Blázquez and Illy

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I. INTRODUCTION

JE TIENS D'ABORD à remercier mes amis de la SEDI de m'avoir invitée à participer à cette conférence sur un sujet qui me passionne and dans une très jolie ville, Valencia. Les deux papiers que l'on m'a demandé de commenter traitent du régionalisme interne et externe en Afrique et en Europe. J'ai beaucoup appris en les lisant et je pense qu'effectivement souvent les forums régionaux servent de laboratoires pour explorer des solutions qui peuvent souvent être exportées multilatéralement. Je ferai mes commentaires en anglais.

First, I will respond to one point each from each of the two panelists. Second, I will comment on the legal situation of regional trade agreements (RTAs) in the World Trade Organization (WTO), and point to a few issues for which research and negotiation is needed in order to clarify and improve our understanding of the implications of today's international law on regionalism. I conclude that the balance between regional and multilateral legal systems corresponds to the stage of our overall economic governance today.

I have learned a lot from Professor Irene's contribution to these proceedings. Irene Blázquez-Navarro, in her chapter titled 'Public Interest in EU Foreign Investment Policy, suggests that the manner in which (following the Treaty of Lisbon)¹ the EU is to deal with investment and trade matters internally will result in an EU-harmonised position that will influence the evolution of the WTO in that field. This would be the case *inter alia* with respect to the opportunity for investor-state dispute mechanisms.

I agree with her more general point that the internal evolution of the EU in its handling of trade and investment matters will impact the WTO. The EU is an important WTO player and it often brings about proposals to the WTO based on its experience

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¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, done at Lisbon on 13 December 2007, [2007] OJ C 306, entered into force on 1 December 2009.

within its own legal order. It may be true that governments have tried new trade approaches in their respective RTAs and have subsequently often tried to 'export' some of them to other negotiating forums, including the WTO. On other occasions, elements of existing RTAs are envied by WTO members outside such an RTA, and this may advance the need to include such elements on the WTO agenda. For example, the services coverage of the European Community treaty² may have encouraged other WTO members to press urgently for the negotiation of disciplines on trade in services during the Uruguay Round.³

I am not sure that I agree with Professor Irene's remark that in the WTO, the EU has benefited somehow from special treatment in terms of RTAs. This is because the EU is not an RTA in the WTO legal system; the EU is a full WTO member. The WTO does not have different types or categories of members. It is indeed peculiar that the EU states are WTO members, while the EU itself is also a WTO member. This arrangement arose as a political deal between the Geneva representatives of the EC (Apul Tran) and the US (Warren Lavorel), and the deal was not 'touched' by the legal group or even the US Congress.⁴ A footnote in the WTO Agreement⁵ provides that in case of voting, Europe would have no more votes than the number of EU states. Besides, only the EU member states, all of which are WTO members, contribute to the WTO budget—neither the EU as an international organisation nor any of its institutions does.

The chapter written by Oussenil Illy, titled 'Le Régionalisme Commercial Africain', is impressive, as was his PhD thesis, now published under the same title. Dr Illy's presentation was very informative on the extent of the relevance of regionalism in Africa. I would add that Africans have developed a special expertise in this field. Africa's experience with multiple overlapping RTAs—and their contradictory rules of origins—is a good example, and provides further evidence, that members need to negotiate an international agreement imposing disciplines on rules of origin.

II. GENERAL COMMENTS

A. The Institutional Place of RTAs in the WTO

Besides the EU, which is an original member, no RTA has become a WTO member and indeed accession to the WTO would not be open to RTAs.⁶ In fact, the EU never

² Treaty Establishing the European Community (done at Rome, 25 March 1957) 298 UNTS 3, as subsequently revised and amended, expired by its terms 23 July 2002, and replaced by Treaty on European Union, 7 February 1992 [1992] OJ C191/1 (1992) 31 ILM 253.

³ The Uruguay Round MTN was launched at the Ministerial Meeting held in Punta del Este, Uruguay; see Declaration of Punta del Este, Ministerial Meeting (20 September 1986) GATT 1987 BISD 33S/19.

⁴ In the GATT forum, the EC member states had been coordinating matters under the EC treaty and speaking with a single voice since 1979.

⁵ Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) (opened for signature 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3, (1994) 33 ILM 1125, fn 2 to art IX:1.

⁶ WTO Agreement, art XII on accession reads as follows:

'1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the

followed any process of accession; it simply signed the Final Act, as did the member states of the European Communities (EC), as the EU was previously known, which had acceded to the former GATT. As noted above, in the WTO legal system, the EU is not an RTA but is a full WTO member.

RTAs have no standing in WTO committees; nor do the rules on observers appear to provide for RTAs to request observership in any of the WTO committees.⁷ An RTA cannot be party to a dispute, since the WTO dispute settlement mechanism (DSM) is reserved to WTO members.⁸

Of note, the WTO somehow encourages (perhaps not sufficiently) the grouping of small members for certain notification obligations, TPRM reports, as well as for the coordination of their positions in various institutional bodies. These efforts should help reduce the overall burden of such obligations on weaker countries; however, they also impose their own difficult coordination exercises. The general thinking is that the grouping of small countries should reduce the occurrence of frictions and facilitate the overall negotiation process. As noted by the Forum panel on 'Regionalism, International Organization and Integration', this perhaps is encouraged by economically stronger countries for this reason.

B. Evolution of the Way in Which the WTO (Members and DSM) have Dealt with RTAs

WTO rules do not deal with the daily internal functioning of RTAs, and international disputes in RTAs may not be relevant to the WTO Dispute Settlement Body (DSB). However, the WTO imposes conditions relating to both the internal and external

Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.
3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.⁹

⁷ RTAs do not have any right to become observers; however, there are rules allowing international governmental organisations (IGOs) to request observership. For example, the EFTA (Europe Free Trade Agreement) became an observer in July 1996, by means of para 4 of Annex 3 of the Rules of Procedure for Ministerial Conferences applicable to the General Council and other bodies, that states: 'Requests for observer status shall be considered on a case-by-case basis by each WTO body to which such a request is addressed, taking into account such factors as the nature of work of the organization concerned, the nature of its Membership, the number of WTO Members in the organization, reciprocity with respect to access to proceedings, documents and other aspects of observership, and whether the organization has been associated in the past with the work of the contracting parties to GATT 1947.' Given that EFTA's work fulfilled these conditions, it was granted observer status. See Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, WT/L/161 (25 July 1996); in particular, the relevant annexes on observer requests do not refer to regional trade agreement bodies.

⁸ See *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report (adopted 6 November 1998) WT/DS58/AB/R para 101: 'It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become

dimensions of RTAs *upon their formation*. An RTA's implementation and activities must continue to respect the relevant WTO requirements.

There are three main sources of WTO requirements for RTAs: article XXIV of the GATT 1994,⁹ concerned with the trade in goods dimension of RTAs; article V of the GATS,¹⁰ for the services dimensions of RTAs; and the Enabling Clause¹¹ for the trade in goods dimensions of RTAs between developing countries, if they so elect. An assessment of the WTO-consistency of RTAs with the parameters of article XXIV¹² allows members to refuse collectively the entry into force of a non-compatible RTA. However, in light of the positive GATT/WTO consensus practice, WTO members have never been able to reach a decision on the consistency or inconsistency of any RTA—even after the creation of the Committee on Regional Trade Agreements (CRTA), a new body responsible for the assessment of all RTAs. (Note, however, that RTAs notified under the Enabling Clause are examined in the Committee on Trade and Development that has traditionally been responsible for the monitoring of actions taken under the Enabling Clause since its inception in 1979.)¹³

On 14 December 2006, WTO Members adopted the Decision on RTA Transparency,¹⁴ providing for expanded and harmonised notification and

parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding.⁷ (Emphasis in the original, footnotes omitted.)

⁹ art XXIV GATT 1994 in Annex 1A to the World Trade Agreement.

¹⁰ art V GATS in Annex 1B to the World Trade Agreement.

¹¹ para 2(c), Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause), Decision of the Contracting Parties (28 November 1979) GATT Doc L/4903, GATT BISD 26S/203.

¹² art XXIV:7(c) GATT 1994 states:

'(a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(b) *If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of subparagraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.*

(c) Any substantial change in the plan or schedule referred to in paragraph 5 (c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.' (Emphasis added.)

¹³ The WTO Committee on Trade and Development is a standing committee dating from the GATT era, set up in 1964, to oversee Pt IV of GATT 1947 and later also tasked with monitoring the Enabling Clause.

¹⁴ General Council Decision, Transparency Mechanism for Regional Trade Agreements (14 December 2006) WT/L/671.

transparency disciplines. There is no reference to any assessment process, and in practice the CRTA no longer produces reports on the assessment of WTO-consistency of the notified RTAs. Instead, the WTO Secretariat produces a 'factual presentation' on each notified RTA (a modest copy of the Trade Policy Review Mechanism (TPRM)¹⁵ report) that is circulated to members, rather than circulating the whole text of the RTA, thereby saving costs and time, increasing transparency, and arguably the chances of good exchanges between WTO members.¹⁶ If a member is not satisfied, it can initiate the dispute settlement procedure.

So far, the implementation and operation of the Decision on RTA Transparency have proved beneficial, and members generally comply and participate in the new mechanism. Nonetheless, several issues arose when implementing the Decision with some existing RTAs. For example, the consideration of some agreements (the Gulf Cooperation Council (GCC), or the India-Korea and Korea-ASEAN Agreements) has been delayed as the goods aspects of these agreements have been notified under both article XXIV and the Enabling Clause. The Transparency Mechanism provides no guidance by which Committee (CTD or CRTA) should consider such 'dual notifications'. Unfortunately, some agreements are not notified by members even though they are in force.

Indeed, the problem of non-notified RTAs of course remains, despite the Decision on RTA Transparency. For instance, for some Latin American Integration Association (LAIA)¹⁷ countries, notification requirements for RTAs under the LAIA framework are fulfilled, given that (i) the LAIA umbrella agreement has already been notified and (ii) periodical reports are submitted by the LAIA countries to indicate RTAs concluded among LAIA countries, briefly summarising them.¹⁸ In addition, many members have difficulty submitting the statistical data required under the factual report process.¹⁹ Delays are also experienced in receiving comments from parties to the draft factual presentations prepared by the Secretariat.

Finally, questions relating to the overlaps between the Decision on RTA Transparency and provisions of articles XXIV of GATT, V of GATTs and the Enabling Clause, remain—including whether and how a member can challenge the WTO consistency of an RTA (measure) during the operation of this new mechanism.

WTO law on RTAs is interesting to study because it confirms some of the more general statements made by the general panel on Regionalism—on the first day of this Valencia Conference. For example, formally the WTO members' right to form a preferential trade agreement is conditional, and it is for the member invoking the RTA exception to bear the burden of proving first that the concerned RTA is

¹⁵ Trade Policy Review Mechanism, Annex 3 to the WTO Agreement.

¹⁶ An important aspect of the factual presentation is that while RTA texts are structurally different, the factual presentation has the same structure for all agreements and therefore allows a comparison across RTA texts.

¹⁷ Asociación Latino Americana de Integración (ALADI) in Spanish.

¹⁸ Note that the G-20 countries in its their last statement (G-20 website) said that 'In order to strengthen the system of WTO surveillance of RTAs, we propose to discuss at the WTO making this mechanism permanent.' They also said: 'We urge WTO members to advance their discussions of the systemic implications of the increasing number of RTAs on the multilateral trading system.'

¹⁹ Decision on RTA Transparency, paras 7–12.

WTO-consistent internally and externally, according to the requirements of the relevant WTO provision(s).²⁰

However, all WTO members are members of at least one of the existing RTA and there are not many MFN trade relations in force world-wide. In fact the Appellate Body (AB) ruling in *Turkey—Textiles*, which prohibited panels from presuming the WTO-consistency of an RTA when a related measure is challenged by a party, was possibly too demanding. It seems to have been ignored or feared by WTO members. Since *Turkey—Textiles*, no member has ever directly challenged the WTO-consistency of any RTA per se, and in disputes concerning safeguard measures in the context of RTAs, defending countries have refused to engage in a demonstration of WTO-consistency of the RTA concerned.

Like Santiago Villalpando,²¹ I would not suggest that the initial rule—the object of which may have been to maintain RTAs as ‘exceptions’ to be monitored by the membership—has been terminated. I believe that even if the evolution of states’ practice goes towards a different balance of regionalism and multilateralism, possibly different from what the original drafters of article XXIV GATT had in mind, governments know that multilateralism often remains the best option, and sometimes the only effective means of dealing with some issues.

C. Why the Large Number of RTA Notifications throughout the History of GATT/WTO?

Given that there have been some 511 RTA notifications throughout the history of GATT/WTO, we might well ask why so many? Is the right to form RTAs a customary rule or practice within the multilateral trading system? In RTAs, WTO members have been able to address issues that are apparently too difficult to deal with in multilateral forums. For example, members have included in RTAs provisions on competition, investment, labour, human rights, or more elaborated remedies. Smaller groups of states mean less chance of conflicting interests. RTAs can be used as a step

²⁰ The Appellate Body in *Turkey—Restrictions on Imports of Textile and Clothing Products* (adopted 19 November 1999), WT/DS34/AB/R (*Turkey—Textiles*) [58]–[59] stated: ‘Accordingly, on the basis of this analysis of the text and the context of the chapeau of paragraph 5 of Article XXIV, we are of the view that Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this “defence” is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV.’ We would expect a panel, when examining such a measure, to require a party to establish that both of these conditions have been fulfilled. It may not always be possible to determine whether the second of the two conditions has been fulfilled without initially determining whether the first condition has been fulfilled. In other words, it may not always be possible to determine whether not applying a measure would prevent the formation of a customs union without first determining whether there is a customs union. In this case, the Panel simply assumed, for the sake of argument, that the first of these two conditions was met and focused its attention on the second condition.

²¹ See further S Villalpando in ch 10 of this volume.

or a stage toward the multilateral coordination of regional positions. For example, a solution to the trade and climate change deadlock could include taking trade-related climate change actions within RTAs. This would lead to more regionally harmonised practices that could eventually simplify the international negotiation process.

We also all know that some issues cannot be satisfactorily addressed in RTAs: for example, subsidies. It is not possible to maintain programmes for regional subsidies versus multilateral subsidies. In other words, it is not possible to control whether subsidies for chicken farming are actually provided only to chicken-farmers that export in a region or multilaterally. If a government provides subsidies to its farmers, they will export their subsidised chicken wherever they can, within that region and outside that region. Also prohibiting regional subsidies, when such farmers may have to compete outside the region with other farmers who will receive subsidies, would not appear fair. So disciplines on (regional) subsidies are generally never included in RTAs.

D. Need for Further Study of the Interactions of RTAs and WTO Law

The interactions of RTAs and WTO law need to be studied further in order to better understand the legal implications of states' practice in regional arrangements. For example, to what extent can an RTA justify discriminatory transit fees, regulations or transit restrictions? And to what extent can an RTA-consistent retaliation, between RTA parties and for RTA trade, include measures that might otherwise be WTO inconsistent? For example, can an RTA party suspend its obligations pursuant to the RTA retaliation provisions in a manner that would lead to the imposition of a GATT-inconsistent import quota, or tariffs above WTO bindings? Can it be argued that the application of article XXIV GAT must include 'effective' RTAs, and for an RTA to be considered 'effective' it needs to have a DSM which provides for retaliation mechanism? And is the answer the same in situations where the retaliation relates to a dispute concerned with non-WTO matters, such as competition, investment, human rights, labour considerations, and so on?

III. CONCLUSION

We need to better understand the relationship between regional and multilateral actions in today's governance. Clearly, regional actions have been able to respond to the needs expressed by governments, and some of those needs were not secured by international agreements and practices. Is the fact that in smaller groups, differences in interests are more limited, the only explanation?

RTAs are better suited for different types of international participations, from collaboration to cooperation. RTAs parties also bring together several areas of government responsibility, such as trade, investment, competition, human rights and others—each of which is part of a different legal system of rights and obligations.

Yet, as noted, some issues cannot be dealt with effectively in regional arrangements. This is true in all areas of regionalism, not only for RTAs. Even if the UN Charter

includes a chapter on regional security arrangements, UN members agree that world peace requires world agreement(s). Moreover, states want to maintain international relational relations at multiple levels, and try to benefit from all of them.

Just as Santiago Villalpando, in his contribution on regionalism versus multilateralism in international law, spoke more generally about the evolution of the role of regional (security) arrangements within the UN system,²² so I believe it is best to describe the evolution of RTAs within the GATT/WTO, as having followed a pragmatic and fluid migration from their initial role and responsibilities, rather than as having deviated from their original object and purpose.

Today, the balance between regional and multilateral relations corresponds to the evolutionary stage of our overall economic governance. In our efforts to improve world economic governance, we need to improve our understanding of the legal relationship of regional and multilateral agreements and practices, so as to better appreciate their mutual interaction and improve their design.

²² See S Villalpando in ch 10 of this volume.